# United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
**FILED**
December 15, 2021
Lyle W. Cayce
Clerk

No. 20-40602
Summary Calendar

BENJAMIN FRANKLIN,

*Plaintiff—Appellant*,

*versus*

BEEVILLE CITY, TEXAS; GARY PENDARVIS; P. CHAPA; CHRISTIE L. GARCIA; BOBBY LUMPKIN; ASSISTANT WARDEN KENNETH M. PUTNAM, JR.,

*Defendants—Appellees*.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:17-CV-370

Before HIGGINBOTHAM, HIGGINSON, and DUNCAN, *Circuit Judges*.

PER CURIAM:*

Benjamin Franklin, Texas prisoner # 1561085, appeals the district court's dismissal of his 42 U.S.C. § 1983 action against the City of Beeville, Texas, and numerous officials employed by the Texas Department of

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

Criminal Justice (TDCJ). Specifically, he challenges the district court's order granting summary judgment in favor of defendants, Gary Pendarvis and Bobby Lumpkin,[1] and dismissing his claims that they acted with deliberate indifference to his health and safety by exposing him to unsafe drinking water at the McDonnell Unit following the City of Beeville's issuance of a boil water notice. He also challenges the district court's dismissal of his remaining claims against the various defendants as frivolous and for failure to state a claim, as well as the order denying his Federal Rule of Civil Procedure 59(e) motion.

"This court reviews a summary judgment *de novo*, using the same standard as that employed by the district court." *McFaul v. Valenzuela*, 684 F.3d 564, 571 (5th Cir. 2012). A district court properly grants a motion for summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A qualified immunity defense, however, alters the typical summary judgment burden of proof in that once the defense is pleaded by an official, the burden shifts to the plaintiff to rebut the defense by establishing a genuine fact issue as to whether the official's allegedly wrongful conduct violated clearly established federal law. *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010).

The district court did not err in granting summary judgment in favor of Lumpkin and Pendarvis and dismissing Franklin's individual-capacity claims against them. *See McFaul*, 684 F.3d at 571. Lumpkin, who was the Director of the TDCJ's Manufacturing, Agribusiness, and Logistics Division, presented evidence that he was not aware of and did not have authority to remedy the issues concerning the boil water notice, but he

[1] Franklin originally identified this defendant as Bobby Humpkin.

conceded that his division might have delivered water tankers to the unit. Franklin, on the other hand, did not present evidence to establish a genuine issue of material fact as to whether Lumpkin was personally involved or should be held liable in a supervisory capacity. *See Brown*, 623 F.3d at 253. Therefore, the district court did not err in determining that Lumpkin had no personal involvement in the alleged constitutional violation. *See Brown v. Megg*, 857 F.3d 287, 289 (5th Cir. 2017). Turning to Pendarvis, a regional maintenance supervisor for TDCJ, he presented evidence that: he immediately posted the boil water notice throughout the unit; he ordered drinking water via tanker truck and also had potable water available throughout the unit as well as in the commissary; he tested the water and found high levels of chlorine; he imposed the prison's own boil water notice and ordered another tanker truck of water; he obtained independent lab testing; and he did not allow the unit to begin using the water until receiving satisfactory test results. Franklin presented no evidence establishing a genuine issue of material fact concerning whether Pendarvis violated his constitutional rights. *See Brown*, 623 F.3d at 253. The district court therefore did not err in determining that Franklin failed to show that Pendarvis was aware of and disregarded a serious risk to his health and safety in response to the boil water notice. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Herman v. Holiday*, 238 F.3d 660, 664 (5th Cir. 2001).

Franklin's other arguments on appeal lack merit for the following reasons. First, his reliance on *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), is misplaced, as that decision concerns dismissals for failure to state a claim, not summary judgment. Further, the district court properly viewed the evidence in the light most favorable to Franklin as the nonmoving party, determined that he did not present sufficient evidence to establish a genuine issue of material fact, and concluded that the uncontroverted evidence established

that he failed to state an Eighth Amendment claim against Lumpkin and Pendarvis. *See Butts v. Martin*, 877 F.3d 571, 581-82 (5th Cir. 2017).

Nor has Franklin shown that the district court abused its discretion in denying his Rule 59(e) motion. *See Dearmore v. City of Garland*, 519 F.3d 517, 520 (5th Cir. 2008). His argument that he is an expert on water treatment is conclusional and may not be relied upon as evidence. *See Butts*, 877 F.3d at 581-82. Franklin has not identified any specific information he sought to obtain from the defendants through discovery or explained how that evidence would have been sufficient to establish a genuine issue of material fact to preclude summary judgment. In addition, the district court properly applied the deliberate indifference standard to his Eighth Amendment claim, not a negligence standard as Franklin argues. Franklin's argument that the magistrate judge and the district court judge were biased against him is conclusional as he does not identify any evidence showing bias on the part of either judge. Franklin's equal protection claim is similarly conclusional and is inadequately briefed.

Finally, Franklin reasserts his claims that (1) the defendants failed to provide an adequate amount of drinking water and failed to remedy various maintenance-related issues; (2) defendant Christie L. Garcia failed to protect him from other offenders who continued to threaten him; and (3) the defendants conspired to deprive him of his constitutional rights and subject him to a campaign of harassment. In a reasoned decision, the district court dismissed these claims as frivolous and for failure to state a claim pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)(1). Franklin, however, has not identified any error in the district court's dismissal of these claims, and he therefore has abandoned any challenge to the district court's decision on these issues. *See Brinkmann v. Dallas Cnty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987). Franklin also has failed to identify any error in the district court's dismissal, pursuant to § 1915(e)(2)(B), of his official-capacity

claims for injunctive and declaratory relief against Lumpkin and Pendarvis, and therefore, he has abandoned any challenge to the dismissal of these claims. *See id.*

Accordingly, the district court's judgment is AFFIRMED. Franklin's motions for hearing en banc and for permission to file a supplement to the record are DENIED.