

06-1728(L), 06-1808 - pr
Wright v. Goord

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - -

August Term, 2007

(Argued: April 23, 2008 Decided: February 3, 2009)

Docket Nos. 06-1728(L), 06-1808 - pr

MELVIN M. WRIGHT, JR., as Administrator of the
Affairs of Melvin O. Wright, deceased,

Plaintiff-Appellant,

- v. -

GLENN S. GOORD, Commissioner; A. DIRE, Corrections
Officer, Coxsackie Correctional Facility; M. DERMUTT,
Corrections Officer, Coxsackie Correctional Facility;
M. KASUNIC, Corrections Officer, Coxsackie
Correctional Facility; GARY H. FILION, Superintendent
of Coxsackie Correctional Facility; TIBERIS,
Corrections Officer, Coxsackie Correctional
Facility; ZIMBER, Corrections Officer, Coxsackie
Correctional Facility; and A. MORRIS, Corrections
Officer, Coxsackie Correctional Facility,

Defendants-Appellees,

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,
NEW YORK STATE, and DAVID A. PATERSON,* Governor of
New York State in his official capacity,

Defendants.

Before: JACOBS, Chief Judge, KEARSE and KATZMANN, Circuit Judges.

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2),
Governor David A. Paterson is automatically substituted
for former Governor George E. Pataki as a defendant in
this case.

1 Consolidated appeals from judgments of the United States
2 District Court for the Northern District of New York, summarily
3 dismissing claims under 42 U.S.C. § 1983 against New York State
4 Department of Corrections officers for alleged violations of the
5 First and Eighth Amendments.

6 Affirmed.

7 CAROLYN A. KUBITSCHKEK, New York, New York
8 (Darius Charney, Lansner & Kubitschek, New
9 York, New York, Efaon Cobb, law student
10 intern, Daniil Karp, student intern, on the
11 brief), for Plaintiff-Appellant.

12 MARTIN A. HOTVET, Assistant Solicitor General
13 of the State of New York, Albany, New York
14 (Andrew M. Cuomo, Attorney General, Barbara
15 D. Underwood, Solicitor General, Andrea
16 Oser, Deputy Solicitor General, Albany, New
17 York, on the brief), for Defendants-
18 Appellees.

19 KEARSE, Circuit Judge:

20 In these consolidated appeals, plaintiff Melvin M. Wright,
21 Jr., as administrator of the affairs of Melvin O. Wright
22 ("Wright"), who was an inmate in the custody of the New York State
23 Department of Correctional Services ("DOCS") from 1982 until
24 November 2007, a month before his death, pursues challenges to
25 summary judgments entered in two actions in the United States
26 District Court for the Northern District of New York dismissing
27 Wright's claims, brought pursuant to 42 U.S.C. § 1983, against
28 several DOCS corrections officers ("COs") for alleged use of
29 excessive force in violation of the Eighth Amendment and
30 retaliation in violation of the First Amendment. On appeal,

1 plaintiff contends that summary judgment was inappropriate because
2 there were genuine issues of material fact to be tried with
3 respect to these claims. For the reasons that follow, we find no
4 error and affirm the judgments.

5 I. BACKGROUND

6 The present appeals arise out of two actions brought by
7 Wright, then proceeding pro se, to complain of a series of events
8 that occurred in 2003 at New York State's Coxsackie Correctional
9 Facility ("Coxsackie"), where Wright had been incarcerated since
10 August 2002. The issues on appeal have been limited (see Part
11 I.E. below) by a prior order of this Court dismissing Wright's
12 appeal with respect to certain of his claims and allowing him to
13 proceed--and appointing counsel to represent him--on his "claim
14 that the defendants violated his Eighth Amendment rights when he
15 was assaulted and intimidated by correctional officers at
16 Coxsackie Correctional Facility" and other undismissed claims.
17 Wright v. Goord, No. 06-1808 (2d Cir. Sept. 22, 2006).

18 A. The First Action ("Action I")

19 Wright first commenced an action in June 2003 against DOCS
20 and several individual defendants. His second amended complaint
21 in that action ("second amended complaint" or "Action I Second
22 Amended Complaint") named as individual defendants DOCS
23 Superintendent Glenn S. Goord, Coxsackie Superintendent Gary H.

1 Fillion, and Cocksackie COs Tiberis, Zimber, and Morris, and
2 described incidents occurring in February and April 2003 in which
3 Wright asserted that his constitutional rights had been violated.

4 The first incident, according to the second amended
5 complaint, occurred on or about February 6. Wright, an African-
6 American housed in a DOCS regional medical ward annexed to
7 Cocksackie, was assaulted by his then-cellmate Robert Brandel with
8 the latter's walking cane. Brandel, who Wright alleged was
9 Caucasian, then summoned "security" and accused Wright of both
10 assaulting him and calling him a "Cracker." (Action I Second
11 Amended Complaint ¶¶ 6-8.) "[S]ecurity" took Brandel's cane and
12 moved Wright to another cell, making comments to Wright about his
13 not liking "crackers." (Id. ¶¶ 7-8.) No disciplinary action was
14 taken against either inmate. (Deposition of Melvin O. Wright
15 ("Wright Dep.") 13.) Wright did not know the names of the COs to
16 whom he referred as security. (Id. at 17-18.)

17 The second amended complaint alleged that on February 26,
18 the COs, upon learning that Brandel had committed the assault,
19 gave the cane back to him. The pleading suggested that the
20 return of the cane to Brandel in these circumstances, with the COs
21 believing that Wright disliked "crackers," constituted a threat
22 against Wright by the COs themselves:

23 [w]hen, security learned that inmate Brandel, was the
24 person that committed the assault against [Wright],
25 February 26, 2003; security gave Brandel, back his
26 walking cane. After taken the cane from him that
27 night of February 6, 2003; stating: "You don't like
28 crackers?"

29

1 10. Especially, after the willful attempt and
2 threats to inflict injury upon [Wright], and coupled
3 with an apparent present ability so to do from
4 corrections officers; and any intentional display of
5 force such as was shown that night of February 26,
6 2003. Was enough for [Wright] to have reason to fear
7 or expect immediate physical harm or assault by the
8 officers; therefore, also a grievance was filed.

9 (Action I Second Amended Complaint ¶¶ 8, 10.) On February 27,
10 Wright wrote a letter to the county district attorney, with a copy
11 to Superintendent Filion, complaining about these events. Wright
12 never received a response to this letter (see id. ¶ 9), the text
13 of which is set out in Part II.B.2. below.

