

## UNITED STATES DISTRICT COURT

## DISTRICT OF NEVADA

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BRIT F. AUGBORNE, III,

v.

Plaintiff,

FILSON, et al.,

Case No. 3:17-cv-00393-MMD-CLB

ORDER

Defendants.

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12       Pro Se Plaintiff Brit F. Augborne, III, an inmate in the custody of the Nevada  
13 Department of Corrections (“NDOC”), brings this action under 42 U.S.C. § 1983 for events  
14 that occurred at Ely State Prison (“ESP”). (ECF No. 20.) Before the Court is the Report  
15 and Recommendation (“R&R”) of United States Magistrate Judge Carla Baldwin (ECF No.  
16 65), recommending that the Court deny in part and grant in part Defendants’<sup>1</sup> motion for  
17 summary judgment (“Motion”) (ECF No. 57). Plaintiff and Defendants had until June 30,  
18 2020, to file objections. To date, no objection to the R&R has been filed. For this reason,  
19 and as explained below, the Court adopts the R&R and denies in part and grants in part  
20 the Motion.

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22       This Court “may accept, reject, or modify, in whole or in part, the findings or  
23 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). Where a party  
24 timely objects to a magistrate judge’s report and recommendation, then the Court is  
25 required to “make a *de novo* determination of those portions of the [report and  
26 recommendation] to which objection is made.” 28 U.S.C. § 636(b)(1). Where a party fails  
27 to object, however, the Court is not required to conduct “any review at all . . . of any issue

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<sup>1</sup>Defendants are James Dzurenda and Michael Stolk.

1 that is not the subject of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985); see also  
2 *United States v. Reyna-Tapia*, 328 F.3d 1114 (9th Cir. 2003) ("De novo review of the  
3 magistrate judges' findings and recommendations is required if, but only if, one or both  
4 parties file objections to the findings and recommendations.") (emphasis in original); Fed.  
5 R. Civ. P. 72, Advisory Committee Notes (1983) (providing that the court "need only satisfy  
6 itself that there is no clear error on the face of the record in order to accept the  
7 recommendation").

8 Nevertheless, the Court conducts *de novo* review to determine whether to accept  
9 the R&R. Upon reviewing the R&R and underlying briefs, this Court finds good cause to  
10 adopt Judge Baldwin's recommendation in full.

11 Judge Baldwin recommends denying summary judgment on Plaintiff's excessive  
12 force and retaliation claims against Stolk because genuine issues of material fact exist.  
13 (ECF No. 172 at 5-13.) Defendants argue that there is no evidence of any altercation  
14 between Stolk and Plaintiff, much less that Stolk used any force against Plaintiff. (ECF No.  
15 57 at 7-9.) Defendants contend that the sworn statements in Plaintiff's verified complaint  
16 do not establish a genuine issue of material fact because they are "uncorroborated and  
17 self-serving" and are "blatantly contradicted by the record, so that no reasonable jury could  
18 believe them." (ECF No. 57 at 7-9 (internal citations omitted).) Judge Baldwin found,  
19 however, that the Court must consider Plaintiff's verified complaint because "the mere self-  
20 serving nature of testimony permits a court to discount that testimony where it states only  
21 conclusions and not facts that would be admissible evidence." (ECF No. 65 at 8 (citing  
22 *Manley v. Rowley*, 847 F.3d 705, 711 (9th Cir. 2017) (internal quotation marks omitted).)  
23 Because Plaintiff's verified complaint—treated as an affidavit—contains specific facts  
24 describing how Stolk retaliated against Plaintiff for requesting a grievance by beating  
25 Plaintiff while shackled, Judge Baldwin found that Defendants failed to meet their initial  
26 burden of establishing an absence of a genuine issue of material fact as to Plaintiff's  
27 excessive force and retaliation claims. (*Id.* at 7-8.) The Court agrees with Judge Baldwin's  
28 findings.

1        Judge Baldwin also found Stolk is not protected by qualified immunity because it  
2 was clearly established in 2016 an officer violates the Eighth Amendment by beating an  
3 inmate simply because the inmate argued with the officer or requested a grievance. (ECF  
4 No. 65 at 14-16 (citing *Hudson v. McMillian*, 503 U.S. 1 (1992); *Wilkins v. Gaddy*, 559 U.S.  
5 34, 35 (2010).) Judge Baldwin also found that it was well-settled law that an officer violates  
6 the First Amendment by retaliating against an inmate for engaging in protected conduct  
7 such as requesting a grievance. (ECF No. 65 at 16-18 (citing *Brodheim v. Cry*, 584 F.3d  
8 1262, 1270 (9th Cir. 2009); *Schroeder v. McDonald*, 55 F.3d 454, 461 (9th Cir. 1995).)  
9 The Court again agrees.

10       Judge Baldwin also found no genuine issue of material fact exists as to Plaintiff's  
11 supervisory liability claim against Dzurenda because Plaintiff failed to provided evidence  
12 that Dzurenda personally participated in or knew or should have known of the alleged  
13 constitutional violations, or promulgated or implemented a policy that was the moving force  
14 of those violations. (*Id.* at 11-13.) For these reasons, the Court agrees with Judge  
15 Baldwin's recommendation to grant summary judgment as to Plaintiff's supervisory liability  
16 claim against Dzurenda. (*Id.*)

17       Additionally, Judge Baldwin found that Plaintiff has abandoned his Eighth  
18 Amendment and conspiracy claims against John Does one (1) through ten (10) and his  
19 Fourteenth Amendment and supervisory liability claims against John Doe Associate  
20 Warden of Operations by failing to identify the Doe Defendants. (*Id.* at 2 n.2.) Accordingly,  
21 Judge Baldwin recommends that the Court dismiss the claims against Doe Defendants.  
22 (*Id.*) The Court again agrees.

23       It is therefore ordered that Judge Baldwin's Report and Recommendation (ECF No.  
24 65) is adopted in its entirety.

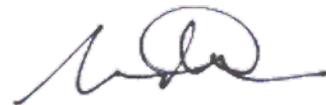
25       It is further ordered that Defendants Michael Stolk and James Dzurenda's motion  
26 for summary judgment (ECF No. 57) is denied in part and granted in part. It is denied as  
27 to the excessive force and retaliation claims against Defendant Michael Stolk. It is granted  
28 as to the supervisory liability claim against Defendant James Dzurenda.

1 It is further ordered that Defendant James Dzurenda is dismissed from this action.

2 It is further ordered that the Eighth Amendment and conspiracy claims against  
3 Defendants John Doe one (1) through ten (10) are dismissed from this action.

4 It is further ordered that the Fourteenth Amendment and supervisory liability claims  
5 against Defendant John Doe Associate Warden of Operations are dismissed from this  
6 action.

7 DATED THIS 8<sup>th</sup> day of July 2020.

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10 MIRANDA M. DU  
11 CHIEF UNITED STATES DISTRICT JUDGE

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