UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DOCKET NUMBER
19-6655

VERNON EARLE,
Plaintiff/Appellant,

v.

MICHAEL SHREVES, Correctional Counselor; JOSE RIVERA, Unit Manager in Training; RHONDA DOMAS, Training Unit Manager; DERRICK WASHINGTON, Lieutenant; SQUIRES, Lieutenant, Special Investigative Services; BRAD GORONDY, Special Investigative Agent; MICHAEL BRECKON, Associate Warden; RACHEL THOMPSON, Executive Assistant; JENNIFER SAAD, Warden; KEVIN KELLY, Complex Warden; ANGELA GYORKO, Case Manager; CHRISTOPHER PULICE, Case Management Coordinator; J. F. CARAWAY, BOP Regional Director; and IAN CONNORS, National Inmate Appeals Administrator.
Defendants/Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
THE HONORABLE JOHN P. BAILEY, DISTRICT JUDGE

APPELLEES' BRIEF

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JURISDICTIONAL STATEMENT

The appellees agree with the appellant's jurisdictional statement as presented.

STATEMENT OF THE ISSUES

I. Whether the district court correctly dismissed Plaintiff's First Amendment retaliation Bivens claim without conducting a special factors analysis pursuant to Abbasi when the Defendants were still entitled to the protection of qualified immunity.

II. Whether the district court abused its discretion in ruling on Defendants' motion for summary judgment without *sua sponte* ordering discovery to proceed when Plaintiff never filed a motion for leave of court to permit discovery.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

Congress has delegated broad authority to the Federal Bureau of Prisons ("BOP") to "provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States." 18 U.S.C. § 4042(a)(2). As part of this duty, BOP operates special housing units ("SHUs"). 28 C.F.R. § 541.20; see Special Housing Units, P.S. 5270.11 (Nov. 2016). These SHUs "securely separate[]" certain inmates "from the general inmate population," 28 C.F.R. § 541.21, and are used in both punitive and non-punitive contexts. Administrative detention in a SHU involves the non-punitive removal of an inmate from the general population as "necessary to ensure the safety, security, and orderly operation of correctional facilities." Id. § 541.22(a). Staff may place an inmate on administrative detention status whenever his "presence in the general population poses a threat to life, property, self, staff, other inmates, the public, or to the security or orderly running of the institution," and he is "under investigation or awaiting a hearing for possibly violating a Bureau regulation," id. at § 541.23(c)(1); see id. § 541.23(c)(2),(3) (identifying other circumstances justifying administrative detention).

Administrative detention decisions are subject to internal review. See id. § 541.26 (describing various levels of review).

Congress has also delegated BOP broad authority, under the Attorney General, to determine the facility in which an inmate is housed, or in other words, to "designate the place of [a federal] prisoner's imprisonment." 18 U.S.C. § 3621(b). In carrying out its authority, BOP may designate any available penal or correctional facility . . . that the Bureau determines to be "appropriate and suitable" after considering several factors, including the "resources of the facility contemplated; the nature and circumstances of the offense; the history and characteristics of the prisoner; … and any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28." Id. BOP also "may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another." Id. Designation and transfer decisions are made subject to a BOP Program Statement, *Inmate Security Designation and Custody Classification*, P.S. 5100.08 (Sept. 2006), which provides that transfer requests must first be approved by the prison warden but also by BOP's Designation and Sentence Computation Center.

Inmates unhappy with any circumstance of their confinement, including their housing assignment, may seek relief through BOP's Administrative Remedy Program. That program provides for "formal review of an issue relating to any aspect of [an inmate's] own confinement." 28 C.F.R. § 542.10(a). The process by which inmates utilize the Administrative Remedy Process is set forth at 28 C.F.R. §§ 542.10 through 542.19.

