FILED
United States Court of Appeals
Tenth Circuit

November 4, 2026

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BERNARD JONES,

Plaintiff - Appellee,

v.

YVETTE BROWN; KRISTI MOORE,

Defendants - Appellants.

No. 24-1442
(D.C. No. 1:21-CV-01792-CNS-STV)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MATHESON**, **EID**, and **CARSON**, Circuit Judges.

Plaintiff Bernard Jones, a Colorado-state inmate, missed the deadline for filing a petition for writ of certiorari to the Supreme Court of the United States. He claims that Defendant Yvette Brown, a legal assistant in the prison law library, caused the missed deadline by closing the library on the day his petition was due. Plaintiff filed two grievances over the missed deadline. After he filed the grievances, another prison employee—Defendant Kristi Moore—transferred Plaintiff to a different facility.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Plaintiff sued Brown and Moore. Both Defendants sought summary judgment based on qualified immunity. The district court granted their motions. Our jurisdiction arises under 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand for further proceedings.[1]

I.

A Colorado state court jury convicted Plaintiff of first-degree-sexual assault and possession with intent to distribute a controlled substance in 1997. At trial, the victim testified that Plaintiff bit her cheek during the assault. The government's expert tied the victim's bite marks to Plaintiff. The Colorado Court of Appeals ("CCA") affirmed Plaintiff's convictions.

Plaintiff then sought post-conviction relief under Colorado Rule of Criminal Procedure 35(c), alleging ineffective assistance of trial counsel. The Colorado Court of Appeals remanded the case for an evidentiary hearing on: (1) evidence of the victim's gang affiliation; (2) use of the victim's adjudication to show motive or bias; and (3) testing of Plaintiff's dental moldings. The trial court began the evidentiary hearing in 2006, paused, then reconvened and completed the hearing in 2012. [Id. at 1093.] Plaintiff presented evidence supporting his ineffective assistance of counsel claim with respect to the bitemark evidence. Among other things, Plaintiff criticized trial counsel's decision not to call his own expert and to proceed to trial

[1] Defendants moved for leave to file portions of their appendix under seal. We GRANT Defendants' motion.

without further testing of his dental molds. The district court denied Plaintiff's motion for post-conviction relief.

The Colorado Court of Appeals affirmed the district court in 2015. The CCA concluded that counsel did not act ineffectively because counsel: consulted an odontologist in advance of trial, reasonably waited until receiving the prosecution's expert report before conducting further testing, and requested a continuance twice, which the court denied. The CCA viewed counsel's decision not to call an expert as a strategic one. Counsel, the CCA concluded, chose to attack the prosecution expert's testimony that Plaintiff's dental impression was consistent with the bitemark on the victim's cheek after learning his own expert largely agreed with the prosecution's expert. And, on cross examination, trial counsel's questioning caused the prosecution's expert to equivocate and concede that Plaintiff may or may not have caused the victim's bite mark. The CCA thus held that trial counsel adequately performed with respect to the bitemark evidence.

Plaintiff then petitioned the United States District Court for the District of Colorado in 2016 for habeas relief under 28 U.S.C. § 2254. The district court denied habeas relief. Plaintiff appealed, asserting that the district court erred in (1) denying the ineffective assistance of counsel claim based on trial counsel's failure to have a defense expert test all the bite mark evidence; (2) denying the ineffective assistance of counsel claim based on an alleged conflict of interest; and (3) determining that the prosecution did not act vindictively. On December 17, 2018, we denied Plaintiff a certificate of appealability.

Plaintiff timely filed a petition for writ of certiorari to the Supreme Court. The Supreme Court rejected that petition, but allowed Plaintiff until May 16, 2019, to refile his petition. Plaintiff drafted his petition in the Fremont Correctional Facility's law library. On May 15, 2019, Plaintiff told a prison legal assistant, LeeAnn Puga, that he needed to add page numbers and print the petition the following day. Puga told Plaintiff that she was not going to be working but that Defendant Brown could print the petition the next day. Puga scheduled law library appointments for Plaintiff on May 16, 2019. Puga testified to this although the roster for that day did not show any inmates scheduled for a law library session. Defendant Brown did not open the law library on May 16, 2019. Instead, she attended a staff funeral in the morning and closed the law library in the afternoon for a "p.m. legal service project setting up offender computer scanners." With no access to the library, Plaintiff missed the deadline to file his petition.