14 The second incident of which Wright complained in Action I
15 occurred on or about April 2, 2003. While Wright was in his cell
16 working on legal papers, another inmate, George Cavallo, brought
17 newspapers to Wright's cell. (See id. ¶ 11.) CO Morris observed
18 this and ordered Wright to get rid of the papers. Wright
19 responded that he was not going to get rid of his legal papers,
20 and he then took the newspapers to Cavallo's cell. (See Wright
21 Dep. 18-19.) Morris promptly issued a misbehavior ticket to
22 Wright charging him with (1) refusing a direct order, (2) being
23 out of place, (3) engaging in unauthorized exchange of personal
24 property, and (4) possessing an authorized item in an unauthorized
25 area. (See Inmate Misbehavior Report, dated April 2, 2003.) With
26 respect to the same incident, Morris also issued a misbehavior
27 report against Wright on April 9, 2003. (See Action I Second
28 Amended Complaint ¶ 13.) Wright filed grievances complaining of
29 Morris's actions. He claimed, inter alia, that Morris's
30 instruction that Wright "move his legal work" on April 2

1 constituted an obstruction of justice and that Morris's filing of
2 the April 2 misbehavior report was "in []retaliation of a
3 complaint [Wright] filed February 27, 2003, for an assault
4 committed against him." (Wright grievance dated April 2, 2003, at
5 1-2). He claimed that Morris's April 9 misbehavior report with
6 regard to the April 2 incident was intended to interfere with
7 Wright's legal work. (See Wright Dep. 22-23; Wright grievance
8 dated April 9, 2003.)

9 The April 9 misbehavior report was summarily dismissed two
10 days later by a DOCS sergeant. (See Action I Second Amended
11 Complaint ¶ 14.) The charges in the April 2 misbehavior report
12 were adjudicated in a disciplinary hearing conducted by Tiberis on
13 April 14. (See Disciplinary Hearing, April 14, 2003, at 1-2.)
14 Tiberis found Wright not guilty of refusing a direct order or of
15 being out of place. However, he found that Wright had taken the
16 newspapers back to Cavallo in violation of prison rules and that
17 Wright was thus guilty of the two remaining charges, i.e.,
18 possessing property in an unauthorized area and unauthorized
19 exchange of property. (See id. at 12-13.)

20 No misbehavior report was issued to Cavallo. The second
21 amended complaint asserted that the bringing of disciplinary
22 charges against Wright, a Black person, but not against Cavallo, a
23 White person, denied Wright equal protection. (See Action I
24 Second Amended Complaint ¶ 15.)

25 The second amended complaint demanded damages against each
26 defendant in his individual and official capacity in the amounts

1 of "\$3,600 Zillions dollars; \$3,600 Tillions dollars; \$3,600
2 Billions dollars; \$3,600 Millions dollars; \$3,600 Thousands
3 dollars." (Id. ¶ 19.)

4 In November 2003, Wright sought permission to insert
5 another claim in his second amended complaint; he proposed to name
6 additional COs as defendants, including M. Kasunic, asserting
7 that he had been assaulted and retaliated against by Kasunic in
8 May 2003. However, the document Wright proffered was a fragment
9 of a pleading to be inserted as a supplement to his second amended
10 complaint, and the court denied his request because court rules
11 required that any amended complaint be a complete pleading.
12 Rather than proffering a complete third amended complaint, Wright
13 commenced a second action.

14 B. The Second Action ("Action II")

15 In Wright's second action, his pleading consisted of a
16 short document labeled a complaint (but containing no factual
17 allegations) plus an expressly incorporated accompanying affidavit
18 containing numbered paragraphs that set out, inter alia, Wright's
19 factual allegations (collectively "Action II Complaint" or
20 "Complaint"). The Action II Complaint named as individual
21 defendants Goord and COs A. Dire ("Dirie"), M. Dermutt
22 ("McDermott"), and Kasunic, and reiterated the allegations made in
23 Action I as to, inter alia, Brandel's assault on Wright in early
24 February, the comment that Wright did not like "Crackers," the
25 COs' return of Brandel's cane to Brandel construed by Wright as a

1 threat of attack by the COs, and Wright's letter of complaint to
2 the county district attorney. (See Action II Complaint ¶¶ 9-13.)
3 Paragraph 14 of the Complaint began with the word "Retaliation"
4 and described events of May 4, 2003. Paragraphs 14 and 15 alleged
5 that Wright, 66 years of age in May 2003 and suffering from
6 emphysema, returned from a "Retreat" to his cell in the hospital
7 ward to access his oxygen tank; while using the oxygen Wright was
8 fixing a cup of coffee, but he needed to get hot water from the
9 day room. The Complaint went on to allege that when Wright went
10 into the day room, he

11 was assaulted by C.O. M. Kasunic, . . . trying to
12 throw [Wright] to the floor. To try and make him
13 spill his hot coffee on him, but [Wright] let the cup
14 dropped to the floor. Then Kasunic, started kicking
15 his cup around the day room. "When I tell you to do
16 something. Dont be asking me any question, Just do
17 it."

18 (Id. ¶ 16.)

19 The Complaint alleged that Kasunic, in an attempt to cover
20 up his assault of Wright and in an act of systematic criminal
21 coercion, filed a misbehavior report against Wright. (See id.
22 ¶¶ 17-18.) This misbehavior report was adjudicated in a
23 disciplinary hearing conducted by McDermott (see id. ¶ 18), at
24 which Wright described Kasunic's alleged assault (see Part I.C.
25 below). The misbehavior report was upheld by McDermott, whose
26 decision was affirmed by Dirie. (See Action II Complaint
27 ¶¶ 18-19.)

1 C. Wright's Deposition and Hearing Testimony and the Summary
2 Judgment Motions

3 Wright's first action had been assigned to Judge Lawrence
4 E. Kahn; his second action was assigned to Chief Judge Norman A.
5 Mordue. Although the actions were not consolidated, defendants
6 took a single deposition of Wright for the two actions.

7 At his deposition, Wright described the February 6 cane
8 incident, introduced in Action I and reiterated in Action II, much
9 as it was described in his pleadings. The COs separated Wright
10 from Brandel that night by moving Wright to another room in the
11 medical ward, where he had a new cellmate. (See Wright Dep.
12 13-15.) Although Wright testified that he did not know which COs
13 had come to his cell on February 6 (see id. at 17-18), he
14 testified that Kasunic was not one of them:

15 A. . . . Kasunic wasn't there that day, but the
16 next day.

17 Q. The next day?

18 A. Kasunic said, "You don't like crackers."

19 I said, "What? What do you mean? I don't like
20 crackers."

21 He said, "Yeah. You don't like crackers." But
22 he used to do it when nobody was around, so I ignored
23 him.

24 (Id. at 35.)

25 When asked how he knew that the cane had been returned to
26 Brandel on February 26, Wright responded "[b]ecause I seen him
27 back with the cane." (Id. at 16.) Wright testified that when he
28 complained--saying "'[t]his man hit me with the cane. You're
29 going to give him back the cane?'"--the person to whom he

1 complained "said the medical department gave it back to him."
2 (Id.)

3 With respect to the April 2 newspaper incident, Wright
4 reiterated his complaint of disparate enforcement of prison rules:

5 Q. There is a rule here in the prison that
6 inmates are not supposed to trade and collect each
7 other's property, isn't that right?

8 A. I guess so. But then why did I get a ticket
9 instead of George?

10 (Wright Dep. 23; see also id. at 19 (testifying that Morris
11 instructed another CO to "[g]ive the nigger a ticket.'").)

12 As to the misbehavior report filed by Morris on April 9
13 with respect to the April 2 newspaper incident, Wright testified
14 that he attributed that report to an effort by Morris to stop
15 Wright from working on his legal papers, but that Morris "didn't
16 put it like that." (Id. at 23.) Wright testified that his legal
17 papers related to his "conviction." (Id. at 19; see also
18 Action II Complaint ¶ 10 (Wright's legal papers contended that his
19 service of the 15-years-to-life term of imprisonment, imposed on
20 him in 1982, should have been completed in January or February
21 1991).)

