

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4411
Summary Calendar

ELROYCE BREWER,

Plaintiff-Appellant,

versus

GEORGE WALDRON, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Texas
(9-89-CV-24)

(November 1, 1994)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.*

GARWOOD, Circuit Judge:

Plaintiff-appellant Elroyce Brewer (Brewer), an inmate in the Texas Department of Criminal Justice (TDCJ), filed this civil rights complaint alleging that various prison officials acted with deliberate indifference when they assigned him duties in the prison chicken house, knowing that the work would significantly aggravate

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Brewer's serious medical condition. We conclude that Brewer has failed to establish an Eighth Amendment violation and affirm the district court's grant of a directed verdict for the defendants.

Facts and Proceedings Below

From August 1984 to October 1986, Brewer was an inmate in the Eastham Unit of TDCJ, assigned to work in the prison chicken house. This job entailed gathering and washing eggs, vaccinating the chickens against avian bronchitis and fowlpox,¹ burning the vials containing the vaccine after use, removing dead chickens, and driving a tractor. Unbeknownst to Brewer at the time, the vaccines he administered contained live viruses.

In 1988, Brewer filed this *pro se* civil rights action alleging that his exposure to the vaccines containing live viruses caused him to contract avian bronchitis and fowlpox. He complained of asthma, bronchitis, and unusual growths on his lip and right testicle. The TDCJ officials named as defendants included George

¹ Infectious avian bronchitis is defined as:

"a specific infectious disease of young birds, caused by infectious bronchitis virus and associated with blocking of respiratory passages by exudate; it is highly transmissible and often causes heavy losses of young chicks, and heavy production losses among older, laying birds." *STEDMAN'S MEDICAL DICTIONARY* at 195 (5th ed. 1982).

Fowlpox is defined as:

"a disease of fowl, worldwide in distribution, caused by fowlpox virus and characterized by proliferative nodular dermal lesions followed by scabbing, chiefly on the head but sometimes involving the feet and vent; there may also be eye lesions or involvement of the trachea (so-called fowl diphtheria); transmission is by contact, or mechanically by mosquitoes." *Id.* at 559.

Waldron, the warden of the Eastham Unit from September 1985 until August 1989; Carlton Hazelwood, the assistant manager of livestock and poultry for the agricultural headquarters of TDCJ; Gary McGee, the poultry supervisor for the Eastham Unit; and Bill Jones, the livestock supervisor of the Eastham farm. Brewer's complaint, initially filed in the United States District Court for the Southern District of Texas, was transferred to the Eastern District of Texas and referred to a magistrate judge, who recommended that the complaint be dismissed as frivolous pursuant to 28 U.S.C. § 1915(d). In response to Brewer's objections to this recommendation, however, the magistrate judge withdrew the report, and the case proceeded to a jury trial before the district court.

Prior to trial, the district court appointed counsel to represent Brewer. The court also appointed Dr. Edward R. Rensimer, a specialist in internal medicine and infectious diseases, to examine Brewer and render an opinion on his claims. In a report submitted to the district court, Dr. Rensimer diagnosed Brewer as having "a subacute inflammatory process active in his body that would be consistent with airway inflammatory disease, such as asthmatic bronchitis." Dr. Rensimer could not conclude that Brewer's asthmatic condition resulted from his work in the chicken house, however, and recommended further tests by an allergy specialist:

"The only truly significant finding in the laboratory data that I received was an elevated immunoglobulin E antibody level of 385 IU/ml, with normal being 0 to 180. This is consistent with an asthmatic predisposition. There is no way to specifically tie this to the patient's exposure in his work at the [TDCJ]. *It is just as likely, and perhaps more so, that the patient has a*

predisposition towards asthma and allergic hypersensitivity since childhood. Again, I think that this question may best be answered by further evaluation with sensitivity testing by an allergy/immunology expert." (Emphasis added.)