Plaintiff's proposed petition for writ of certiorari presented three questions for review: (1) whether the federal courts erred by denying his ineffective assistance claim when the state courts failed to provide him with a constitutionally adequate opportunity to present evidence outside the record; (2) whether the federal courts erred by denying his ineffective assistance claim based on a conflict of interest because the state court denied him an opportunity to properly weigh his right to testify at trial; and (3) whether the federal courts erred by denying his due process violation claim because the state prosecutor acted vindictively.

Less than a week after missing his deadline, Plaintiff filed two grievances against Defendant Brown. Plaintiff contended that Defendant Brown was unqualified to work as a legal assistant and that she did not help him file his legal documents. He further asserted that Defendant Brown denied him access to the courts by closing the library. The day Defendant Brown received the grievances, she and Puga sought and obtained a meeting with Associate Warden Matt Windon to discuss Plaintiff. Defendant Brown claimed that Plaintiff consistently complained about law library access and questioned her legal credentials. She further alleged that Plaintiff was argumentative and became upset if he was not in the law library every day that it was open.

After Defendant Brown and Puga complained to Windon, Defendant Kristi Moore notified Plaintiff that he would be transferred to another facility despite Plaintiff having no incident reports, charges, or disciplinary actions filed against him at Fremont Correctional Facility. Defendant Moore is responsible, in her role as chair of the Internal Classification Committee, for initiating requests to transfer inmates to other facilities. Plaintiff alleged Defendant Moore disregarded his case manager's recommendation that Plaintiff stay at Fremont Correctional Facility and initiated his transfer. Defendant Moore testified that her boss told her to transfer Plaintiff based on the law librarians' harassment allegations. The Colorado prison system transferred Plaintiff from Fremont Correctional Facility to Bent County Correctional Facility in June 2019.

Plaintiff then filed this civil action, alleging two violations of his constitutional rights. He first asserted Defendant Brown violated his right of access to the courts in violation of 42 U.S.C. § 1983 when she closed the library on the day his petition was due to the Supreme Court. He secondly claimed that Defendants Brown and Moore retaliated against him for exercising his constitutional right to file grievances in violation of 42 U.S.C. § 1983.

The parties filed several pretrial motions. Plaintiff filed a motion for summary judgment on the access-to-courts claim. As to Plaintiff's motion, the district court found genuine issues of material fact and denied it. Defendant Brown also sought summary judgment on the access-to-courts claim arguing that she did not deny Plaintiff meaningful access to the courts and that he could not show that he was pursuing a nonfrivolous claim. The district court again found a fact dispute and denied the motion. As to frivolity, Plaintiff argued that his petition contained arguable claims of legal merit and was not frivolous because he argued that Brumfield v. Cain, 576 U.S. 305 (2015), calls into question Tenth Circuit caselaw prohibiting federal courts from considering facts that the state court did not consider in the underlying state-court action. The district court denied Defendant Brown's motion for summary judgment as to frivolity. In the district court's view, both parties made reasonable arguments concerning the scope of Brumfield and, therefore, Plaintiff's petition was not frivolous.

Both parties also moved for summary judgment on Plaintiff's retaliation claim. The district court denied those motions as well, finding a genuine fact dispute.

Finally, Defendants requested qualified immunity on both of Plaintiff's claims. The district court denied qualified immunity. It concluded that Plaintiff provided competent evidence supporting both his access-to-courts claim and his retaliation claim such that a reasonable juror could find in his favor.

Defendants timely filed their notice of appeal seeking review of the district court's qualified immunity decision; specifically: (1) whether the law entitles Defendant Brown to qualified immunity on the denial-of-access-to-courts claim when Plaintiff allegedly failed to establish that she prevented him from filing a nonfrivolous federal habeas claim in his proposed petition for writ of certiorari; and (2) whether the district court erred in denying Defendant Moore's motion for summary judgment on the grounds of qualified immunity on Plaintiff's retaliation claim.[2]

II.

In many instances, a district court's denial of summary judgment is not an appealable final order for purposes of 28 U.S.C. § 1291. Vogt v. McIntosh Cnty., Okla. Bd. of Cnty. Comm'rs, 98 F.4th 1013, 1016 (10th Cir. 2024) (citing Roosevelt-Hennex v. Prickett, 717 F.3d 751, 753 (10th Cir. 2013)). But we have jurisdiction over this interlocutory appeal because the "denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the

[2] Defendants do not appeal the district court's denial of qualified immunity to Defendant Brown on Plaintiff's retaliation claim.

meaning of 28 U.S.C. § 1291." Id. (quoting Mitchell v. Forsyth, 472 U.S. 511, 530 (1985)).