22 With respect to the alleged assault by Kasunic, Wright
23 testified as follows:

24 Q. Did Officer Kasunic assault you physically?

25 A. Yes, he did.

26 Q. Tell me about that.

27

1 A. I come down from a prayer meeting that they
2 had upstairs in the dayroom, just like this upstairs,
3 and I think the date was May 4, 2003.

4 Q. Yes.

5 A. Okay. And I'm struggling to get to my air,
6 because they didn't allow the air, so I had the
7 concentrator. It doesn't work by battery. So I'm
8 trying to get to my room so I can get air. So when
9 the air come on, I took in air like I did today, and
10 I came down to fix me a cup of coffee.

11 Q. You came down to this room, dayroom to get
12 yourself some coffee?

13 A. Right. And Kasunic approached me, told me I
14 got to throw it away. I looked at him and I said,
15 "For what?"

16 He said, "Because was [sic] already out you
17 can't leave and come back." I just came from
18 upstairs. So when I didn't throw it away now--

19

20 A. When I didn't throw it away--I'd like to
21 stop at this point because here--because I have had
22 an operation on my colon, right, and this is where he
23 tried to grab me in the neck. I dropped the cup of
24 coffee and I was down like this.

25 Q. With your body, you're leaning forward,
26 putting your hands on your thighs, catching your
27 breath?

28 A. Yes. At the time--he threw my cup around
29 the room.

30

31 A. First he kicked my cup around the room, and
32 at that time I thought the man was going completely
33 out of his mind. I was looking at him. And so I
34 walked outside and one officer put the cup on the
35 railing outside the door. Do you know the railings
36 out there? So I picked it up, I picked the cup up
37 from there

38 Q. Well, let me just make sure we've got our
39 details straight. You said when Kasunic put his
40 hands on you, he puts one hand around the base of

1 your neck and the other hand around you[r] abdomen,
2 around your stomach area, and used force to stand you
3 up, stand you up onto your feet?

4 A. No, he used force to try to cause injury,
5 and I was backing off of him. I had dropped my cup,
6 and I was backing off of him, you know. You know, I
7 stopped the force with me from my neck, and I stopped
8 the force where I had the operation.

9 Q. You used your hands to push his hands off of
10 you?

11 A. Right.

12 Q. Okay.

13 A. And after I dropped my coffee, he went
14 kicking my cup around the dayroom.

15

16 Q. So after the two of you physically
17 separated, he then concentrated his attention on your
18 coffee cup, which was bouncing around the floor?

19 A. Which he was kicking around the floor.

20

21 Q. So as he was kicking the coffee cup
22 around. You walked under your own power through one
23 of these two doors into the hallway here?

24 A. After I got my breath back.

25 Q. You got your breath back, okay. Did you
26 have the oxygen concentrate machine with you at this
27 moment?

28 A. No.

29 Q. So you had no medical equipment with you.
30 You're walking without oxygen support?

31 A. I'm not sure, but I think somebody brought
32 the tank down to escort me back to my room.

33

34 Q. And where was Kasunic at that time?

1 A. I don't know. He was back at his desk. And
2 I picked up my cup and went on about my business.

3 (Wright Dep. 36-41.)

4 As to his claims of injury as a result of his encounter
5 with Kasunic, Wright testified as follows:

6 Q. Did you experience any physical injuries
7 from this incident apart from your shortness of
8 breath?

9 A. It's hard to say, because I have a
10 respiratory problem. All that stems from a
11 respiratory problem

12 Q. You had several minutes where you had some
13 acute shortness of breath, is that what you're
14 saying?

15 A. Right. By that time I couldn't move. . . .
16 Back then I couldn't even move at all. That's why I
17 stood there with my hands on my thighs, trying to get
18 myself together.

19 Q. You allege that you suffer from emphysema,
20 is that right?

21 A. Emphysema, yeah.

22 Q. When did you develop that?

23 A. . . . back in '99.

24 (Id. at 42-43.) Wright testified that his emphysema at the time
25 of his deposition in 2005 was about the same as it had been in
26 2003 (see id. at 57).

27 Although Wright testified that Kasunic, while placing one
28 hand on the back of Wright's neck, had grabbed Wright's abdomen at
29 the site of Wright's colon surgery (see id. at 38-39), he did not
30 testify that he suffered any pain at that site. The colon surgery
31 to which Wright referred had taken place in mid-December 2001
32 (see, e.g., Letter from Melvin Wright in Action II to Clerk of the

1 District Court dated August 29, 2005 ("Wright Action II Letter to
2 Court"), at 1), and the surgical staples had been removed sometime
3 between December 2001 and August 2002 (see Wright Dep. 51-52;
4 Wright Action II Letter to Court at 1).

5 With respect to the Action II Complaint's allegation of
6 retaliation, Wright testified in his deposition as follows:

7 Q. In your complaint, I'm going to back track a
8 little bit to the May 4, 2003 incident with Officer
9 Kasunic. In your complaint in Paragraph 14 you state
10 that this incident was retaliation.

11 In federal litigation that's a term that means a
12 certain thing. Are you alleging that Officer Kasunic
13 retaliated against you or his behavior towards you
14 was retaliation for something?

15 A. Yes.

16 Q. What was he retaliating against?

17 A. The fact that Brandell [sic] told him that
18 the staff--that I don't like crackers and the word
19 went around that I don't like crackers.

20 Q. So if Kasunic was retaliating against you,
21 it's because he believed you--he believed you were a
22 racist and you didn't like white people. Is that
23 what he was retaliating about?

24 A. Yes.

25 (Wright Dep. 48-49.)

26 After taking Wright's deposition, defendants moved for
27 summary judgment dismissing his complaint in each case. In
28 support of their motions, defendants submitted Wright's
29 deposition testimony, as well as, inter alia, records of Wright's
30 February 27 letter to the county district attorney, Wright's
31 grievances, and the disciplinary hearing conducted by McDermott on

1 the misbehavior report filed by Kasunic. In that hearing, Wright
2 described Kasunic's alleged assault on him as follows:

3 McDermott: What I need to know is the exact
4 type of assault, what did he do. Did he punch you,
5 grab you, kick you, what did he do?

6 Wright: He tried to throw me to the ground.

7 McDermott: ____ [sic] So did he grab you,

8 Wright: Yes he did.

9 McDermott: Where did he grab you?

10 Wright: What?

11 McDermott: Where did he grab you, on your body,
12 what did he grab?

13 Wright: He grabbed me.

14 McDermott: Right.

15 Wright: Well he tried to grab me around my
16 neck. He had a body hold ____ [sic] trying to throw
17 me down and hit the wall.

18 McDermott: Did you hit the ground?

19 Wright: What, did I hit the ground because he
20 told me to. So when he got off he had my hands on my
21 knees because I couldn't move.