II. Factual Background

Plaintiff/Appellant Earle ("Plaintiff" or "Earle") was committed to BOP custody on July 21, 1989, following his sentencing by the District of Columbia Superior Court to life in prison for his convictions of murder while armed, assault with a dangerous weapon, carrying a pistol without a license, and assault with intent to kill while armed. JA88. From December 2, 2014, until July 25, 2017, Earle was incarcerated at the FCI Hazelton which is the medium security correctional facility within FCC Hazelton. JA88, 89. On July 25, 2017, Earle was transferred to the United States Penitentiary in Bruceton Mills, West Virginia ("USP Hazelton"). Id. He remained there until May 1, 2018, when he was transferred to the United States Penitentiary in Pollock, Louisiana ("USP Pollock"), where he is presently incarcerated. Id.

In or about late November of 2015, an unidentified inmate in M-Unit at FCI Hazelton punched Counselor Michael Shreves in the mouth because the inmate did not wish to accept a cellmate. JA172-173. As a result, the Warden determined that the housing unit should be locked down. Id. During a lockdown, inmates are prevented from moving around the institution or housing unit, cannot receive visitors, recreation and work duties are cancelled, and food and meal services are disrupted. JA 173.

Counselor Shreves required stitches for the injuries he sustained during the assault and remained on leave for approximately a week afterwards. Id. When Shreves returned to work, he found two (2) requests for informal resolution from Earle on his desk. Id. Counselor Shreves reviewed the requests, and believing them to contain a threatening substance and tone, he referred the matter to the Special Investigative Agent ("SIA") and Special Investigative Services ("SIS") Department for investigation and review. Id. Shreves interpreted Earle's requests as threatening, as blaming Shreves for the unit lockdown, and insinuating that Shreves deserved the assault. Id.

On December 7, 2015, staff placed Earle in the SHU in Administrative Detention pending the SIS investigation into the

substance of his remedy requests as directed to Counselor Shreves. JA178, 182. Counselor Shreves did not play a role in the determination to place Earle in the SHU nor did he request that Earle be placed there. JA173. While defendant Lt. Washington does not remember Earle or the events surrounding his placement in the SHU, Washington states that he has only placed inmates in the SHU pending a SIS investigation when specifically instructed to do so by SIS staff. JA177-178.

On January 6, 2016, Earle was released from the SHU, and he returned to the general population at FCI Hazelton. JA185, JA189. Upon Earle's release from SHU, he was moved from M Unit to N Unit, such that he was no longer assigned to Counselor Shreves. JA189, JA202. The change in housing unit also meant that Earle was assigned a new Case Manager, defendant Angela Gyorko. JA 185. Upon being assigned Earle's Case Manager, Gyorko reviewed Earle's custody classification and noted that Earle had a non-immigration detainer on file. Id. The detainer required Gyorko to update Earle's custody classification points. Id. Earle's unit manager then conducted an independent review of Earle's custody classification and instructed Gyorko to revise it so that Earle would remain at FCI Hazelton. JA186. In fact, a review of Earle's Quarters History reveals that except for one

day spent in Administrative Detention in the SHU, he remained in N Unit from January 6, 2016 until April 6, 2017. JA188-189. Ms. Gyorko notes that Earle was later absorbed into a new unit at the institution and assigned a new Case Manager. Id. The Quarters History indicates Earle's move to a new unit occurred April 6, 2017 when he moved to L Unit. JA188.

On February 1, 2016, Earle filed Administrative Remedy No. 850257-F1 requesting an investigation into his placement in the SHU. JA142. The Warden denied Earle's remedy request on February 25, 2016. JA142. On March 10, 2016, Earle appealed the decision of the Warden to the Regional Director in Administrative Remedy No. 850257-R1, again requesting investigation into his placement in SHU. Id. The Regional Director denied the request on March 30, 2016. Id. Finally, on April 18, 2016, Earle appealed the Regional Director's decision to the Central Office in Administrative Remedy No. 850257-A1. JA143. This remedy was closed on May 17, 2016. Id.

