

**FILED**

IN THE UNITED STATES COURT OF APPEALS ~~§~~ August 7, 2007  
FOR THE FIFTH CIRCUIT

Charles R. Fulbruge III  
Clerk

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No. 06-41290  
Summary Calendar

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CLIFFORD ALLEN SMITH,

Plaintiff-Appellant,

v.

GEAN LEONARD,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Southern District of Texas  
No. 3:06-CV-288

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Before REAVLEY, SMITH, and BARKSDALE, Circuit Judges.

PER CURIAM:\*

Clifford Smith, a Texas prisoner, appeals the dismissal of his 42 U.S.C. § 1983 complaint against Galveston County Sheriff Gean Leonard in which he complains of poor prison conditions consisting of lead paint, mold, asbestos, and unsanitary food slots. In dismissing Smith's complaint as frivolous and for failure to state a claim for which relief could be granted, the district court ac-

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

cepted the report and recommendation of the magistrate judge (“MJ”) in which the MJ determined that Smith had not alleged a physical injury as required under 42 U.S.C. § 1997e(e). We review the district court’s decision de novo. See *Geiger v. Jowers*, 404 F.3d 371, 373 (5th Cir. 2005); *Black v. Warren*, 134 F.3d 732, 733-34 (5th Cir. 1998).

Smith argues that his symptoms constituted physical injuries and that Leonard’s failure to remove allegedly toxic mold from the jail is gross negligence. Smith’s alleged symptoms—headaches, sinus problems, trouble breathing, blurred vision, irritated eyes, and fatigue—may be sufficient to state a claim of physical injury under 42 U.S.C. § 1997e(e). See *Alexander v. Tippah County*, 351 F.3d 626, 630-31 (5th Cir. 2003); *Gomez v. Chandler*, 163 F.3d 921, 924-25 (5th Cir. 1999); *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997). To the extent Smith’s gross negligence claim is liberally construed to allege an Eighth Amendment claim of cruel and unusual punishment, he has alleged facts sufficient to preclude a determination that his mold claim is frivolous or fails to state a claim. See *Geiger*, 404 F.3d at 373; *Shipp v. McMahon*, 234 F.3d 907, 911 (5th Cir. 2000), overruled on other grounds by *McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002) (en banc); *Palmer v. Johnson*, 193 F.3d 346, 352 (5th Cir. 1999). Accordingly, we vacate the judgment as to the mold claim and remand for further proceedings on that claim. See *Geiger*, 404 F.3d at 373; *Black*, 134 F.3d at 733-34.

Smith does not make any arguments on appeal concerning lead paint, asbestos, or unsanitary food slots. Because he has abandoned those claims, we affirm their dismissal. See *Hughes v. Johnson*, 191 F.3d 607, 612-13 (5th Cir. 1999).

The judgment is AFFIRMED in part and VACATED in part, and this case is REMANDED for further proceedings.