22 McDermott: So in the day room Kasunic grabbed
23 you about the body and tried to throw you to the
24 floor.

25 Wright: That's right. And that was after I
26 came out [of] my room.

27 McDermott: Now you pushed him away?

28 Wright: Pushed him off me.

29 McDermott: You pushed him off you?

30 Wright: To get out of his hold that he had on
31 me.

32 McDermott: Then he stopped.

1 Wright: No then he kicked my cup all around the
2 room.

3 McDermott: No I am talking about your physical
4 well being. He stopped that pretty rapidly, he tried
5 to throw you, you pushed away from him, and than
6 [sic] he stopped assaulting you?

7 Wright: You already know that.

8 McDermott: All I want to know is about the
9 assault.

10 Wright: Right.

11 McDermott: You said he grabbed you. He tried
12 to throw you to the floor.

13 Wright: Well.

14 McDermott: You pushed away from him?

15 Wright: The only reason he stopped was because
16 he seen me get ready to hit him.

17 McDermott: All he was worried about was your
18 fists. Your fist.

19 Wright: Yeah.

20 McDermott: Okay.

21 Wright: _____ [sic] (inmate is mumbling) he
22 stopped and started kicking my foot.

23 McDermott: Did he touch you ____ [sic]

24 Wright: _____ [sic]

25 McDermott: Did he touch you again?

26 Wright: Not after that.

27 (Disciplinary Hearing, May 14, 2003 ("May 14 Disciplinary Hrg."),
28 at 9-10.)

29 In Action I, defendants contended that summary judgment
30 dismissing the second amended complaint was appropriate on a
31 variety of grounds, including lack of evidence of any injury to

1 Wright or any disciplinary action against him in connection with
2 the February cane incident. With respect to the April newspaper
3 incident, defendants asserted in a statement of undisputed facts
4 pursuant to Local Rule 7.1 of the Northern District of New York
5 ("Local Rule 7.1") that Wright, in his grievances and his
6 disciplinary hearing testimony, had neither alleged any
7 misbehavior by Cavallo nor complained of any racially disparate
8 treatment. Defendants contended that there was no evidence of any
9 arbitrary action by Morris.

10 In Action II, defendants contended that summary judgment
11 dismissing the Complaint was appropriate because, inter alia,
12 Wright's own testimony showed (a) that, in the May 4 incident,
13 Wright had experienced only a few minutes' shortness of breath,
14 and (b) that any force used by Kasunic against Wright was not
15 excessive.

16 Wright opposed summary judgment in each action, submitting
17 in each an affidavit in which he asserted that prison officials
18 were aware of "officers who allegedly wrote false disciplinary
19 report[s], . . . and obstacles to protect from corrections
20 officers that caused [Wright] to suffered physical injuries and
21 emotional trauma." (Affidavit of Melvin O. Wright in Action I,
22 dated August 15, 2005 ("Wright Aug. 15, 2005 Aff."), ¶ 6; see
23 Affidavit of Melvin O. Wright in Action II, dated August 19, 2005,
24 ¶ 7.) And in each action Wright sent an unsworn letter to the
25 district court stating that he had been "attack[ed] or assaulted
26 by another inmate February 6, 2003; and threaten[ed] by

1 corrections officers from April 2, 2003, to May 4, 2003, after
2 being assaulted by an officer" and that these events caused him
3 mental anguish, physical and psychic injuries, sensation of pain,
4 and feelings of distress, fright, and anxiety. (Letter from
5 Melvin Wright in Action I to Clerk of the District Court dated
6 August 29, 2005 ("Wright Action I Letter to Court"), at 1-2;
7 Wright Action II Letter to Court at 1-2). Wright did not submit
8 in either action any statement of disputed facts pursuant to Local
9 Rule 7.1.

10 D. The District Court Decisions

11 In each action, the defendants' summary judgment motion
12 was referred to a magistrate judge for report and recommendation.
13 In Action I, in a Report and Recommendation dated February 27,
14 2006 ("Action I Report"), adopted by and reprinted with the
15 district court's subsequent Decision and Order, see Wright v.
16 Goord, No. 03 Civ. 0743, 2006 WL 839532 (N.D.N.Y. Mar. 27, 2006)
17 ("Wright I"), at *1, Magistrate Judge David E. Peebles recommended
18 dismissing the second amended complaint in its entirety. The
19 magistrate judge recommended, inter alia, that Wright's claims for
20 money damages against DOCS and the individual defendants in their
21 official capacities be dismissed on the ground of Eleventh
22 Amendment immunity; he recommended that all of the claims against
23 Commissioner Goord be dismissed for lack of any evidence of his
24 personal involvement in the alleged constitutional violations.
25 See id. at *6. As to Wright's remaining claims--construed as

1 (1) Eighth Amendment and substantive due process claims based on
2 the COs' failure to protect Wright from Brandel in the February
3 2003 cane incident, and (2) equal protection and procedural due
4 process claims based on the bringing of disciplinary proceedings
5 against Wright but not Cavallo with respect to the April 2003
6 newspaper incident--the magistrate judge recommended that those
7 claims be dismissed on the merits for lack of evidentiary support
8 as to essential elements of the claims. See id. at *7-*11.

9 Wright filed objections to the Action I Report, simply
10 reiterating in affidavit form most of the factual allegations in
11 the second amended complaint. (See Affidavit of Melvin O. Wright
12 dated March 7, 2006 ("Wright Mar. 7, 2006 Aff."), at 2-5 (setting
13 out the allegations made in paragraphs 6-10, 12, 15, and 16 of the
14 second amended complaint).)

15 Judge Kahn, in a Decision and Order dated March 27, 2006,
16 after undertaking a de novo review of the record and considering
17 Wright's objections, approved and adopted the Action I Report and
18 granted defendants' motion for summary judgment dismissing the
19 second amended complaint. See Wright I, 2006 WL 839532, at *1.

20 In Action II, in a Report and Recommendation dated March
21 1, 2006 ("Action II Report"), adopted by and reprinted with the
22 district court's subsequent Memorandum-Decision and Order, see
23 Wright v. New York State Department of Correctional Services, No.
24 04 Civ. 0308, 2006 WL 752787 (N.D.N.Y. Mar. 22, 2006)
25 ("Wright II"), at *1, Magistrate Judge Gustave J. DiBianco
26 recommended granting defendants' summary judgment motion in its

1 entirety. Wright's Action II claims against DOCS had been
2 dismissed previously; in the Action II Report, the magistrate
3 judge recommended dismissing the claims against all of the
4 individual defendants except Kasunic on the ground that there was
5 no evidence of their personal involvement in the events giving
6 rise to those claims.

7 As to Kasunic, the magistrate judge determined that Wright
8 had stated an Eighth Amendment claim based on Kasunic's alleged
9 assault during the May 2003 coffee incident but recommended that
10 that claim be dismissed. Citing Wright's testimony in his
11 deposition and in the May 14 disciplinary hearing, the magistrate
12 judge concluded that the amount of force used was de minimis, that
13 Wright suffered no injury, and that even viewing the evidence in
14 the light most favorable to Wright, no reasonable factfinder could
15 conclude that Kasunic used excessive force during the coffee
16 incident. See Wright II, 2006 WL 752787, at *6.

17 The magistrate judge also concluded that Wright had stated
18 a First Amendment claim that Kasunic had retaliated against Wright
19 because Kasunic believed Wright was a racist. However, the
20 magistrate judge recommended dismissing that claim on the ground
21 that "[t]he alleged dislike of white people is not a
22 constitutionally protected activity." Id. at *8.

