

**UNITED STATES COURT OF APPEALS
For the Fifth Circuit**

No. 92-3335
Summary Calendar

Maurice Gibbs,

Plaintiff-Appellant,

VERSUS

Bruce N. Lynn,

Defendants-Appellees.

Appeal from the United States District Court
For the Middle District of Louisiana

(CA 90 1070 B M1)

(October 22, 1993)

Before THORNBERRY, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

THORNBERRY, Circuit Judge* :

Maurice Gibbs appeals from the district court's grant of summary judgment for the defendants and the subsequent dismissal of his civil rights suit against various prison officials and employees of the Louisiana Department of Corrections. On appeal, Gibbs raises various challenges to the district

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

court's granting of summary judgment. We agree that summary judgment was inappropriate as to some of the defendants and therefore reverse and remand this action to the district court.

Facts and Prior Proceedings

Maurice Gibbs, an inmate in the Louisiana state prison system, filed this pro se lawsuit under 42 U.S.C. § 1983, alleging violations of his civil rights by defendants, who are prison officials and employees. Both Gibbs and the defendants moved for summary judgment. Summary judgment was granted to the defendants. Because we are reviewing a summary judgment motion, we review the evidence relating to all material issues in the light most favorable to the non-moving party below. **King v. Chide**, 974 F.2d 653, 655 (5th Cir. 1992). The non-moving party on the defendant's motion for summary judgment is Gibbs.

I. Standard of Review

To determine whether summary judgment has been properly granted, an appellate court must review the record employing the same standards which the trial court applied. **Wilson v. United States Fidelity & Guaranty Insurance Co.**, 830 F.2d 588, 590 (5th Cir.1987) (citing **Reid v. State Farm Mutual Auto Insurance Co.**, 784 F.2d 577, 578 (5th Cir.1986)). Hence, we must determine whether "there is no genuine issue as to any material fact" and whether the defendants are "entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); see **Galindo v. Precision American Corp.**, 754 F.2d 1212, 1216 (5th Cir.1985). We therefore draw all reasonable inferences most favorable to the party opposing the motion. **Phillips Oil Co. v. OKC Corp.**, 812 F.2d 265, 272 (5th Cir.), **cert. denied**, 484 U.S. 851, 108 S. Ct. 152, 98 L. Ed. 2d 107 (1987). However, "only disputes over facts that might affect the outcome of this suit under the governing laws will properly preclude the entry of summary judgment." **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).

Reviewing the evidence in the light most favorable to Gibbs, the facts reveal that Gibbs injured his back in 1988 while performing hard labor in prison. Gibbs' medical records showed that on May 17, 1990, a physician at the Louisiana State Penitentiary New General Hospital examined Gibbs for

lower back pain.¹ Gibbs was issued a medical duty status relating to his work duties. Gibbs alleges that the doctors' notes ordered him to be placed on "Limited Duty" status for one week pending the results of a CAT scan. Instead, Gibbs was ordered by defendant Butler to work on a "Light Duty" squad. Ten minutes after receiving the work order, Gibbs informed defendant Jimmy Johnson that his medical status precluded him from doing "Light Duty" work. Johnson required Gibbs to begin the "Light Duty" work. Gibbs was given a hoe and ordered to scrape grass. After Gibbs had worked for two hours, defendant Ronnie Lundsford, a field emergency medical technician, spoke to Gibbs. After reading the medical status report, Lundsford called someone on the phone seeking information on whether Gibbs could use a hoe.² After Lundsford returned, Gibbs was told to continue using the hoe. In support of his motion for summary judgment, Gibbs attested that when he was ordered to perform "Light Duty" work in squad B, his back injury was severely aggravated. As a result, Gibbs argues that his rights were violated because he was forced to perform work which did not correspond to his medical duty status.³ Specifically, he argues that he was forced to hoe in violation of his "Limited Duty" medical status. Hoeing, he argues, is only required when an inmate is put on "Light Duty" medical status. The defendants argue that he has misinterpreted his medical status. The defendants also explain that during this time period at the prison, there was a change in the requirements for each medical duty status. Gibbs asserts that a genuine issue of material fact exists regarding whether he was placed on "Limited Duty" medical status, which would have restricted his work duty.

¹ We note that both Gibbs and the defendants submitted Gibbs' medical records as support for their respective motions for summary judgment.

² Gibbs does not know who Lundsford phoned. Lundsford claims he called the hospital.

³ Gibbs has provided this Court with what he believes to be the "Light Duty" squad requirements. If a prisoner's medical duty status is "Light Duty A", hoeing is not a requirement; however, hoeing is a requirement for "Light Duty B". Gibbs does not provide us with the requirements for "Limited Duty".

