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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DERRICK R. PARKHURST,

Plaintiff - Appellant,

v.

DAN SHANNON, Director, Wyoming Department of Corrections; AMERICA STINSON, a/k/a America Stinton; MICHAEL PACHECO, Warden, Wyoming Department of Corrections Medium Correctional Institution; WYOMING DEPARTMENT OF CORRECTIONS MEDIUM CORRECTIONAL INSTITUTION DEPUTY WARDEN, a/k/a Marlena McManis; WYOMING DEPARTMENT OF CORRECTIONS MEDIUM CORRECTIONAL INSTITUTION HEAD FOOD WORKER, Individually; SERGEANT LIRA, Individually, Wyoming Department of Corrections Medium Correctional Institution Sergeant,

Defendants - Appellees.

No. 24-8017

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING
(D.C. No. 1:22-CV-00262-SWS)

Laila M. Kassis (Cynthia D. Love, Mark C. Gillespie, Samantha Tidwell with her on the briefs), Kirkland & Ellis LLP, New York, New York, for Appellant.

Timothy W. Miller, Senior Assistant Attorney General (Prentice Olive, Assistant Attorney General with him on the briefs), Cheyenne, Wyoming, for Appellees.

Before **HARTZ**, **TYMKOVICH**, and **BACHARACH**, Circuit Judges.

BACHARACH, Circuit Judge.

This appeal grew out of a retaliation claim involving

- an alleged threat to fire a prisoner from his job and
- the later filing of a disciplinary charge against the prisoner.

The appeal triggers two main issues.

The first issue involves the specificity required for a retaliation claim involving the threatened loss of a prisoner's job. Prisoners' jobs bear unique features and penological functions. Given these unique features and penological functions, can a prisoner prevail on a retaliation claim for the threatened loss of a job without providing any details about the job itself? We answer *no*.

The second issue involves the impact of a finding of guilt on a claim of retaliation in the disciplinary charge itself. Does this finding prevent liability when the prisoner relies on timing of the disciplinary charge and a departure from prior practice? We answer *no*.

The alleged retaliatory acts and the ruling

This action is brought by a prisoner, Mr. Derrick Parkhurst, who worked in the kitchen of his prison. He was allegedly asked to serve salad dressing that had spoiled. He complained to his supervisor, America Stinson, who allegedly responded to pour out the excess oil, shake the dressing, and serve it. Mr. Parkhurst objected, and Ms. Stinson purportedly responded to "hit the road" if he didn't like it.

Mr. Parkhurst filed a grievance; and the warden answered, stating that the salad dressing wasn't being served because the expiration date had passed. Two days later, Mr. Parkhurst approached Ms. Stinson while she was working in a small room (called the *tool room*). According to Ms. Stinson, she feared for her safety as Mr. Parkhurst aggressively cornered her.

The incident led Ms. Stinson to file a disciplinary charge, and Mr. Parkhurst was found guilty and sanctioned with 45 days in restrictive housing. After getting sanctioned, Mr. Parkhurst claimed retaliation by Ms. Stinson in threatening to fire him and submitting a disciplinary charge. To pursue these claims, Mr. Parkhurst made four requests for appointment of counsel. The district court declined the requests and granted summary judgment to Ms. Stinson.

Appointment of counsel

On appeal, Mr. Parkhurst argues that the district court erred in denying his requests for appointment of counsel. We disagree.

1. Standard of review

In civil cases, courts can "request" an attorney to take a case but can't force the attorney to take it. *Rachel v. Troutt*, 820 F.3d 390, 396 (10th Cir. 2016). In deciding whether to request counsel, district courts generally must selectively consider the justification because not every attorney is willing to accept. *Id.* at 397.

When a district court declines to make a request, we review that decision for an abuse of discretion. *Id.* In reviewing the exercise of discretion, we consider the apparent merit of the claim, the nature of the claim, the pro se party's ability to present the claim without counsel, and the complexity of the issue. *Id.*

2. Need for counsel to watch the video

Mr. Parkhurst argues in part that he needed legal representation to obtain a video recording of the incident in the tool room. To assess this argument, "we evaluate the district court's exercise of discretion based on the information presented at the time of the ruling." *United States v. Herrera*, 51 F.4th 1226, 1277 (10th Cir. 2022).

The court's information included the layout of the tool room. The tool room has a video camera that recorded the incident underlying the

disciplinary charge. Given Mr. Parkhurst's focus on the incident, he asked for the video, insisting that he alone would understand its relevance. This insistence could have suggested the inability of counsel to help, and the court denied the request for appointment of counsel. Mr. Parkhurst renewed his request two more times, and the district court said both times that the circumstances hadn't changed.