On January 1, 2017, Earle filed the instant lawsuit. JA8. There is no dispute that at the time of filing he had exhausted the administrative remedy process while incarcerated at FCI Hazelton. JA64. Earle remained at FCI Hazelton until July 25, 2017, at which point he was

transferred to USP Hazelton. JA88. On May 24, 2018, Earle was transferred to USP Pollock where he presently remains. Id.

Plaintiff claims that the named Defendants conspired to retaliate against him because he filed the grievances against Counselor Shreves by placing him in the SHU while the grievances were investigated and by moving him to a new unit away from Counselor Shreves once he was released from the SHU. Earle also claims that Case Manager Gyorko increased his security points to have him transferred to USP Hazelton and that upon release from the SHU he was "stripped of his job."

III. Procedural History

Earle filed a pro se civil rights complaint under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), which permits suit under limited circumstances against federal employees. JA 8-51. Earle's January 17, 2017 complaint set forth various claims against federal employees Michael Shreves, Jose Rivera, Rhonda Domas, Derrick Washington, FNU Squires, Brad Gorondy, Michael Breckon, Rachel Thompson, Jennifer Saad, Kevin Kelly, Angela Gyorko, Christopher Pulice, J. F. Caraway, and Ian Connors ("Defendants"), alleging violations of Earle's First, Fifth, and Eighth Amendment rights. First of all, Earle claimed that the Defendants

conspired to retaliate against him for filing the grievances against Counselor Shreves, in violation of his First Amendment rights. JA18-19. Secondly, Earle alleged Defendants violated his Fifth Amendment due process rights by placing him in the SHU. JA019. Finally, Earle complained that his placement in the SHU for administrative detention violated his Eighth Amendment right to be free from cruel and unusual punishment. JA239.

On February 23, 2018, the magistrate judge ordered the Defendants to respond to Earle's allegations. JA52-53. On July 23, 2018, Earle filed a Motion for Appointment of Counsel, which the magistrate judge denied. JA54-58. On August 30, 2018, Defendants filed a Motion to Dismiss, or in the Alternative, Motion for Summary Judgment. JA59-193. On August 31, 2018, the magistrate judge issued an Order and Roseboro Notice notifying Plaintiff of his right and obligation to respond to the Defendants' motion. JA194-195. After filing a Motion for Extension of Time to respond, which the magistrate judge granted, (JA196-199), on October 19, 2018, Plaintiff filed his response in opposition to Defendants' Motion. JA200-230.

On April 23, 2019, the district court granted summary judgment in Defendants' favor as to all of Plaintiff's claims. JA231-241. In dismissing

Plaintiff's First Amendment retaliation claim, the district court did not conduct a special factors analysis pursuant to Ziglar v. Abbasi, 137 S. Ct. 1843 (2017). Instead, the court concluded that Plaintiff's First Amendment claim failed because prisoners do not have a First Amendment right to file grievances. JA238. The court decided that Plaintiff's Fifth and Eighth Amendment claims were without merit as well. Finally, because the Court concluded that none of Plaintiff's constitutional rights had been violated, the court determined Defendants were entitled to qualified immunity. JA239. On May 6, 2019, Plaintiff filed his notice of appeal. JA242. Plaintiff's appeal only addresses the dismissal of his First Amendment retaliation claims.

SUMMARY OF ARGUMENT

Inmate Earle appeals the dismissal of his Bivens suit for money damages against federal officials for alleged retaliation under the First Amendment arising out of prison housing assignments. Defendants submit that although the district court dismissed Plaintiff's First Amendment retaliation claim without conducting a special factors analysis pursuant to Ziglar v. Abbasi, dismissal remains proper because the court correctly found the Defendants were entitled to qualified immunity. Moreover, had a special factors analysis been undertaken, the

end result would be that multiple special factors counsel against extending Bivens to Plaintiff's claim. A First Amendment retaliation claim is "different in a meaningful way from previous Bivens cases decided by [the Supreme] Court." Abbasi, 137 S.Ct. at 1849. Earle's First Amendment retaliation claim presented a new Bivens context, particularly in the arena of prison housing decisions, and multiple special factors counsel hesitation in extending a Bivens remedy to this arena. Accordingly, Defendants respectfully request the Court affirm the district court's decision.