A prisoner states a valid claim under the Eighth Amendment if he shows that (1) an assigned work duty significantly aggravated a medical condition, causing him injury and (2) the prison officials knew of the specific danger because of his physical condition and yet ignored it. **Jackson v. Cain**, 864 F.2d 1235, 1247 (5th Cir. 1989).

The magistrate judge recommended granting the defendants' motion for summary judgment after he reviewed several documents offered as evidence by the defendants. The magistrate judge determined that the document which indicated that Gibbs' work duty was to be restricted was typed in error, and that Gibbs' doctor intended to place Gibbs on "Light Duty" not on restricted duty. The magistrate judge also determined that Gibbs was not denied medical care because defendant Lundsford examined Gibbs in the field. In addition, the judge agreed that Lundsford contacted the hospital to verify Gibbs' medical limitations and found that Gibbs could use a hoe.

One document that the magistrate judge and the district court relied on was a Triage Report, wherein defendant Lundsford verified that Dr. Bankston intended to place Gibbs on "Light Duty" in Squad B on May 17, 1990. Both courts also looked to a memorandum prepared on December 5, 1990, stating that an investigation into Gibbs' complaints revealed that the typed interpretation of Dr. Bankston's orders was typed in error.

Neither the district court, nor this Court, may properly consider hearsay evidence or unsworn documents when considering whether a genuine issue as to a material fact exists. **Martin v. John W. Stone Oil Distributor, Inc.**, 819 F.2d 547, 549 (5th Cir. 1987)(citations omitted). Although the records were certified, both the typed interpretation of Dr. Bankston's orders and the December 5, 1990 memorandum contain hearsay evidence of what Dr. Bankston intended on May 17, 1990, when he ordered Gibbs to "LDRS B." Because the medical records themselves do not otherwise reveal what Dr. Bankston's intention was, the district court erred by relying on a document containing hearsay. Without these documents, a genuine issue of material fact exists.⁴ In addition, the record

⁴ We express no opinion whether Gibbs' claims could withstand a properly documented motion for summary judgment.

does not indicate whether or not Gibbs had a serious medical need.⁵ Accordingly, the district court's grant of summary judgment in favor of defendants Johnson, Butler, and Lundsford must be reversed.⁶

Gibbs next argues that his claims against defendants Bruce Lynn, Secretary of the Department of Corrections at the Louisiana State Penitentiary, and John Whitley, warden at the prison, should not have been dismissed because they knew or should have known of the conduct of defendants Johnson, Butler and Lundsford. He states that Lynn and Whitley "permitted a pervasive risk of harm to prisoners, failed to define the duty of subordinates, failed to correct the conduct of subordinates, and encouraged the conduct stated in the complaint." Gibbs attaches various exhibits, not presented in the district court, to support his claims against Lynn and Whitley.

Gibbs, however, failed to allege any personal involvement by defendants Lynn and Whitley in his assigned work duty. A defendant cannot be held liable under § 1983 on a theory of vicarious liability, including respondeat superior. **Baskin v. Parker**, 602 F.2d 1205, 1207-08 (5th Cir. 1979). "Personal involvement is an essential element of a civil rights cause of action." **Thompson v. Steele**, 709 F.2d 381, 382 (5th Cir.), **cert. denied**, 464 U.S. 897 (1983). Accordingly, the district court did not err in granting summary judgment in favor of defendants Lynn and Whitley.

Gibbs asserts that the court erred when it denied his motion for appointment of counsel. The Court need not address this argument because Gibbs did not appeal the magistrate judge's order denying his motion to the district court. **See Unida v. Levi Strauss & Co.**, 986 F.2d 970, 976 n.4 (5th Cir. 1993) (citation omitted).

Gibbs next argues that the court erred when it denied his motion to compel responses to his discovery requests. The magistrate judge denied Gibbs' motion as moot because since the filing of the motion, the defendants had responded. Gibbs argues that he would have used these documents

⁵ We note that while Gibbs purported to attach documents to his summary judgment motion on this subject, they are missing from the record before us.

⁶ We need not address Gibbs' argument that the district court erred when it denied his motion to strike the defendant's documents presented in support of their motion for summary judgment because we have already determined that some of the documents contain hearsay evidence, and the district court erred in considering these documents.

to defeat the defendants' motion for summary judgment. Because we are reversing the grant of summary judgment, we need not address this argument as Gibbs will have the defendants' responses available to him in the district court on remand.

Conclusion

We reverse the summary judgment as to defendants Johnson, Butler and Lundsford, and affirm the grant of summary judgment as to defendants Lynn and Whitley.