We review de novo a district court's summary judgment denial. Id. (citing Duda v. Elder, 7 F.4th 899, 910 (10th Cir. 2021)). If the movant shows that no genuine dispute as to any material fact exists and the movant is entitled to judgment as a matter of law, summary judgment is appropriate. Id. (citing Fed. R. Civ. P. 56(a)). The "universe of facts" we look to in our legal review of qualified immunity consists of the district court's factual findings and reasonable assumptions. Id. (citing Cox v. Glanz, 800 F.3d 1231, 1242 (10th Cir. 2015)). To overcome qualified immunity at summary judgment, Plaintiff must raise a genuine issue of material fact that "(1) [D]efendant's actions violated [Plaintiff's] constitutional or statutory rights, and (2) the right was clearly established at the time of the alleged misconduct." Id. (quoting Paugh v. Uintah Cnty., 47 F.4th 1139, 1153 (10th Cir. 2022)). We address Plaintiff's access-to-courts claim before turning to his retaliation claim.

A.

To succeed on an access-to-courts claim, "a prisoner must demonstrate an actual injury from interference with his access to courts—that is, that the prisoner was frustrated or impeded in his efforts to pursue a nonfrivolous legal claim concerning his conviction or his conditions of confinement." Gee v. Pacheco, 627 F.3d 1178, 1191 (10th Cir. 2010) (citing Lewis v. Casey, 518 U.S. 343, 351–55 (1996)). Defendant Brown argues that Plaintiff cannot satisfy the constitutional

standard for his denial of access-to-courts claim under the first prong of qualified immunity because he did not suffer an "actual injury." Before addressing "actual injury" though, we must determine whether we have jurisdiction over this issue. Plaintiff contends that Defendant Brown bases her appeal on an attempt to improperly relitigate the facts. And, in his view, the question of whether he suffered an actual injury is a mixed question of fact and law.

For support, Plaintiff cites our unpublished opinion in Valdez v. Motyka, 804 F. App'x 991, 995 (10th Cir. 2020) (unpublished). In Valdez, we dismissed an interlocutory appeal challenging the denial of qualified immunity where the district court clearly articulated which factual disputes precluded granting qualified immunity and provided a detailed analysis of how those facts could lead to a jury's reasonable conclusion that the appellants violated the appellee's Fourth Amendment rights. Valdez, 804 F. App'x at 995. Even though the appellants argued that legal errors pervaded the district court's view of the facts, the appellants ultimately challenged the district court's view of the facts. Id. Such a scenario deprived us of jurisdiction. Id.

That's not the case here. Defendant Brown's challenge does not require us to revisit the district court's assessment of the evidence at summary judgment or resolve any disputed facts. Instead, Plaintiff's proposed petition was before the district court and the district court considered it when it determined Plaintiff established a non-frivolous claim in his petition. Thus, based on the contents of the petition, we need only determine whether Plaintiff's legal claims have an arguable basis in law.

If they do not, they are frivolous. That question presents a purely legal question appropriate for interlocutory review. See Billman v. Ind. Dep't of Corr., 56 F.3d 785, 787 (7th Cir. 1985) ("En route to determining that a claim is frivolous, the district court must determine whether it is legally insufficient, an issue purely of law. . . ."). And although frivolousness may at some point depend on factual matters, a claim is legally frivolous when it is not arguable on its merits. Neitzke v. Williams, 490 U.S. 319, 325 (1989). Because the petition provides the relevant facts and Defendant Brown challenges only whether the legal argument appearing on its face was arguable on the merits, Brown presents a legal question over which we have jurisdiction.

We turn now to Defendant Brown's assertion that Plaintiff failed to show an actual injury resulting from the May 16, 2019, law library closure. For purposes of an access-to-courts claim, a showing of actual injury requires an inmate to "demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." Lewis, 518 U.S. at 351. The touchstone of our analysis is "meaningful access to the courts." Id. (quoting Bounds v. Smith, 430 U.S. 817, 823 (1977)). Certainly "adequate law libraries or adequate assistance from persons trained in the law" confer meaningful access, Bounds, 430 U.S. at 828, but the access-to-courts right is not "an abstract, freestanding right to a law library or legal assistance," Lewis, 518 U.S. at 351. We require an inmate to go one step more and demonstrate that the alleged library or legal-assistance shortcomings hindered the inmate's efforts to pursue a non-frivolous legal claim. Id.