ARGUMENT

I. Standard of Review

A district court's award of summary judgment is reviewed *de novo*, viewing the facts and inferences reasonably drawn from those facts in the light most favorable to the nonmoving party. A summary judgment award is appropriate only when the record shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Core Commc'ns, Inc. v. Verizon Md. *LLC*, 744 F.3d 310, 320 (4th Cir. 2014).

II. Although the district court did not conduct a special factors analysis pursuant to Abbasi, dismissal of Plaintiff's claim is still proper because multiple special factors counsel against a Bivens decision in Plaintiff's case.

Earle has asserted a Bivens claim alleging that Defendants placed him in the SHU, transferred him to a different housing unit and transferred him to another facility, all in retaliation for him filing grievances against counselor Shreves. Before the merits of constitutional claims against federal officials in their individual capacities can be considered, the "antecedent question" is whether an implied damages remedy is available at all. Hernandez v. Mesa, 137 S. Ct. 2003, 2006 (2017) (quoting Wood v. Moss, 572 U.S. 744, 757 (2014)).

In Bivens, the Supreme Court allowed an alleged victim of an unlawful arrest and search to bring a Fourth Amendment claim for damages against federal actors even though no federal statute authorized such claim. See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 395-97 (1971). Bivens' main tenet is to deter individual officers' unconstitutional acts. See Correctional Services Corp v. Malesko, 534 U.S. 61 (2001). However, in the almost 50 years following the Bivens decision, the Supreme Court has extended Bivens to include only two additional constitutional claims: the Due Process Clause of the Fifth Amendment in Davis v. Passman, 442 U.S. 228 (1979), and a federal prisoner's Eighth Amendment claim pursuant to the Cruel and Unusual Punishments Clause, for failure to provide adequate medical treatment in Carlson v. Green, 446 U.S. 14 (1980).

Since Carlson, when asked to extend Bivens, the Supreme Court has first looked to see if the claim arises in a "new context" or involves a "new category of defendants." Malesko, 54 U.S. at 68. To date, the Supreme Court has consistently rejected attempts to extend Bivens liability to any new context or new category of defendants. See FDIC v. Meyer, 510 U.S. 471, 484-86 (declining to extend Bivens to permit suit against a federal agency). See also Holly v. Scott, 434 F.3d 287, 290 (4th

Cir. 2006)(declining to extend Bivens to an Eighth Amendment claim against employees of a privately operated prison); Lebron v. Rumsfeld, 670 F.3d 540 (4th Cir. 2012)(declining to extend Bivens in a military context). In Abbasi, the Supreme Court clarified the limits of Bivens, noting that "expanding the Bivens remedy is now a disfavored judicial activity." Abbasi, 137 S. Ct. at 1857. See also Tun-Cos v. Perrotte, 922 F.3d 514 (4th Cir. 2019) (noting that extending Bivens to a new context is "highly" disfavored). In the more recent case of Hernandez v. Mesa, the Supreme Court again refused to expand the Bivens remedy, noting "Congress's decision not to provide a judicial remedy does not compel us to step into its shoes." Hernandez v. Mesa, 140 S.Ct. 735, 750 (2020). Notably, in Hernandez Justice Clarence Thomas cautioned: "The analysis underlying Bivens cannot be defended. We have cabined the doctrine's scope, undermined its foundation, and limited its precedential value. It is time to correct this Court's error and abandon the doctrine altogether." Id., at 752 (Thomas, J. Concurring).