After the third request, prison officials informed Mr. Parkhurst that they had taped over the recording. He then dropped his insistence on watching the video, stating for the first time that it would be enough for the court to appoint an attorney and allow that attorney to see the recording.[1] At that point, however, Mr. Parkhurst had already been told that the recording no longer existed. And in a separate motion, a prison official had informed the court that disclosure of the video could compromise security by disclosing blind spots in the camera coverage. The court thus had to rule based on information that was known, which included

- Mr. Parkhurst's prior insistence that he needed to see the video because he alone would understand its relevance and
- security concerns if Mr. Parkhurst were to see the video.

[1] Mr. Parkhurst states that he emphasized in June 2023 that he needed an attorney in order to get access to the video. But in June 2023, Mr. Parkhurst requested appointment of counsel without dropping his prior insistence on seeing the video for himself.

Based on the circumstances surrounding each request for counsel, the district court didn't abuse its discretion by declining to appoint counsel to facilitate disclosure of the video.

3. Complexity of the issues

Mr. Parkhurst also argues that he needed counsel because the issues were complex. But Mr. Parkhurst didn't rely on complexity of the issues in district court.

In the first motion, Mr. Parkhurst argued that he might need an attorney to review the discovery and develop a factual record. But at that point, the court had only the complaint; there was no reason to speculate about the need for a factual record on the retaliation claims.

In the second motion, Mr. Parkhurst urged prosecution of prison authorities for crimes involving another prisoner's death over 20 years earlier. Again, Mr. Parkhurst said nothing about complexity of the issues.

In the third motion, Mr. Parkhurst presented no new reasons for the court to request counsel. Instead, Mr. Parkhurst again insisted that he needed to see the video and alleged corruption involving the other prisoner's death over 20 years earlier. Again, Mr. Parkhurst said nothing about complexity of the issues.

In the fourth motion, Mr. Parkhurst argued that past strokes had left him forgetful and unable to properly amend the complaint. At that point, however, Ms. Stinson had already moved for summary judgment on the

retaliation claims; and Mr. Parkhurst didn't identify any complex issues. The district court thus didn't abuse its discretion in declining to request counsel based on complexity of the issues.

Given the pertinent factors, the district court didn't err in declining to request an attorney for Mr. Parkhurst.

Retaliation claims

The appellate issues include not only the refusal to request counsel, but also the grant of summary judgment to Ms. Stinson on the retaliation claims. In support of these claims, Mr. Parkhurst alleges (1) a threat to fire him from his kitchen job and (2) the filing of a disciplinary charge.

1. Mr. Parkhurst's burden

In reviewing the grant of summary judgment, we conduct de novo review based on the standard that governed in district court. *Sawyers v. Norton*, 962 F.3d 1270, 1282 (10th Cir. 2020). Under this standard, we view the evidence in the light most favorable to Mr. Parkhurst, resolving factual disputes and reasonable inferences in his favor. *Cillo v. City of Greenwood Vill.*, 739 F.3d 451, 461 (10th Cir. 2013). Through this view of the evidence, we ask whether Ms. Stinson showed a right to judgment as a matter of law and the absence of a genuine dispute of material fact. *Id.*

This inquiry requires consideration of Mr. Parkhurst's burden on his underlying claims. For the retaliation claims,[2] Mr. Parkhurst needed to prove

- that he had engaged in constitutionally protected activity,
- that Ms. Stinson's actions would have chilled a person of ordinary firmness from continuing that activity, and
- that Ms. Stinson's adverse action had been substantially motivated by his exercise of constitutionally protected activity.

Leverington v. City of Colo. Springs, 643 F.3d 719, 729 (10th Cir. 2011).

2. Retaliatory threat to fire Mr. Parkhurst

Mr. Parkhurst claims that when he complained about the salad dressing, Ms. Stinson said to "hit the road" if he didn't like it. R. 111–12. The district court acknowledged that a fact-finder could reasonably characterize the alleged statement as a threat to fire Mr. Parkhurst from his kitchen job. *Id.* at 322. He states that this characterization would prevent summary judgment.