Because Plaintiff's petition for writ of certiorari was for an appeal in a federal habeas corpus proceeding, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") applied. Federal courts can grant habeas relief only if the petitioner establishes that the state-court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). Under this statute, federal courts "grant relief only 'if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Court] has on a set of materially indistinguishable facts.'" Gipson v. Jordan, 376 F.3d 1193, 1196 (10th Cir. 2004) (quoting Williams v. Taylor, 529 U.S. 362, 413 (2000)). A petitioner must do "more than merely establish that the state court's adjudication of his or her constitutional claim was wrong." Eaton v. Pacheco, 931 F.3d 1009, 1018 (10th Cir. 2019) (quoting Williams, 529 U.S. at 410). Instead, the petitioner must show that the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in exiting law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 103 (2011). The Supreme Court has said that judicial review of ineffective assistance of counsel claims under AEDPA is "doubly deferential." Knowles v. Mirzayance, 556 U.S. 111, 123 (2009).

Turning to the merits, we conclude that the district court erred in determining that Plaintiff established the actual injury necessary for his access-to-courts claim. Once Defendant Brown asserted qualified immunity and challenged the actual injury, our precedent required Plaintiff to show that she hindered his efforts to pursue a nonfrivolous claim. The Supreme Court has described the requisite underlying claim as a "nonfrivolous," "arguable" one. Christopher v. Harbury, 536 U.S. 403, 415 (2002) (quoting Lewis, 518 U.S. at 353, n.3.). Thus, a plaintiff need not show that the underlying claim would have succeeded. In Lewis the Supreme Court explained that loss of an "arguable (though not yet established) claim" constitutes actual injury. 518 U.S. at 353 n.3. But Plaintiff must still set forth enough substance for a court to apply the nonfrivolousness inquiry and determine that the claim's "arguable" nature is "more than hope." 536 U.S. at 416.

Plaintiff did not make this showing. At summary judgment, Plaintiff relied on one theory to establish that his proposed certiorari petition presented a nonfrivolous claim. Plaintiff argued that the federal courts improperly denied his ineffective assistance of counsel claim because the state court failed to provide an adequate opportunity to develop the factual record regarding his "junk science" bite-mark theory. Plaintiff's sole authority in support of his proposition is Brumfield.

In Brumfield, the Supreme Court held that when a capital defendant presents evidence suggesting he may be intellectually disabled, the state court must provide an evidentiary hearing to determine intellectual disability. Brumfield, 576 U.S. at 307. Although Plaintiff exclusively relies on Brumfield, he fails to show how that decision

renders his claim nonfrivolous. Put simply, nothing in Brumfield changes our existing case law that holds federal courts cannot look outside the record to determine whether § 2254(d) entitles an inmate to habeas relief or that state courts must hold hearings on new evidence.

True, the absence of authority adopting Plaintiff's position does not alone make his claim frivolous. And an argument does not necessarily become frivolous because it asks the Supreme Court to extend existing precedent. But Harbury requires the asserted claim to contain enough substance to demonstrate that its "arguable" nature is "more than hope." 536 U.S. at 416. Plaintiff's Brumfield theory at summary judgment did not make that showing. As we explained above, Brumfield did not—even arguably—displace the precedent that foreclosed Plaintiff's position. And his position did not present a reasoned argument that undermined Brumfield. The mere possibility that the Supreme Court could still extend Brumfield or reconsider its existing precedent established only that the Court possessed the authority to change the law, not an arguable legal basis for why the law supported Plaintiff's claim.

The district court concluded that Plaintiff's claim was nonfrivolous simply because he invoked Brumfield and argued for a change in the law. But that's not enough. To be nonfrivolous, a claim must have an arguable basis in both law and in fact. Neitzke, 490 U.S. at 325. Plaintiff's mere assertion that existing precedent should change does not satisfy that standard.

Furthermore, the district court's other reasoning, that we previously rejected Plaintiff's habeas arguments without expressly labeling them frivolous, did not establish arguable merit. The relevant question is whether the claim that Defendant Brown allegedly hindered Plaintiff from pursuing was nonfrivolous; not whether we previously labeled it frivolous.