Nonetheless, Abbasi established a two-step test to be undertaken when deciding whether a cognizable Bivens remedy exists for alleged official misconduct. First, a court must determine whether the claim presents a "new" Bivens context. Abbasi, 137 S. Ct. at 1859. If it does,

the court must then determine whether any "special factors counsel[] hesitation" in recognizing a new remedy "in the absence of affirmative action by Congress." Id. at 1857, 1859. The Abbasi Court explained that "[i]f the case is different in a meaningful way from previous Bivens cases decided by this Court, then the context is new." Id. at 1859. Although the Abbasi Court did not provide "an exhaustive list of differences that are meaningful enough to make a given context a new one," the Court did provide the following "instructive" examples:

> A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous Bivens cases did not consider.

Id. at 1859-60.

Plaintiff now alleges that Defendants retaliated against him for submitting administrative remedies, in violation of his First Amendment rights. The mere fact that Plaintiff alleges a violation of a constitutional right does not conclusively establish that Bivens extends to Plaintiff's constitutional claim. Although the district court did not undertake an

analysis of Plaintiff's claim pursuant to Abbasi, Defendants respectfully submit that had the district court done so, a Bivens remedy would not have been extended to Plaintiff. Thus, it must first be determined whether Plaintiff's retaliation claim presents a new Bivens context.

A. This case presents a new Bivens context.

This court has held that inmates have a clearly established First Amendment right to file prison grievances free from retaliation. See Booker v. South Carolina Department of Corrections, 855 F.3d 533, 545 (4th Cir. April 28, 2017)). However, Booker involved a Section 1983 action and the issue of whether Bivens extends to such First Amendment right was not addressed by the court in its opinion. Moreover, the Supreme Court has never affirmatively recognized an implied damages remedy against federal officials under the First Amendment, and has explicitly declined on several occasions to do so. See Reichle v. Howards, 566 U.S. 658 (2012)("We have never held that Bivens extends to First Amendment claims."); also see Malesko, 534 U.S. at 67-68 (noting that "we declined to create a Bivens remedy against individual Government officials for a First Amendment violation arising in the context of federal employment"); Bush v. Lucas, 462 U.S. 367 (1983) ("[W]e have not found an implied damages remedy under the Free Exercise Clause"). Because

neither the Supreme Court nor this court have previously considered the constitutional right of an inmate to be free from retaliation for filing grievances, Defendants submit that Plaintiff's claim presents a new Bivens context.

B. An alternative process exists by which Plaintiff can pursue his claims.

Bivens should not be extended to Plaintiff's case because the BOP's Administrative Remedy Program provides an "alternative, existing process for protecting the interest [which] amounts to a convincing reason for the Judicial Branch to refrain from providing a new freestanding remedy in damages." Wilkie v. Robbins, 551 U.S. 537, 550 (2007). "[T]he existence of alternative remedies usually precludes a court from authorizing a Bivens action." Abbasi, 137 S.Ct. at 1865 ("[I]f there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new Bivens cause of action."); Malesko, 534 U.S. at 69 ("So long as the plaintiff had an avenue for some redress," a court may decline to provide a new Bivens remedy).

Earle indeed had alternative remedies available to him through the BOP administrative remedy program. The BOP administrative remedy program allows inmates to seek formal review of issues relating to any

aspect of his or her confinement. During his incarceration with the BOP, Earle has filed 652 formal BOP grievances. JA91. Furthermore, it is without merit that Earle may have been dissatisfied with a response to his grievances. An alternative process need not end favorably for the plaintiff. An inmate's mere dissatisfaction with the BOP's responses to his administrative remedies should not be an invitation for a court to imply a cause of action absent congressional authority. See Bush, 462 U.S. at 388.

C. Additional special factors counsel hesitation against implying a Bivens remedy in this context.

In addition to Earle having had an alternative process, there are numerous other special factors counseling hesitation in providing a non-statutory damages remedy to this type of claim. The first of these considerations is the separation of powers on which our democracy rests. The Supreme Court has held that when the Court is asked to infer a cause of action for money damages to enforce a constitutional right, separation of powers is "central to the analysis." Abbasi, 137 S. Ct. at 1857. If there are "sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy," then "the courts must refrain from creating the remedy in order to respect the role of Congress in

determining the nature and extent of federal-court jurisdiction under Article III." Id. at 1858. To that end, it is significant and "telling" to note that although Congress has extensively legislated and undertaken policy choices in the arena of prison administration and inmates' rights, it has never created a personal damages remedy against a federal prison official. Id. at 1862. In fact, Congress enacted the Prisoner Litigation Reform Act ("PLRA") to "limit" prisoner litigation and "remove federal district courts from the business of supervising day-to-day operation of [] prisons." McLean v. United States, 566 F.3d 391, 403 (4th Cir. 2009)