Verbal threats don't ordinarily violate a prisoner's constitutional rights. *McDowell v. Jones*, 990 F.2d 433, 4344 (8th Cir. 1993), *cited with approval in Requena v. Roberts*, 893 F.3d 1195, 1211 (10th Cir. 2018). But

[2] Mr. Parkhurst also sued seven other individuals (Dan Shannon, Michael Pacheco, Marlena McManies, Jeremy Lira, Edna Curry, and two unidentified individuals). But this appeal involves only the claims against Ms. Stinson.

even if a threat could suffice, we would need to consider the impact to Mr. Parkhurst from the loss of his kitchen job. The issue is thus whether the threat to fire Mr. Parkhurst would chill a person of ordinary firmness from complaining about the salad dressing.[3]

This inquiry is objective. *Eaton v. Meneley*, 379 F.3d 949, 954 (10th Cir. 2004). So we consider the chilling effect on a person of ordinary firmness rather than on Mr. Parkhurst himself. *Smith v. Plati*, 258 F.3d 1167, 1177 (10th Cir. 2001).

Mr. Parkhurst insists that the district court erred by applying a subjective test, pointing to his filing of additional grievances after the alleged threat. But the court said that it was applying an objective test. And we ordinarily take a district court at its word. *See, e.g.*, *Kellogg v. Watts Guerra LLP*, 41 F.4th 1246, 1258 (10th Cir. 2022).

Granted, the court observed that Mr. Parkhurst had continued filing grievances after the alleged threat. But we too have coupled application of the objective test with observations about what the plaintiff did after an alleged act of retaliation. *E.g.*, *Shero v. City of Grove, Okla.*, 510 F.3d 1196, 1203–04 (10th Cir. 2007) (applying an objective test and stating that

[3] In district court, Ms. Stinson denied that the alleged statement would constitute a threat to fire Mr. Parkhurst. But Ms. Stinson has dropped that argument on appeal. Here she argues only that the alleged threat wouldn't chill a person of ordinary firmness from complaining about the salad dressing.

the plaintiff "remained free to express his views publicly and to criticize the city council and, in fact, he did" (cleaned up)).

But even if the district court had applied the wrong test, we would still apply the same standard (de novo review) to determine whether the threat would chill a person of ordinary firmness. *See Colo. Motor Carriers Ass'n v. Town of Vail*, 153 F.4th 1052, 1062 n.3 (10th Cir. 2025). De novo review turns on the particular circumstances because the inquiry into a chilling effect is fact intensive. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006) (stating that "the significance of any given act of retaliation will often depend upon the particular circumstances"); *Williams v. Mitchell*, 122 F.4th 85, 90 (4th Cir. 2024) (characterizing this inquiry as "fact intensive").

Given the fact-intensive nature of the inquiry, a threat to retaliate could suffice depending on what was at stake. *See Hill v. Lappin*, 630 F.3d 468, 474 (6th Cir. 2010) (concluding that a threat to transfer a prisoner could qualify as an adverse action when the transfer would foreseeably create negative consequences for the prisoner); *Burgess v. Moore*, 39 F.3d 216, 218 (8th Cir. 1994) (concluding that a threat to retaliate could create a sufficient injury "if made in retaliation for an inmate's use of prison grievance procedures"). But what about threatening to fire a prisoner from a job in the kitchen? Would that threat chill a person of ordinary firmness from filing a grievance?

Mr. Parkhurst argues on appeal that jobs are valuable to prisoners because of the psychological benefits. But in district court, Mr. Parkhurst opposed summary judgment without saying anything about his job, such as how long he had worked in the kitchen, whether he had obtained wages, whether he had worked there by choice, whether another job would have been hard to get, or whether the kitchen job had been considered desirable.

A similar lack of specificity existed in *Douglas v. Reeves*, 964 F.3d 643 (7th Cir. 2020). There a casework manager fired a prisoner from his job as a wheelchair pusher. *Id.* at 647. Based on the firing, the prisoner claimed retaliation, arguing that officials had given him a new job that involved only menial duties and lacked the intangible qualities of work as a wheelchair pusher. *Id.* The Seventh Circuit concluded that the casework manager was entitled to summary judgment because the prisoner hadn't shown enough of a disparity in the new job to chill a prisoner of ordinary firmness. *Id.* at 647–48. For this conclusion, the court reasoned that the prisoner needed to show something more concrete than reliance on intangible differences in the desirability of the new job. *Id.* at 648. For example, the required showing could involve a difference in pay, working conditions, or side benefits. *Id.*[4]

[4] At the motion-to-dismiss stage, the Third Circuit took a different approach in *Wisniewski v. Fisher*, 857 F.3d 152 (3d Cir. 2017). There a prisoner claimed that authorities had fired him from a job in the library for helping a fellow inmate prepare a grievance. *Id.* at 155. The Third Circuit