Moreover, as we mentioned above, judicial review of ineffective assistance of counsel claims under § 2254(d)(1) is "doubly deferential." This AEDPA deference also supports that Plaintiff lacked a nonfrivolous argument for his certiorari petition. The Colorado Court of Appeals held in the underlying postconviction proceedings that Plaintiff's counsel's performance was not deficient as a matter of law. This was because his counsel consulted an expert before trial; reasonably waited for the prosecution's report before deciding whether to do further testing; asked for a continuance for the defense expert to test the evidence and prepare to testify; learned from the defense expert that he was unable to exclude Plaintiff as the source of the bitemark; and made the reasonable strategic decision to attack the prosecution's expert on cross-examination. Plaintiff's trial counsel successfully obtained testimony conceding that the bite "may or may not" have been from Plaintiff.

In Harrington, the Supreme Court held that a defense attorney's trial performance was not deficient where the defense counsel effectively cross-examined the prosecution's experts without bringing in his own expert. 562 U.S. at 106, 110–11. The Supreme Court has thus already rejected Plaintiff's argument that his counsel's decision not to call an expert and instead attack the prosecution's expert on

cross examination entitled him to habeas relief. Plaintiff did not provide a good-faith argument in his petition to distinguish Harrington or assert that the Court wrongly decided it. Plaintiff therefore lacks a basis to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland v. Washington, 466 U.S. 668, 689 (1984) (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). In his petition, Plaintiff did not provide contrary controlling authority from the Supreme Court reaching a different conclusion from the state court on the deficient performance prong. His petitioner therefore fails to show that the Colorado Court of Appeals incorrectly applied the law when deciding that his counsel's performance was not deficient.

In sum, Plaintiff failed to show that the Colorado Court of Appeals incorrectly rejected his argument that his counsel's performance was deficient or that the decision was objectively unreasonable. Plaintiff failed to satisfy the high standard for habeas relief in his petition. And because his deficient performance claim in his petition lacks merit, it is also frivolous.

For all these reasons, we reverse the district court's denial of qualified immunity to Defendant Brown on Plaintiff's access-to-courts claim.

B.

We now address Defendant Moore's appeal on the denial of qualified immunity for Plaintiff's retaliation claim. A First Amendment retaliation claim requires Plaintiff to show: (1) that he engaged in constitutionally protected activity; (2) that Defendant's actions caused him to suffer an injury that would chill a person

of ordinary firmness; and (3) that Plaintiff's protected conduct substantially motivated Defendant's adverse action. Shero v. City of Grove, 510 F.3d 1196, 1203 (10th Cir. 2007).

Defendant Moore contends that the district court made no findings on two elements of Plaintiff's First Amendment retaliation claim against her—retaliatory motive and personal participation—and that the record does not support either element. She points to the district court's findings that Warden Winden spoke with Defendant Brown and Puga about their concerns regarding Plaintiff, that Jim Moore supervised Defendant Moore and instructed her to transfer Plaintiff, and that Warden Winden ultimately made the decision to transfer Plaintiff. Defendant Moore contends those findings establish that she did not decide to transfer Plaintiff or that she even knew he had filed grievances against Defendant Brown and Puga. Without evidence that she knew of the protected conduct or personally caused the transfer, Defendant Moore argues that no reasonable jury could find that she personally participated in retaliation or acted with a retaliatory motive.

But this argument ignores the district court's factual findings. As to personal participation, the district court found that Defendant Moore initiated the transfer and wrote the reason for the justification. As to retaliatory motive, the district court rejected Defendant Moore's assertion that the undisputed evidence established that she did not know about Plaintiff's grievances. In doing so, the district court highlighted Defendant Moore's testimony that (1) she discussed Plaintiff with her supervisor, Jim Moore, who told her that a change of scenery would be good for

Plaintiff, and (2) that she believed Plaintiff was harassing the law librarians, although she did not ask Jim Moore what he meant. The district court also considered evidence that Defendant Moore's reason for the transfer shifted over time. Initially, Defendant Moore attributed the transfer to Jim Moore, but later she said that Warden Winden made the decision. Finally, the district court emphasized that Jim Moore did not remember directing Defendant Moore to transfer Plaintiff.

The district court also found that Plaintiff filed two grievances against Defendant Brown on May 21, 2019, Defendant Brown received those grievances on May 28, 2019, Defendant Brown and Puga, a legal assistant, met with Warden Winden to discuss those grievances on that same day, and Defendant Moore initiated the transfer on May 29, 2019.