In addition to the PLRA, as set forth in the Statutory and Regulatory Background section above, Congress explicitly delegated management of federal prisons to the Attorney General and the BOP. 18 U.S.C. § 4042(a). The intrusion of the Judicial Branch into an area previously left to the direction of the Executive Branch also raises separation of powers concerns that counsel hesitation.

Secondly, the utter volume of potential litigation that would result should Bivens be expanded to allow a First Amendment retaliation claim by inmates is yet another special factor counseling hesitation. The certain escalation in suits would then result in increased litigation costs to the Government and impose a burden upon individual employees to defend

such claims. Such an extension would open the floodgates to such litigation. Furthermore, "the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions" and prison administrators need to be given "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." Bell v. Wolfish, 441 U.S. 520, 547 (1979).

Thirdly, the chilling effect that potential personal liability for money damages might have on prison employees is yet another special factor to consider in the prison setting where safety and security are paramount. Officials who face personal liability for damages might refrain from taking urgent and lawful action in a time of crisis. Abbasi, 137 S. Ct. at 1863. Thus, courts "must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." Overton v. Bazzetta, 539 U.S. 126, 132 (2003). Corrections employees are tasked with managing a large inmate population and the very nature of the relationship between inmates and officers can be a source of tension. Thus, officers must be able to make split-second

decisions without fear that every interaction with an inmate could lead to litigation in their personal capacity. See Jones v. North Carolina Prisoner's Union, 433 U.S. 119, 137 (1977) (acknowledging a need to protect "certain basic rights of inmates" but recognizing that prison administration is best left to "those with the most expertise in th[e] field" and not the courts). Moreover, declining to recognize a Bivens remedy in most prisoner suits does not mean that BOP misconduct will go unchecked. Criminal investigations and prosecutions of prison officers already deter official misconduct, as does the threat of an internal investigation through the BOP's Office of Internal Affairs or DOJ's Office of the Inspector General. See Abbasi, 137 S. Ct. at 1862.

In sum, although the district court did not undertake an Abbasi analysis below, Earle's allegations present a new Bivens context in which the Supreme Court has not authorized a remedy and there are multiple special factors which caution hesitation against expanding Bivens liability to Earle's claim.

III. Even if a Bivens remedy were extended to Plaintiff's First Amendment retaliation claim, the district court correctly determined that Defendants were entitled to qualified immunity.

The district court correctly found that the BOP officials were entitled to qualified immunity. The Supreme Court has held that government officials are entitled to qualified immunity with respect to "discretionary functions" performed in their official capacities. Anderson v. Creighton, 483 U.S. 635, 638 (1987). The doctrine of qualified immunity provides officials "breathing room to make reasonable but mistaken judgments about open legal questions." Abbasi, 137 S. Ct. at 1866, citing Ashcroft v. al–Kidd, 563 U.S. 731, 743 (2011).

In essence, qualified immunity gives government officials the benefit of the doubt from civil liability and suit "insofar as their conduct does not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (emphasis added). This Court has held that the purported constitutional right alleged by the plaintiff must be defined "at a high level of particularity." Owens ex rel. Owens v. Lott, 372 F.3d 267, 279 (4th Cir. 2004) (quoting Edwards v. City of Goldsboro, 178 F.3d 231, 251 (4th Cir. 1999)). To defeat a defendant's claim of qualified immunity,

the plaintiff must show: "(1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." See al-Kidd, 563 U.S. at 735 (internal quotation marks omitted). See also Saucier v. Katz, 533 U.S. 194, 201 (2001). A right is "clearly established" when "at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." al-Kidd, 563 U.S. at 741 (internal citations omitted). Furthermore, the court is not required to address the two prongs in sequence, but instead may use its "sound discretion" to decide which issue to first address. Attkisson v. Holder, 925 F.3d 606, 623 (4th Cir. 2019), as amended (June 10, 2019) (referencing Pearson v. Callahan, 555 U.S. 223, 236 (2009). The defendant is entitled to qualified immunity if either prong is not satisfied. Id. at 244-45.