The prisoner in *Douglas* showed at least some difference in the jobs; in contrast, Mr. Parkhurst presented the district court and our court with no argument at all about the importance or value of his job.[5]

In oral argument, Mr. Parkhurst questioned the need to focus on the particulars of his job, comparing his job to public employment and arguing that loss of a job in the public sector might prove devastating regardless of its pay or stature. *See Belcher v. City of McAlester*, 324 F.3d 1203, 1207 n.4 (10th Cir. 2003) (stating that a threat to dismiss public employees based on their speech may constitute adverse employment actions). "But prison work assignments are not the same as ordinary public employment." *Douglas*, 964 F.3d at 648. Unlike ordinary public employment, for example, prison employment has a penological purpose and a firing wouldn't affect the employee's benefits. *Id.*

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concluded that the retaliation claim should survive a motion to dismiss because "the termination of prison employment constitutes adverse action sufficient to deter the exercise of First Amendment rights." *Id.* at 157. There the court didn't address the specificity of the allegations about the job in the prison library. *See id.*

[5] We addressed a similar issue in *Vreeland v. Schwartz*, No. 19-1316, 2021 WL 2946465 (10th Cir. 2021) (unpublished op.). There a prisoner claimed retaliation when he was fired from his job as a unit clerk. *Id.* at *5. We held that the defendants were entitled to summary judgment because the prisoner hadn't said anything about the job itself or the work that he obtained after the firing. *Id.* at *6. Though the opinion isn't precedential, it is persuasive. *See* 10th Cir. R. 32.1(A).

Because Mr. Parkhurst failed to present any argument or evidence about the nature of his kitchen job, a fact-finder couldn't reasonably infer that the alleged threat would have chilled a prisoner of ordinary firmness. So the district court didn't err in granting summary judgment to Ms. Stinson on this claim.

3. Retaliatory filing of disciplinary charge

Mr. Parkhurst also complains about a second incident, where he was again serving salad dressing that had allegedly spoiled. Concerned, he found Ms. Stinson in the tool room and allegedly tried to tell her that the salad dressing was spoiled again. Ms. Stinson told Mr. Parkhurst to leave and filed a disciplinary charge for threatening or intimidating behavior. The charge led to a hearing, where Mr. Parkhurst was found guilty.

a. Impact of a finding of guilt

Mr. Parkhurst attributes the disciplinary charge to retaliation for his filing of a successful grievance. In response, Ms. Stinson argues that she couldn't have had a retaliatory motive because the hearing officer subsequently found guilt and had support for this finding.[6] The clash of

[6] Ms. Stinson also insists that she brought the disciplinary charge before learning of Mr. Parkhurst's grievance. But Mr. Parkhurst stated under oath that he had told Ms. Stinson about the grievance before she brought the disciplinary charge. R. 171–72. This clash of evidence prevents an award of summary judgment based on Ms. Stinson's denial of knowledge about the grievance. *See* p. 7, above.

positions requires us to consider whether the finding of guilt prevents a finding of retaliatory motive.

For an inference of retaliatory motive, the plaintiff may rely on evidence that includes

- animosity on the part of prison officials,
- temporal proximity between the protected activity and a disciplinary charge,
- flaws in the hearing procedures,
- excessive punishment,
- departure from prior practice, and
- falsity of the disciplinary charge.

See Smith v. Maschner, 899 F.2d 940, 947–49 (10th Cir. 1990) (considering animosity, temporal proximity, timing, excessive punishment, and departure from past practice); *Colon v. Coughlin*, 58 F.3d 865, 872–73 (2d Cir. 1995) (considering temporal proximity, excessive punishment, false disciplinary charges, and admissions of retaliatory intent).

Two of our cases show how we've analyzed the interplay between these factors and a finding of guilt:

1. *Requena v. Roberts*, 893 F.3d 1195 (10th Cir. 2018) and
2. *Smith v. Maschner*, 899 F.2d 940 (10th Cir. 1990).

From these two opinions, we draw two conclusions:

1. If the prisoner relies solely on falsity of the charges after obtaining due process in the disciplinary proceedings, a finding of guilt prevents the court from inferring a retaliatory motive.

2. If the prisoner relies on other evidence, such as suspicious timing or a departure from a prior practice, a finding of guilt does not prevent an inference of a retaliatory motive.