23 Wright objected to the Action II Report by reiterating
24 most of the factual allegations in his Action II Complaint. (See
25 Wright Affidavit In Support of Objections Motion dated March 11,
26 2006 ("Wright March 11, 2006 Aff."), at 2-7 (setting out the

1 allegations made in paragraphs 9-14, and 16-19 of the Complaint).)
2 Chief Judge Mordue, in a Memorandum-Decision and Order dated March
3 22, 2006, considered Wright's objections, conducted a de novo
4 review of the record, accepted and adopted the Action II Report,
5 and granted defendants' motion for summary judgment dismissing the
6 Action II Complaint. See Wright II, 2006 WL 752787, at *1.

7 Judgments were entered dismissing Wright's complaints, and
8 these appeals followed.

9 E. The Issues on Appeal

10 As briefly indicated above, in connection with an
11 application by Wright in this Court for assignment of counsel to
12 represent him in challenging the decisions of the district court,
13 this Court reviewed Wright's claims in order to determine whether
14 they could be pursued consistent with 28 U.S.C. § 1915(e) ("The
15 court may request an attorney to represent any person unable to
16 afford counsel," but "the court shall dismiss the case at any time
17 if the court determines that . . . the . . . appeal . . . is
18 frivolous . . . [or] fails to state a claim on which relief may
19 be granted; or . . . seeks monetary relief against a defendant who
20 is immune from such relief."). We dismissed so much of Wright's
21 appeal as sought to pursue his claims with respect to equal
22 protection, procedural due process, and failure to provide
23 protection from Brandel, concluding that "the appeal of the
24 district court decision dismissing those claims lacks an arguable
25 basis in fact or law. See Neitzke v. Williams, 490 U.S. 319, 325

1 (1989); 28 U.S.C. § 1915(e)." Wright v. Goord, No. 06-1808 (2d
2 Cir. Sept. 22, 2006) ("Wright III"), at 1. Our order appointed
3 counsel to represent Wright with respect to the claims as to which
4 his appeal was not dismissed, mentioning in particular his "claim
5 that the defendants violated his Eighth Amendment rights when he
6 was assaulted and intimidated by correctional officers at
7 Coxsackie Correctional Facility." Id. at 1-2.

8 Appointed counsel argues that in both Wright I and
9 Wright II, the district court erred in granting summary judgment
10 dismissing Wright's Eighth Amendment claims and in dismissing
11 claims that the Coxsackie COs violated the First Amendment by
12 retaliating against Wright for filing grievances.

13 II. DISCUSSION

14 Summary judgment is appropriate only "if the pleadings,
15 the discovery and disclosure materials on file, and any affidavits
16 show that there is no genuine issue as to any material fact and
17 that the movant is entitled to judgment as a matter of law." Fed
18 R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317,
19 322 (1986); McPherson v. Coombe, 174 F.3d 276, 279-80 (2d Cir.
20 1999). A genuine issue of fact means that "the evidence is such
21 that a reasonable jury could return a verdict for the nonmoving
22 party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
23 (1986); see, e.g., Graham v. Henderson, 89 F.3d 75, 79 (2d Cir.

1 1996) (a genuine issue is one that "can 'reasonably be resolved in
2 favor of either party'" (quoting Anderson, 477 U.S. at 250)).

3 We review a district court's decision to grant summary
4 judgment de novo, see, e.g., Johnson v. Goord, 445 F.3d 532, 534
5 (2d Cir. 2006), "'resolv[ing] all ambiguities and draw[ing] all
6 permissible factual inferences in favor of the party against whom
7 summary judgment is sought,'" id. (quoting Terry v. Ashcroft, 336
8 F.3d 128, 137 (2d Cir. 2003)); see, e.g., Graham v. Henderson, 89
9 F.3d at 79 ("The evidence of the party opposing summary judgment
10 is 'to be believed, and all justifiable inferences are to be drawn
11 in [that party's] favor.'" (quoting Anderson, 477 U.S. at 255)).
12 When a motion for summary judgment is properly supported by
13 documents or other evidentiary materials, the party opposing
14 summary judgment may not merely rest on the allegations or denials
15 of his pleading; rather his response, by affidavits or otherwise
16 as provided in the Rule, must set forth "specific facts"
17 demonstrating that there is "a genuine issue for trial." Fed. R.
18 Civ. P. 56(e).

19 A. The Eighth Amendment Claims of Cruel and Unusual Punishment

20 1. Action I

21 Plaintiff contends that the district court in Wright I
22 erred in dismissing the Action I claim for use of excessive force
23 because the court failed to construe liberally the "complaint and
24 other documentation" that he contends "demonstrate[d] an Eighth
25 Amendment claim based on an ongoing campaign of harassment and

1 intimidation against [Wright] that began with verbal threats and
2 harassment and culminated in a physical assault." (Wright brief
3 on appeal at 13.) For several reasons, even with all justifiable
4 inferences drawn in Wright's favor, the record does not support
5 this characterization of Wright's pleading and submissions in
6 Action I.

7 First, the only concretely alleged physical assault by a
8 corrections officer in either of Wright's lawsuits was the alleged
9 assault by Kasunic. That claim, however, was not asserted in
10 Action I. Although Wright attempted to add his claim of a Kasunic
11 assault to Action I, he was informed that simply appending that
12 claim to his second amended complaint, as he sought to do, was
13 not permitted by court rules. Wright then elected to commence a
14 new lawsuit to assert the Kasunic assault claim rather than filing
15 a third amended complaint to assert that claim in Action I. Thus,
16 the alleged assault on Wright by Kasunic was not part of Action I.

17 Second, although the cane incident alleged in Action I
18 involved an assault on Wright, that was an assault by Brandel, his
19 cellmate. This Court's order in Wright III affirmed the Wright I
20 rejection of any claim that corrections officers had improperly
21 failed to protect Wright from Brandel. And there was no
22 allegation or proffer of proof in Action I of any physical assault
23 on Wright by any corrections officer.

24 Third, although paragraph 10 of the second amended
25 complaint in Action I, which is set out in full in Part I.A.
26 above, referred to an "intentional display of force such as was

1 shown that night of February 26, 2003," that phrase was the only
2 suggestion in the case that there had been any display of force on
3 February 26. The pleading itself contained no allegation that in
4 fact any force had been used on February 26. Similarly, although
5 paragraph 10 also made reference to pre-February 26 "threats to
6 inflict injury upon [Wright]," this offhand suggestion that there
7 had been such threats was entirely conclusory and was not detailed
8 elsewhere in the pleading. And nothing in Wright's affidavits
9 provided any basis for inferring that any use of force had
10 occurred on February 26 or that any officer had threatened Wright
11 with physical injury before that date.

12 Finally, to the extent that paragraph 10 of the second
13 amended complaint was intended to suggest that corrections
14 officers, upon learning that Brandel had hit Wright with the cane,
15 returned the cane to Brandel on February 26 so that he could
16 assault Wright again (see also Wright brief on appeal at 8 ("on
17 February 26, 2003, prison staff returned the cane to Mr. Wright's
18 cellmate . . . , thereby re-arming Wright's assailant")), Wright
19 proffered no evidence to support that suggestion. Indeed, Brandel
20 was no longer Wright's cellmate, Wright having been moved to a new
21 cell on February 6. And Wright's deposition testimony revealed
22 that Wright had no information about the return of the cane to
23 Brandel except that he saw Brandel with the cane and, upon
24 complaining that Brandel had previously hit him with the cane,
25 Wright was informed that the cane had been returned to Brandel not
26 by security officers but by the medical staff.