A. Plaintiff fails to meet the second prong because a prisoner's First Amendment right to be free from retaliation for filing grievances was not clearly established at the time of the events in question.

In the case at hand, the district court based its conclusion that Defendants were entitled to qualified immunity on its separate determination that none of Plaintiff's constitutional rights were violated

and thus the first prong of the test could not be met[1]. JA239. Defendants indeed acknowledge that at the time the court issued its decision, this court had issued its unpublished decision in Booker v. South Carolina Department of Corrections, 855 F.3d 533 (4th Cir. April 28, 2017)), holding that prisoners do have a constitutional right to file grievances without retaliation. However, that decision was issued two years after the events in question occurred, and qualified immunity asks whether the relevant constitutional right was clearly established at the time of the alleged misconduct. al-Kidd, 563 U.S. at 735. Furthermore, it is significant to note again, as set forth above, the Supreme Court has "never held that Bivens extends to First Amendment claims." Reichle, 566 U.S. at 663 n.4 (citations omitted). Earle simply cannot establish that his First Amendment right to be free from retaliation for filing grievances was so clearly established such that any reasonable BOP correctional officer would have understood it when the actions alleged were taken.

[1] The district court relied on Adams v. Rice, 40 F.3d 72, 75 (4th Cir. 1994) (holding that there is no constitutional right to participate in grievance proceedings).

B. Even if Plaintiff could meet the second prong, the district court correctly found that Plaintiff failed to establish a First Amendment case of retaliation.

Defendants find it significant to first note that this Court has held that claims of retaliation by prisoners must "be regarded with skepticism, lest federal courts embroil themselves in every disciplinary act that occurs in [ ] penal institutions." Adams v. Rice, 40 F.3d 72, 74 (4th Cir. 1994). If an inmate could file a retaliation claim every time he or she is dissatisfied with decisions made by prison officials, such claims would "disrupt prison officials in the discharge of their most basic duties" and significantly encumber the operation and administration of prison facilities. Id. In the case at hand, the district court correctly determined that Earle failed to establish the essential elements necessary to support a retaliation claim. To state a First Amendment retaliation claim, a plaintiff must show that: "(1) his speech was protected, (2) the alleged retaliatory action adversely affected his protected speech, and (3) a causal relationship between the protected speech and the retaliation." Raub v. Campbell, 785 F.3d 876, 885 (4th Cir. 2015) (internal quotation marks omitted). In fact, this Court has held that a Plaintiff must prove that the alleged retaliation would not have occurred *but for* his protected action. Huang v. Board of Governors of University of North Carolina, 902

F.2d 1134, 1140 (4th Cir. 1990) (emphasis added). Earle simply cannot overcome this high hurdle. Special Investigative Services placed Earle in the SHU for the legitimate reason of investigating the statements made in his informal grievances and determine whether they contained threats towards Counselor Shreves. Moreover, after being released from the SHU, BOP staff assigned Earle to a new unit for the legitimate reason of ensuring that Shreves and Earle did not have further interaction, for the safety of all involved. Furthermore, Earle's transfer from FCI Hazelton to USP Hazelton did not occur until July 2017, approximately twenty (20) months after Earle filed his initial grievances against Shreves. So to the extent that he claims such transfer was retaliatory, the wide gap in time certainly weakens Earle's argument as to the causal relationship between filing the grievances and any alleged retaliatory action. Perhaps most significantly, Congress delegated to BOP the authority to designate which correctional facility is "appropriate and suitable" for a prisoner, upon consideration of the "resources of the facility contemplated; the nature and circumstances of the offense; the history and characteristics of the prisoner; … and any pertinent policy statement issued by the Sentencing Commission" and to "at any time, having regard for the same matters, direct the transfer of a prisoner from