In *Smith*, the prisoner had been disciplined for refusing to submit to a second search of his briefcase before a court hearing. *Smith*, 899 F.2d at 945. To support a retaliation claim, he pointed to

- the close temporal proximity between his refusal to open the briefcase and his disciplinary proceedings,
- a departure from past practice (questioning the prisoner about his briefcase),
- his harassment through the imposition of sanctions,
- the interference with his legal actions, and
- an inability to meet with a witness.

Id. at 948. We concluded that a fact-finder could reasonably rely on this combination to infer a retaliatory motive for the disciplinary charge. *Id.* at 948–50.

The prisoner brought a separate claim involving a denial of due process in his disciplinary hearing. *Id.* at 946–47. For this claim, we concluded that a genuine dispute of material fact existed. *Id.* But we didn't suggest that the retaliation claim hinged on a denial of due process. To the contrary, we called the retaliation claim "a separate cause of action" and

noted that this cause of action could remain viable even if the action against him had been "otherwise permissible." *Id.* at 948.

We also addressed a retaliation claim in *Requena*, but there the prisoner relied solely on his characterization of the disciplinary charge as false: "Plaintiff was subjected to false convictions of disciplinary actions for filing grievances and Writs of Habeas Corpus challenging disciplinary actions. These false convictions were in retaliation of Plaintiff's filings." Appellant's Opening Br. at 20, *Requena v. Roberts*, Case No. 17-3040 (10th Cir. May 15, 2017). Given the prisoner's sole focus on the falsity of the charge, we concluded that the availability of due process and finding of guilt would have thwarted a finding of retaliation. *Requena v. Roberts*, 893 F.3d 1195, 1211 (10th Cir. 2018).

Mr. Parkhurst urges a conflict between *Smith* and *Requena*. But "we must endeavor to interpret our cases in a manner that permits them to coexist harmoniously with overarching and controlling Supreme Court precedent and with each other." *United States v. Hansen*, 929 F.3d 1238, 1254 (10th Cir. 2019); *see also* Bryan A. Garner et al., *The Law of Judicial Precedent* § 36, at 300 (2016) (noting that "decisions of equal authority" that appear to be "discordant" "should be harmonized" "[i]f at all possible" (cleaned up)). In this endeavor, we view the two opinions as harmonious, attributing the difference in outcomes to the different ways that the prisoner tried to show a retaliatory motive.

The prisoner in *Requena* relied on a narrower universe of evidence than the prisoner in *Smith*. In *Requena*, the prisoner tried to show a retaliatory motive based solely on the falsity of his disciplinary charge. *See* p. 16, above. But the fact-finder couldn't view the charge as false if a hearing officer found the prisoner guilty after providing him with due process.

The different outcomes in *Smith* and *Requena* stem from differences in the claims themselves. When a prisoner relies solely on the falsity of a disciplinary charge, as in *Requena*, the court can't infer a retaliatory motive if the hearing officer found guilt after providing the prisoner with due process. *See Requena v. Roberts*, 893 F.3d 1195, 1211 (10th Cir. 2018). But if the prisoner relies on evidence besides the falsity of a disciplinary charge, as in *Smith*, the availability of due process and the finding of guilt wouldn't prevent an inference of a retaliatory motive. *See Smith v. Maschner*, 899 F.2d 940, 948–50 (10th Cir. 1990).

b. Mr. Parkhurst's reliance on innocence and a denial of due process

Mr. Parkhurst relies in part on the falsity of the disciplinary charge.[7] This reliance is misguided because the hearing officer found Mr. Parkhurst guilty after providing him with due process.

[7] Mr. Parkhurst makes this argument in his pro se brief. We consider the arguments both by Mr. Parkhurst in his pro se brief and by his attorney in her supplemental brief. *See United States v. Graham*, 466 F.3d 1234,

For disciplinary hearings, due process includes a limited right to call a witness and to require at least some evidence of guilt. *See Wolff v. McDonnell*, 418 U.S. 539, 566 (limited right to call witnesses); *Superintendent, Mass. Corr. Inst. v. Hill*, 472 U.S. 445, 455 (1985) (requiring at least some evidence of guilt). On appeal, Mr. Parkhurst claims that he couldn't

- call particular witnesses or question witnesses,
- access a video of the incident in the tool room, or
- present his case to a neutral and detached hearing officer.

He argues in part that he couldn't present key witnesses, such as

- Mr. Zachary Anderson, an inmate who worked near the tool room when the incident took place, and
- other individuals who appeared in the video of the incident.