1 Wright's brief on appeal states that on February 26, i.e.,
2 the
3 same day [that the cane was returned to Brandel],
4 officers, including defendant-appellee Morris,
5 accosted Mr. Wright, shouting and taunting him about
6 the cane . . . and the alleged "cracker"
7 comments. . . . By their shouting and threatening
8 posturing, the officers convinced Mr. Wright that
9 they all were about to assault him.

10 (Wright brief on appeal at 8). But the record citations
11 accompanying this statement are only to Wright's pleadings, which
12 were conclusory, and to deposition testimony describing events of
13 April 2 and February 6, not February 26 (see id. at 8-9). There
14 was no factual allegation in the second amended complaint as to
15 any instance on which any CO threatened to subject Wright to
16 physical injury. Nor did Wright adduce any evidence of such a
17 threat.

18 In sum, nothing in the papers submitted by Wright in
19 Action I permitted the inference that Wright had been assaulted,
20 or threatened with personal injury, by a corrections officer. We
21 conclude that the Wright I court properly dismissed Wright's
22 Eighth Amendment claims in Action I.

23 2. Action II

24 The Complaint in Action II did allege in nonconclusory
25 terms that Wright had been subjected to excessive force by Kasunic
26 on May 4 during the coffee incident. However, we agree with the
27 Wright II court that Wright's own testimony would prevent a
28 rational juror from finding in his favor on this claim.

1 Analysis of a claim for use of excessive force begins with
2 "identif[ication of] the specific constitutional right allegedly
3 infringed by the challenged application of force." Graham v.
4 Connor, 490 U.S. 386, 394 (1989); see generally Baker v. McCollan,
5 443 U.S. 137, 140 (1979) (the first step in analysis of any claim
6 brought under § 1983 is to identify the precise constitutional
7 right allegedly violated). In the context of a claim by a
8 prisoner that he was subjected to excessive force by prison
9 employees, the source of the ban against such force is the Eighth
10 Amendment's ban on cruel and unusual punishments. The validity of
11 the prisoner's claim must "be judged by reference to th[is]
12 specific constitutional standard . . . , rather than to some
13 generalized 'excessive force' standard." Graham v. Connor, 490
14 U.S. at 394; see, e.g., Whitley v. Albers, 475 U.S. 312, 318-26
15 (1986) (claim of excessive force to subdue convicted prisoner is
16 to be analyzed under an Eighth Amendment standard).

17 A claim of cruel and unusual punishment in violation of
18 the Eighth Amendment has two components--one subjective, focusing
19 on the defendant's motive for his conduct, and the other
20 objective, focusing on the conduct's effect. See, e.g., Hudson v.
21 McMillian, 503 U.S. 1, 7-8 (1992); Blyden v. Mancusi, 186 F.3d
22 252, 262 (2d Cir. 1999). The subjective component of the claim
23 requires a showing that the defendant "had the necessary level of
24 culpability, shown by actions characterized by 'wantonness'" in
25 light of the particular circumstances surrounding the challenged
26 conduct. Id. at 262 (quoting Wilson v. Seiter, 501 U.S. 294, 299

1 (1991)); see, e.g., Sims v. Artuz, 230 F.3d 14, 21 (2d Cir. 2000);
2 Davidson v. Flynn, 32 F.3d 27, 30 & n.2 (2d Cir. 1994). When
3 prison officials are accused of using excessive force, the
4 "wantonness" issue turns on "whether force was applied in a good-
5 faith effort to maintain or restore discipline, or maliciously and
6 sadistically to cause harm." Hudson, 503 U.S. at 7; see also
7 Blyden v. Mancusi, 186 F.3d at 262-63.

8 The objective component of a claim of cruel and unusual
9 punishment focuses on the harm done, in light of "contemporary
10 standards of decency." Hudson, 503 U.S. at 8 (internal quotation
11 marks omitted). In assessing this component, the court must ask
12 whether "the alleged wrongdoing was objectively 'harmful enough'
13 to establish a constitutional violation." Id. (quoting Wilson,
14 501 U.S. at 298). But when prison officials use force to cause
15 harm maliciously and sadistically, "contemporary standards of
16 decency always are violated. . . . This is true whether or not
17 significant injury is evident." Hudson, 503 U.S. at 9.

18 Accordingly, where a prisoner's allegations and
19 evidentiary proffers could reasonably, if credited, allow a
20 rational factfinder to find that corrections officers used force
21 maliciously and sadistically, our Court has reversed summary
22 dismissals of Eighth Amendment claims of excessive force even
23 where the plaintiff's evidence of injury was slight and the proof
24 of excessive force was weak. See, e.g., Scott v. Coughlin, 344
25 F.3d 282, 291 (2d Cir. 2003) (reversing summary dismissal of
26 prisoner's complaint, though suggesting that prisoner's evidence

1 of an Eighth Amendment violation was "thin" as to his claim that a
2 corrections officer struck him in the head, neck, shoulder, wrist,
3 abdomen, and groin, where the "medical records after the . . .
4 incident with [that officer] indicated only a slight injury");
5 Griffin v. Crippen, 193 F.3d 89, 91 (2d Cir. 1999) (vacating
6 district court's sua sponte dismissal of prisoner's complaint,
7 though characterizing his "excessive force claim [a]s weak and his
8 evidence [as] extremely thin" where prisoner alleged that he was
9 hit by prison guards "after he was handcuffed" but "the only
10 injuries he suffered were a bruised shin and swelling over his
11 left knee").

12 Nonetheless, the Eighth Amendment's prohibition against
13 cruel and unusual punishment does not extend to "de minimis uses
14 of physical force, provided that the use of force is not of a sort
15 repugnant to the conscience of mankind." Hudson, 503 U.S. at 10
16 (internal quotation marks omitted). "'Not every push or shove,
17 even if it may later seem unnecessary in the peace of a judge's
18 chambers, violates a prisoner's constitutional rights.'" Id. at 9
19 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

20 In the present case, Wright's evidence with respect to his
21 claim that Kasunic violated his Eighth Amendment rights by
22 grabbing him in the dayroom on May 4 falls far short of even the
23 level of evidence that we termed "thin" in Scott v. Coughlin and
24 Griffin v. Crippen, and was insufficient with respect to both the
25 objective and subjective components of the Eighth Amendment claim
26 asserted in Action II.

1 As to the objective component, Wright's description of the
2 coffee incident does not permit a finding that Kasunic's alleged
3 conduct was "objectively 'harmful enough' to establish a
4 constitutional violation." Hudson, 503 U.S. at 8. Apart from the
5 several minutes during which he experienced acute shortness of
6 breath, Wright could not say that he experienced any physical
7 injuries from his encounter with Kasunic. (See Wright Dep. 42.)