one penal or correctional facility to another." BOP has the authority to move inmates within an institution and between institutions as necessary. Finally, Earle's filing history reveals that as of June 27, 2018, he filed 652 formal BOP grievances during his time in BOP custody. JA91, JA146. From October 31, 2015 through January 17, 2017, the period of time at issue in this case, Earle filed 41 formal grievances (JA91). Such prolific grievance filing is exactly what gives rise to this court's concern about the disruption to prison officials' duties and the encumbrance on the operation and administration of prison facilities should every unfavorable decision then result in a retaliation claim[2]. The district court correctly found that Plaintiff could not maintain a claim for retaliation.

IV. The district court did not abuse its discretion by granting summary judgment without permitting further discovery by the incarcerated Plaintiff.

Plaintiff alleges that the district court abused its discretion by granting summary judgment to Defendants without permitting additional discovery. This court affords "substantial discretion to a district court in managing discovery and review[s] discovery rulings only

[2] A search of LexisNexis' online CourtLink service indicates that since 1995, Plaintiff Earle has filed twenty (20) civil actions in five (5) separate district courts.

for abuse of that discretion." United States ex rel. Becker v. Westinghouse Savannah River Co., 305 F.3d 284, 290 (4th Cir.2002). Furthermore, "[a] district court abuses its discretion only where it has acted arbitrarily or irrationally, has failed to consider judicially recognized factors constraining its exercise of discretion, or when it has relied on erroneous factual or legal premises." L.J. v. Wilbon, 633 F.3d 297, 304 (4th Cir.) (internal quotation marks and alterations omitted), *cert. denied*, 565 U.S. 1058 (2011). Furthermore, a party "cannot complain that summary judgment was granted without discovery unless that party had made an attempt to oppose the motion on the grounds that more time was needed for discovery." Evans v. Techs. Applications & Serv. Co., 80 F.3d 954, 961 (4th Cir. 1996). Rule 7 of the U.S. District Court for the Northern District of West Virginia's Local Rules of Prisoner Litigation Procedure provides that "No discovery pursuant to Rules 26 through 37 of the Federal Rules of Civil Procedure shall be conducted with respect to petitions, motions, applications and complaints filed under these provisions without leave of the Court." Although in his response to Defendants' motion for summary judgment Plaintiff Earle included a sentence that "[t]o the extent [the court] has additional question[s] or concerns" that it should order limited discovery, Plaintiff

never filed a formal motion for discovery. JA219, JA2-7. Moreover, Plaintiff attached numerous exhibits to his response to Defendants' motion for summary judgment and at no point described what discovery he would seek to provide if given the opportunity. See Putney v. Likin, 656 F. App'x 632, 639 (4th Cir. 2016) (holding that the district court did abuse discretion where the inmate specifically stated, "I need Discovery to uncover information that is essential to my suit" and delineated nine pieces of evidence the inmate needed but could not obtain, along with in-depth description of the evidence requested.) Earle's case is clearly distinguished from Putney, and the district court did not abuse its discretion in granting summary judgment when it did without further discovery.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

STATEMENT ON ORAL ARGUMENT

Oral argument is not necessary, as the briefs adequately address the issues.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6655 **Caption: Vernon Earle v. Shreves, et al.**

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)

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Date: May 4, 2020

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CERTIFICATE OF SERVICE

I, Erin K. Reisenweber, Assistant United States Attorney for the Northern District of West Virginia, hereby certify that on May 4, 2020, I caused this *Brief of Appellees* to be filed electronically with the Clerk of Court using the CM/ECF system, which will send notice of this filing to: Marcella Coburn, Counsel for Appellant.

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