In addition, Mr. Parkhurst argues that he should have had a chance to question witnesses. But in district court, Mr. Parkhurst failed to mention the denial of key witnesses or inability to question them. So the district court didn't err by declining to inject these issues. *See Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998) (limiting review to the materials that the parties had brought to the attention of the district court).

1237 n.1 (10th Cir. 2006) (considering the arguments by both counsel and the party in his pro se brief).

Even if Mr. Parkhurst had made these arguments in district court, they would fail because the hearing officer interviewed witnesses and considered their statements. For example, the officer interviewed two witnesses requested by Mr. Parkhurst: Brittany Thomas and Patrick McAtee. The hearing officer also considered Mr. Anderson, but declined to question him because he would presumably echo what Mr. McAtee had said. Mr. Parkhurst questions this reasoning, but he doesn't explain what he would have asked Mr. Anderson or how the answers might have changed the outcome.

Mr. Parkhurst also claims that he should have been able to see the prison's video of the incident. The hearing officer explained that disclosure of the video would compromise security by revealing blind spots in the camera coverage, and Mr. Parkhurst hasn't questioned the validity of this concern. *See Piggie v. Cotton*, 344 F.3d 674, 679 (7th Cir. 2003) (concluding that a prisoner was not entitled to see a videotape if his access would have entailed a security risk, such as a chance to "learn the location and capabilities of the prison surveillance system"); *see also Lennear v. Wilson*, 937 F.3d 257, 269 (4th Cir. 2019) (stating that the right to due process entitles an inmate to access video surveillance evidence unless the access would "infringe on legitimate penological interests"). Given the undisputed evidence of a security risk, Mr. Parkhurst's inability to see the video didn't deprive him of due process.

Finally, Mr. Parkhurst claims that the hearing officer was biased because he refused Mr. Parkhurst's reasonable requests to present evidence in his defense. But an adverse ruling doesn't imply bias, *Bixler v. Foster*, 596 F.3d 751, 762 (10th Cir. 2010), and Mr. Parkhurst doesn't refer to any evidence casting doubt on the hearing officer's objectivity.

Because Mr. Parkhurst's disciplinary hearing comported with due process, he can't rely on the alleged falsity of the disciplinary charge. *See Requena v. Roberts*, 893 F.3d 1195, 1211 (10th Cir. 2018).

c. Mr. Parkhurst's reliance on suspicious timing and a departure from prior practice

Mr. Parkhurst has relied not only on the falsity of the disciplinary charge, but also on other evidence. For example, he points to the filing of disciplinary charges soon after telling Ms. Stinson about his successful grievance. R. 130. Mr. Parkhurst also relies on a departure from prior practice, pointing out that Ms. Stinson said under oath that this was the first time that she had ever filed a disciplinary charge. *Id.* at 125.

We addressed similar issues in *Smith*. There a prisoner based a retaliatory intent on evidence that

- the disciplinary charge had come right after he appeared in court and
- the disciplinary charge stemmed from a departure from prior practice (questioning the prisoner about his briefcase).

Smith v. Maschner, 899 F.2d 940, 948 (10th Cir. 1990). Like the prisoner in *Smith*, Mr. Parkhurst implies a retaliatory motive based on

- close temporal proximity between the protected activity and filing of disciplinary charges and
- Ms. Stinson's departure from prior practice.

Ms. Stinson filed a disciplinary report on the same day that Mr. Parkhurst renewed his complaint about the salad dressing and told her that he had filed a successful grievance, and Ms. Stinson had never before filed a disciplinary charge. This combination of evidence would support a retaliatory motive irrespective of Mr. Parkhurst's guilt.

Given the evidence of suspicious timing and a departure from prior practice, the finding of guilt doesn't prevent liability for retaliation. So the district court shouldn't have granted summary judgment on the second retaliation claim.

4. Conclusion

We affirm the denial of Mr. Parkhurst's motions for appointment of counsel. These denials fell within the district court's discretion.

We also affirm the grant of summary judgment as to Mr. Parkhurst's first claim of retaliation. Though Mr. Parkhurst claims that the threat to fire him would have chilled an ordinary person from complaining about spoiled salad dressing, he failed to present any evidence about his prison

job. That gap in the evidence entitled Ms. Stinson to summary judgment on the first retaliation claim.

But Ms. Stinson is not entitled to summary judgment on the second retaliation claim. Though Mr. Parkhurst was found guilty, he presented evidence of suspicious timing and a departure from past practice. This evidence could show a retaliatory motive even if Mr. Parkhurst were guilty. We thus reverse and remand for the district court to vacate the award of summary judgment on the second retaliation claim.