8 Wright testified that he spent a few minutes leaning
9 forward with his hands on his thighs, and "got [his] breath back."
10 (Wright Dep. 38, 40.) Someone brought Wright an oxygen tank (see
11 id. at 41), and Wright testified that he then left the dayroom:
12 Kasunic "was back at his desk. And I picked up my cup and went on
13 about my business" (id.).

14 Further, although in describing Kasunic's conduct, Wright
15 said that Kasunic had placed a hand on the site of Wright's colon
16 surgery, Wright did not testify that this had caused him any pain
17 at that site. Indeed, when expressly questioned at his deposition
18 as to what injuries he claimed to have suffered as a result of his
19 encounter with Kasunic, Wright did not testify that Kasunic's
20 actions caused him any pain whatever--physical or emotional--other
21 than the shortness of breath.

22 In sum, although Wright stated conclusorily in some of his
23 submissions to the district court in opposition to defendants'
24 motions for summary judgment that he had suffered "physical . . .
25 injuries" (see, e.g., Wright Aug. 15, 2005 Aff. ¶ 6), neither his
26 deposition testimony nor any other evidentiary material in the

1 record reveals that as a result of the May 4 coffee incident
2 Wright suffered any physical injury other than a few minutes'
3 shortness of breath. Plainly, given his testimony, any injury to
4 Wright was de minimis.

5 As discussed above, the absence of any significant injury
6 to Wright does not end the Eighth Amendment inquiry, for our
7 standards of decency are violated even in the absence of such
8 injury if the defendant's use of force was malicious or sadistic.
9 But the record here does not permit an inference that Kasunic
10 acted in such a manner or with such intent.

11 When Wright was asked at the May 14 disciplinary hearing
12 whether Kasunic had punched, kicked, or grabbed him, Wright
13 testified only that Kasunic grabbed him and attempted to throw him
14 to the ground. (See May 14 Disciplinary Hrg. at 9-10.) Wright's
15 brief on appeal cites a strength disparity between Wright and
16 Kasunic (see Wright brief on appeal at 7, 17), a disparity that is
17 acknowledged by Kasunic in a June 3, 2003 memorandum to a DOCS
18 sergeant and is easily inferable in recognition of Wright's age--
19 nearly 66--at the time of the incident. But the mere existence of
20 greater strength does not mean that such strength was used, and
21 Wright's deposition testimony definitively negates any possibility
22 that Kasunic used his greater strength during the coffee incident.
23 Wright testified:

24 [Kasunic] used force to try to cause injury, and I
25 was backing off of him. I had dropped my cup, and I
26 was backing off of him, you know. You know, I
27 stopped the force with me from my neck, and I stopped
28 the force where I had the operation.

1 Q. You used your hands to push his hands off of
2 you?

3 A. Right.

4 (Wright Dep. 38-39.) Similarly, at his disciplinary hearing,
5 Wright testified that he "[p]ushed [Kasunic] off" (May 14
6 Disciplinary Hrg. at 10).

7 Finally, although Wright stated that Kasunic had placed
8 one hand on Wright's abdomen at the site of his colon surgery,
9 there was no evidence that that placement was sadistic or
10 malicious. Wright did not testify that Kasunic knew or had reason
11 to know that his abdomen was unusually tender. Nor does the
12 record reveal any basis for inferring that Kasunic would have been
13 aware that it was a surgical site. Wright's surgery had been
14 performed some 17 months earlier--and some eight months before
15 Wright became an inmate at Coxsackie.

16 In sum, the evidence was that Kasunic grabbed Wright, and
17 Wright pushed him away; while Wright leaned over to catch his
18 breath, Kasunic kicked Wright's coffee cup around the room, but
19 only the coffee cup was abused. After the few minutes needed to
20 catch his breath, Wright left the dayroom, took his cup, and "went
21 on about [his] business." As a matter of law, this record would
22 not permit a rational factfinder to find that Kasunic subjected
23 Wright to excessive force or cruel and unusual punishment.
24 Summary judgment dismissing this claim was proper.

1 B. Retaliation

2 1. Action I

3 Plaintiff contends that the district court erred in
4 failing to read Wright's papers in Action I sufficiently liberally
5 to conclude that Wright asserted a claim of retaliation. The
6 argument is that Wright filed a grievance in April 2003 alleging
7 that Morris filed the April 2 misbehavior report with regard to
8 the newspaper incident in retaliation for Wright's having
9 complained to the county district attorney on February 27 with
10 respect to the cane incident, and that the April 2003 grievance
11 was incorporated by reference into the Action I Second Amended
12 Complaint. We reject that argument.

13 First, we see no indication in the record that either of
14 the grievances filed by Wright against Morris with respect to the
15 April 2 newspaper incident was attached to the second amended
16 complaint. Second, a claim of retaliation was not integral to
17 the claim that Wright alleged with respect to the newspaper
18 incident, i.e., the equal protection claim that Morris's issuance
19 of a misbehavior report against Wright and not against Cavallo
20 constituted disparate treatment based on race. (See, e.g.,
21 Action I Second Amended Complaint ¶ 15; Wright Dep. 19, 23.)
22 Indeed, in the sections of the second amended complaint that
23 allege "Facts" and "Causes of Action" (see Action I Second
24 Amended Complaint ¶¶ 6-22), there is but one terse--and largely
25 incomprehensible--mention of Wright's April grievance:

26 Officer A. Morris, yelled from A desk to officer
27 Zimmer at B desk to give that nigger a ticket; Tape

1 no. 03-0858, of witnesses; and Grievance no. CX-9520-
2 03, expired past the 12 working days limitation.

3 (Id. ¶ 12.)

4 There was a clearer statement in the second amended
5 complaint that Wright had filed a grievance against Morris with
6 regard to the April 2 incident; but that statement was made in the
7 preliminary sections of the pleading, which followed a form
8 promulgated by the United States District Court for the Northern
9 District of New York for "Inmate Civil Rights Complaint[s]
10 Pursuant to 42 U.S.C. § 1983." Given that prisoners are required
11 to exhaust certain claims administratively before bringing suit in
12 federal court, see 42 U.S.C. § 1997e(a), the form required that,
13 before asserting facts and causes of action, a plaintiff provide
14 information as to, inter alia, whether his place of confinement
15 had a grievance procedure, if so whether he had pursued his claims
16 in the grievance procedure, and if not whether he had complained
17 to prison authorities about the facts alleged in his complaint.
18 Wright's pleadings followed this format. (See, e.g., Action I
19 Second Amended Complaint ¶ 4.) And although paragraph 4 of the
20 second amended complaint asserted, more clearly than did the
21 "Facts" and "Causes of Action" sections of the pleading, that
22 Wright had filed a grievance against Morris, paragraph 4 did not
23 disclose that the grievance claimed that Morris's misbehavior
24 reports against Wright constituted retaliation. Indeed, no form
25 of the word "retaliation" appeared anywhere in the second amended
26 complaint.

1 Understandably, the magistrate judge did not mention a
2 claim of retaliation in making his recommendation to the district
3 judge for the disposition of the second amended complaint. Wright
4 lodged objections to the Action I Report; but they did not include
5 an objection that that report failed to address a claim of
6 retaliation. We view Wright's failure to make that objection as
7 confirmation of our view that he had no belief that he had
8 asserted a retaliation claim in Action I. And if in fact he had
9 intended to assert and believed he had asserted such a claim, he
10 waived his right to challenge the dismissal of that claim on
11 appeal by failing to make a retaliation-claim-related objection to
12 the Action I Report's recommendation that the second amended
13 complaint be dismissed in its entirety.

