IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4837
Summary Calendar

RICHARD C. ARAIZA,

Plaintiff-Appellant,

v.

U. P. JOHNSON, ETC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(6:91-CV-700)

(September 20, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.*

EDITH H. JONES, Circuit Judge:

Appellant Richard C. Araiza appeals the dismissal of his section 1983 lawsuit pursuant to 28 U.S.C. § 1915(d). We affirm.

On October 25, 1991, Araiza, who apparently suffers from asthma, noticed that his section had been painted when he returned to the building from the outside yard. Sensing strong paint fumes, he asked Sergeant John Riggle to place him elsewhere until the fumes subsided. Riggle refused. Later, Araiza refused to return

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*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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

to his cell after a shower because of the fumes. Riggle was summoned and arrived on the scene with Nurse Molly Johnson, the head nurse. Johnson checked Araiza's lungs, determined that he was not having an asthma attack, and stated that Araiza should be returned to his cell. Araiza concedes that he was not suffering an asthma attack, but argues that he should not have been returned to his cell because he was dizzy and short of breath.

The facts alleged by Araiza are insufficient to show that either Riggle or Johnson were consciously indifferent to Araiza's safety or needs. Araiza complains that Sergeant Riggle should have moved him to a different cell, but he concedes that Riggle sought medical advice before deciding not to move Araiza. Araiza also concedes that Nurse Johnson examined him and determined that he was not suffering an asthma attack. He also concedes that her diagnosis was correct, although he argues that he should have been moved because of his alleged dizziness and shortness of breath. Deliberate indifference to a convicted inmate's serious medical needs may establish a civil rights violation, Jackson v. Cain, 864 F.2d 1235, 1245 (5th Cir. 1989), but a simple disagreement with the medical treatment received or a complaint that the treatment received has been unsuccessful is insufficient to set forth a constitutional violation. Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985). Araiza's allegations involving this incident do not set forth a cause of action.

Araiza next argues that he suffered cruel and unusual punishment because he waited approximately two and one-half months

during the fall of 1991 before receiving a requested second blanket. As an asthmatic, Araiza alleged he could not use the ordinary wool blankets issued to prisoners. He was issued a cotton blanket, but he complained that it was very thin and would not keep him warm during the winter. He requested another blanket on September 30, 1991, but did not receive it until December 20, 1991. As a result of this experience, Araiza sued Director Collins, Warden Crow, and Warden White, because they did not adequately respond to Araiza's grievance concerning his inability to obtain a second cotton blanket.

Assuming the facts as Araiza has alleged them, these defendants' actions did not rise to the level of a constitutional violation. Araiza eventually obtained another blanket as the result of his grievance, and the Eighth Amendment does not afford inmates absolute protection against conditions of confinement which cause mere discomfort or inconvenience. Wilson v. Lynaugh, 878 F.2d 846, 849 (5th Cir.), cert. denied, 493 U.S. 969, 110 S. Ct. 417, 107 L.Ed.2d 382 (1989). Moreover, Araiza concedes that the reason he was not given an additional blanket is that none were available at the time.

On May 20, 1991, Araiza complained about pain in his left testicle and went to see Nurse Johnson. She scheduled an appointment for him with the doctor at the Michael Unit, who after examining Araiza said he would refer him to a specialist. Araiza's appointment to see the specialist was rescheduled on two occasions, and he did not see the specialist until February 1992.

Although the court heard Araiza's testimony of testicular pain, Araiza never demonstrated how the rescheduling of his appointments manifested conscious indifference to his medical needs. Araiza also conceded at his Spears hearing that none of the defendants named in this lawsuit had any personal involvement with this claim. Although Nurse Johnson is a named defendant to this lawsuit, he does not complain of her actions relating to this claim. From his complaint and testimony, it is clear that Araiza has not sued anyone in connection with this claim and has not shown any named defendant's participation in the alleged wrong. See Jacquez v. Procunier, 801 F.2d 789, 793 (5th Cir. 1986). This claim lacks merit.

In a related claim, Araiza complains that he did not get pain medication for his ailment. He contends that he told Nurse Johnson that he needed pain medication on two occasions, and on both occasions she replied that Araiza had an appointment scheduled and there was nothing else she could do. He does not elaborate whether these appointments were with the specialist or whether he ever filed sick call requests to talk to a physician at the unit about his pain. These allegations, too, are insufficient to demonstrate conscious indifference to Araiza's medical needs in connection with this incident.

Finally, Araiza complains that he does not receive adequate preventive care at the Michael Unit. When he was at the Beto I Unit, he received preventive care by being hooked up to an oxygen machine to prevent asthma attacks. This treatment is not

available at the Michael Unit. Instead, Araiza was given an inhaler to help him when he does have an asthma attack. While his allegations suggest that asthmatics in the general prison population appear to receive better treatment than those in administrative segregation, there is no indication that the treatment he now receives is in any way substandard. Only if the different classification of treatment were intentional or arbitrary and capricious could it violate the equal protection clause. In this case, not even a hint of invidious discrimination arises from the alleged different treatments for asthmatics. Consequently, Araiza's equal protection claim must fail.[1]

For the assigned reasons, the district court's dismissal of Araiza's claims is **AFFIRMED**.

[1] We do not consider two other matters. First, Araiza waived his other equal protection claim by not raising it initially before the magistrate judge. Second, Araiza's state law claim, as he concedes, presents no federal constitutional question for us to resolve. Additionally, there is no reason to appoint counsel for Araiza here.