

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2759
Summary Calendar

WESLEY CAREY, JR.,

Plaintiff-Appellant,

versus

DAVID STACKS, Warden, JERRY
BALLARD, and DR. HUNG L. DAO,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-92-2577)

(July 1, 1994)

Before POLITZ, Chief Judge, JONES and EMILIO M. GARZA, Circuit
Judges.

PER CURIAM:*

Wesley Carey, Jr., a prisoner of the Texas Department of
Criminal Justice, appeals an adverse summary judgment in his
42 U.S.C. § 1983 civil rights action. We affirm.

*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should not be published.

Background

Carey, suffering from swollen tonsils and from back pain associated with a gunshot wound received years before, sought medical treatment. The prison physician, Dr. Hung Dao, treated Carey with medication for his back pain and gave a medical restriction limiting strenuous work assignments or work that involved lifting more than 25 pounds. For some time Dr. Dao prescribed penicillin and refused to recommend surgery for the difficulty with Carey's tonsils. Ultimately, however, Dr. Dao recommended that Carey be sent to a hospital for evaluation for a tonsillectomy.

Invoking section 1983, Carey complains that Dr. Dao rendered improper treatment for his tonsil problem, and that Warden David Stacks failed to revise his work assignment in light of Dr. Dao's medical restriction. Carey also sued prison health director Jerry Ballard but made no allegation whatsoever that Ballard engaged in culpable conduct.¹ Dao, Stacks, and Ballard moved for summary judgment and, after a response from Carey, the magistrate judge recommended granting the motion. The district court adopted the magistrate judge's report, granted summary judgment, and dismissed Carey's petition.

Analysis

We review the grant of summary judgment *de novo*, affirming if the record discloses no genuine issue of material fact and that the

¹Where no allegation of personal wrongdoing has been made against a section 1983 defendant, summary judgment is appropriate. See **Thompkins v. Belt**, 828 F.2d 298 (5th Cir. 1987).

moving parties are entitled to judgment as a matter of law.²

Carey first alleges that he was denied proper medical care for tonsillitis. Neither unsuccessful or negligent medical treatment nor mistaken medical judgment will support a section 1983 action.³

Carey next maintains that the warden left him in a work assignment too strenuous for his physical condition. Carey argues only that he should have been moved to Work Force B, a lighter-duty group, rather than remaining in Work Force A. Even given Dr. Dao's recommended work restriction, however, Carey was correctly classified under prison regulations for Work Force A. Disagreement with one's medical classification provides no basis for section 1983 relief.⁴

Carey finally contends he was denied an opportunity to amend his complaint. While a specific opportunity to amend may be required before dismissing a prisoner suit under 28 U.S.C. § 1915(d), the same protection is not accorded plaintiffs on a motion for summary judgment because in the latter proceeding notice and an opportunity to respond are provided.⁵ Despite the liberality with which we treat *pro se* complainants, a specific opportunity to amend is not required before dismissal on summary

²**Matagorda County v. Law**, 19 F.3d 215 (5th Cir. 1994).

³**Varnado v. Lynaugh**, 920 F.2d 320 (5th Cir. 1991).

⁴**Wilson v. Budney**, 976 F.2d 957 (5th Cir. 1992). Carey also complains on appeal that he has experienced a physical decline because of his assignment to Work Force A. This allegation was not raised in the trial court and will not be considered on appeal. **Self v. Blackburn**, 751 F.2d 789 (5th Cir. 1985).

⁵See **Graves v. Hampton**, 1 F.3d 315 (5th Cir. 1993).

judgment.⁶

Carey's motions before this court for appointment of counsel and to submit additional evidence are DENIED.

The judgment of the district court is AFFIRMED.

⁶Cf. **Jacquez v. Procunier**, 801 F.2d 789 (5th Cir. 1986).