14 Finally, we note that Wright's counsel on these appeals
15 appears to argue that Morris's April 9 misbehavior report was
16 filed in retaliation for Wright's filing the grievance on April 2,
17 which in turn was based on the misbehavior report Morris had filed
18 against Wright on April 2. (See Wright brief on appeal at 24
19 ("When [Wright] filed a . . . complaint, on April 2, 2003, . . .
20 Morris again retaliated, filing new charges against [Wright]
21 based on the very same incident."). Wright, however, did not make
22 this argument in the district court. Rather, in the district
23 court proceedings, as described in Parts I.A. and I.C. above,
24 Wright claimed only that Morris filed the April 9 misbehavior
25 report in order to interfere with Wright's legal work. (See
26 Wright Dep. 22-23; Wright grievance dated April 9, 2003.) Given

1 that Wright raises this new retaliation contention for the first
2 time on appeal, and indeed made an entirely different claim with
3 respect to the April 9 misbehavior report in the proceedings
4 before the district court, we decline to address the new
5 contention. See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A.,
6 Inc., 396 F.3d 96, 124 n.29 (2d Cir. 2005) ("The law in this
7 Circuit is clear that where a party has shifted his position on
8 appeal and advances arguments available but not presented below,
9 . . . waiver will bar raising the issue on appeal." (quoting
10 United States v. Braunig, 553 F.2d 777, 780 (2d Cir. 1977))).

11 2. Action II

12 Plaintiff argues that the district court erred in
13 dismissing Wright's retaliation claim in Action II by failing to
14 consider that the defendant COs may have retaliated against Wright
15 for filing grievances. We have several difficulties with this
16 argument.

17 To begin with, the Action II Complaint, although
18 describing Kasunic's alleged assault of Wright on May 4 as
19 "Retaliation" (Action II Complaint ¶ 14), does not identify the
20 actions of Wright for which Kasunic allegedly retaliated. At his
21 deposition, Wright testified as follows:

22 Q. . . . Are you alleging that Officer
23 Kasunic retaliated against you or his behavior
24 towards you was retaliation for something?

25 A. Yes.

26 Q. What was he retaliating against?

1 A. The fact that Brandell [sic] told him that
2 the staff--that I don't like crackers and the word
3 went around that I don't like crackers.

4 Q. So if Kasunic was retaliating against you,
5 it's because he believed you--he believed you were a
6 racist and you didn't like white people. Is that
7 what he was retaliating about?

8 A. Yes.

9 (Wright Dep. 49; see also id. at 35 (testifying that Kasunic had
10 commented on Wright's purported dislike of "crackers").)
11 Accordingly, the district court reasonably viewed Wright's
12 Action II retaliation claim as asserting that Kasunic retaliated
13 against Wright because Kasunic believed Wright was a racist.

14 The claim of retaliation on that basis was expressly
15 abandoned by Wright's counsel on this appeal. At oral argument,
16 when asked what Wright contended was the basis for Kasunic's
17 retaliatory animus, counsel responded as follows:

18 COUNSEL: Retaliation for his complaint to the
19 district attorney, which he had made on February
20 27th.

21 As the court may be aware, the problems began on
22 February 6th when a cellmate attacked Mr. Wright with
23 a cane and then to cover up the assault, the cellmate
24 accused Mr. Wright of calling his cellmate a cracker,
25 which is a derogatory term for a white person.

26 The prison guards heard about the false
27 statement and came to the mis-conclusion that Mr.
28 Wright was a bigot and began to threaten and to
29 intimidate him. He is not claiming retaliation for
30 that

31 THE COURT: I'm sorry, he's not
32 claiming retaliation for, for what?

33 COUNSEL: For the guard's misperception that he
34 was a bigot.

1 (Tape of oral argument (emphases added).) Although on this
2 appeal, in which Wright is represented by counsel, it is now
3 clarified that Wright's claim is that he was retaliated against
4 for filing grievances, this could not have been clear to the
5 district court. In objecting to the magistrate judge's
6 recommendations in Action II, Wright repeated nearly verbatim the
7 allegations in his Complaint and added that the defendant
8 corrections officers were motivated by the desire for revenge and
9 that their misbehavior reports were filed, and that Kasunic
10 assaulted him, "for the sole purposes of 'retaliation' and
11 'revenge.'" (Wright March 11, 2006 Aff. at 7.) But Wright did
12 not specify the supposed reasons for the alleged desires for
13 retaliation and revenge. Given Wright's explicit and unambiguous
14 deposition testimony that his claim was that Kasunic retaliated
15 against Wright because Kasunic "believed [Wright] w[as] a racist"
16 (Wright Dep. 49), it is difficult to fault the district court for
17 not viewing Wright as claiming that he was being retaliated
18 against for exercising his First Amendment right to file
19 grievances.

20 Wright's counsel at oral argument of this appeal specified
21 that Wright "is claiming retaliation because . . . of the letter
22 that he wrote to the district attorney saying that he feared for
23 his physical health because the guards threatened and harassed
24 him." (Tape of oral argument.) That February 27 letter to the
25 county district attorney was indeed mentioned in paragraph 12 of
26 Wright's Action II Complaint, which reiterated his Action I Second

1 Amended Complaint allegations with respect to the February 2003
2 cane incident. The letter itself, which was one of the documents
3 submitted by defendants in support of their motion for summary
4 judgment in Action I, read as follows:

5 Dear Sir:

6 Any willful attempt or threat to inflict injury
7 upon the person of another, when coupled with an
8 apparent present ability so to do, and any
9 intentional display of force such as would give the
10 victim reason to fear or expect immediate bodily
11 harm, constitutes an assault.

12 Approximately, about the week of February 6,
13 2003, inmate Brandel, Id. 00-B-0791, here in some
14 kind of protected custody (P.C.) as a patient in the
15 hospital infirmary (allegedly); attacked inmate
16 Wright, with his walking cane by hitting him on his
17 head with it. Then inmate Brandel, [ran] to the
18 emergency nurse bell and pushed it asking for
19 security. When security arrived inmate Brandel,
20 reversed the incident and told them Wright, hit him
21 with the cane, at 11:30 p.m., and called him a
22 "Cracker," with the cane still in his hand, pursuant
23 to Correctional Law Sections 52.19, 114. A, and
24 138.4; Title 18 U.S.C. Sections 241, 242, and 18
25 U.S.C. § 3041(F).

26 Then security removed Wright, from his room and
27 gave the room to Brandel, and took his cane, and then
28 gave it back to him February 26, 2003. This
29 complaint is based on lack of security or racism,
30 (Emphasis yours)?

31 Sincerely submitted

32 MELVIN O. WRIGHT, SR.

33 (Letter from Melvin O. Wright to Prosecutor's Office dated
34 February 27, 2003.)

35 Even if a claim of retaliation for having written this
36 letter were properly preserved for appeal, we could not agree that
37 it was error to dismiss Wright's Action II retaliation claim. The