The district court's factual findings bind us on appeal.[3] See Booker v. Gomez, 745 F.3d 405, 409–10 (10th Cir. 2014) ("[I]f a district court concludes that a reasonable

[3] Defendants urge us to jettison the district court's findings based upon the idea that the record blatantly contradicts them. True, "when the 'version of events' the district court holds a reasonable jury could credit 'is blatantly contradicted by the record,' we may assess the case based upon our own *de novo* view of which facts a reasonable jury could accept as true." Lewis v. Tripp, 604 F.3d 1221, 1225-26 (10th Cir. 2010) (quoting Scott v. Harris, 550 U.S. 372, 380 (2007)). But Defendants' contradictory evidence is not the type upon which we have relied in concluding the record blatantly contradicts a district court's factual findings. The blatant contradiction doctrine is generally limited to "cases involving objective documentary evidence, such as video recordings or photographs." See Vette v. K-9 Unit Deputy Sanders, 989 F.3d 1154, 1164–65 (10th Cir. 2021) (compiling cases). And we have declined to extend the exception where the source of the contradictory evidence is a defendant's own testimony, which is not the type of evidence that entirely discredits the district court's factual findings. Id. at 1165 (citing Younes v. Pellerito, 739 F.3d 885, 889 (6th Cir. 2014)).

jury could find certain specified facts in favor of the plaintiff, the Supreme Court has indicated we usually must take them as true—and do so even if our own de novo review of the record might suggest otherwise as a matter of law."). The district court found genuine factual disputes regarding Defendant Moore's knowledge of the grievances, concluding that a reasonable jury could find that she knew about the grievances. The district court further found that her reasons for the transfer shifted over time. Moreover, Defendant Moore undisputedly initiated the transfer days after Plaintiff filed his grievances. We acknowledge these facts aren't overwhelming; a jury could determine that she did not act with a retaliatory motive. But a reasonable jury could also infer retaliatory motive from these findings based on (1) Defendant Moore's knowledge of the grievances; (2) Defendant Moore's shifting explanations; and (3) the close temporal proximity between Plaintiff's grievances and Defendant Moore initiating the transfer. Viewed together, these facts create a triable issue on Moore's retaliatory motive. Maestas v. Segura, 416 F.3d 1182, 1189 (10th Cir. 2005) (citing Ramirez v. Okla. Dep't of Mental Health, 41 F.3d 584, 596 (10th Cir. 1994), overruled in part on other grounds by Ellis v. Univ. of Kan. Med. Ctr., 163 F.3d 1186, 1194–98 (10th Cir. 1998)) ("[k]nowledge of the protected speech, together with close temporal proximity between the speech and challenged action, may be sufficiently probative of causation to withstand summary judgment." (emphasis removed)).

Defendant Moore also argues the district court erred by failing to address the clearly established prong of qualified immunity. She is correct. The district court

resolved the case by finding evidence supporting Plaintiff's version of the events without performing the clearly established inquiry as to Defendant Moore. Despite the error, we may address the clearly established prong in the first instance on appeal because it is a purely legal endeavor. See Duda, 7 F.4th at 916 ("Whether a constitutional right was clearly established at the time an alleged violation occurred is a quintessential example of a *purely legal* determination fit for interlocutory review." (emphasis added)). Our precedent clearly establishes that prison officials may not transfer inmates in retaliation for filing grievances or lawsuits. See Frazier v. Dubois, 922 F.2d 560, 561–62 (10th Cir. 1990) (quoting Murphy v. Mo. Dep't of Corr., 769 F.2d 502, 503 (8th Cir. 1985)) ("[W]hile a prisoner enjoys no constitutional right to remain in a particular institution and generally is not entitled to due process protections prior to such a transfer, prison officials do not have the discretion to punish an inmate for exercising his first amendment rights by transferring him to a different institution."); see also Requena v. Roberts, 893 F.3d 1195, 1211 (10th Cir. 2018) (citing Gee, 627 F.3d at 1189) (explaining that filing of prison grievances is constitutionally protected activity). Viewed in a light most favorable to Plaintiff, Defendant violated clearly established law. We thus affirm the district court's denial of qualified immunity to Defendant Moore on Plaintiff's retaliation claim.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED for further proceedings consistent with this order and judgment.

Entered for the Court

Joel M. Carson III
Circuit Judge