Dr. Rensimer conducted a computer search to access relevant medical literature pertinent to the case. He failed to find any literature profiling the live fowlpox or avian bronchitis vaccines, but he did find a number of articles detailing the occurrence of respiratory problems in occupations involving exposure to a variety of fowl and their habitats.

Dr. Rensimer opined:

"From my experience as an internal medicine and infectious disease specialist dealing with chronic or recurrent respiratory problems related to infection or hypersensitivity, it is most medically reasonable that this patient's problems antedated his exposure in the vaccination of chickens, but that his underlying problems were exacerbated by that experience."

During a deposition taken by Brewer's counsel, Dr. Rensimer clarified his conclusions that, although there was no specific literature on the effects of handling the vaccines themselves, the environment in which the vaccines were used could have exacerbated Brewer's asthma.² He reiterated that, although Brewer may have been predisposed to getting bronchitis or asthma, his occupational exposure to the chickens and the vaccines contributed to his

² Dr. Rensimer testified:

"I think that what I concluded was that there wasn't any specific literature regarding the fowl pox virus vaccine or the live bronchitis chicken bronchitis virus vaccine per se, but just the environment where those were being used was enough to and it is well founded that that kind of environment can exacerbate asthma, and that's not new information; that's fairly well established in pulmonary medicine."

asthmatic condition.³

On cross-examination by defendant's counsel, however, Dr. Rensimer agreed that Brewer had not contracted avian bronchitis or fowlpox, and that he had never heard of any human having either of those diseases. The doctor conceded that Brewer's habit of smoking one-half a pack of cigarettes a day could also be a contributing factor of his asthma.⁴

At trial, Brewer introduced the testimony of Dr. Rensimer (by deposition), the four defendants, a fellow TDCJ inmate who had worked with Brewer in the chicken house and who also suffered from asthma, and Dr. Kerry Rasberry, an osteopathic physician for TDCJ who reviewed Brewer's medical records. Brewer also took the stand to testify concerning his medical condition.

Following Waldron's testimony, the district court dismissed Brewer's claims against the warden, finding that Brewer had failed to produce any evidence of the warden's personal involvement in the management of the chicken house or in Brewer's activities there. At the close of Brewer's evidence, the district court took the case from the jury and entered a directed verdict in favor of the defendants.

Brewer filed a timely notice of appeal. He pursues this appeal *pro se*.

³ Dr. Rensimer never specified any connection between the vaccines and Brewer's condition. Indeed, he testified that he could find nothing to suggest such a connection.

⁴ Dr. Rensimer testified at his deposition that Brewer had admitted smoking a pack of cigarettes per day for eight to ten years prior to 1985. From 1985 on, Brewer smoked about half a pack per day.

Discussion

We review a district court's award of judgment as a matter of law, pursuant to FEDERAL RULE OF CIVIL PROCEDURE 50(a), *de novo*, examining the entire record and all inferences in the light most favorable to the non-movant. *Turner v. Purina Mills, Inc.*, 989 F.2d 1419, 1421 (5th Cir. 1993). The award of judgment as a matter of law is appropriate only when the facts and inferences point so strongly in the movant's favor that no reasonable jury could reach a contrary conclusion. *Id.*

Brewer relied on two theories of recovery before the district court: (1) that he had contracted avian bronchitis and fowlpox from his exposure to the live viruses in the vaccines and (2) that the dust and feathers in the air in the chicken house caused his bronchitis and exacerbated his asthmatic condition. In his briefs on appeal, Brewer argues only that the chicken vaccines were dangerous to humans. Because he does not pursue his claim that the dusty conditions of the chicken house affected his medical condition, we deem this theory of recovery waived. *Brinkmann v. Dallas County Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987) (issues not briefed on appeal are deemed abandoned).

Unlike most Eighth Amendment claimants, Brewer does not challenge the amount or quality of the medical care he has received in TDCJ. Instead, he claims that prison officials acted with deliberate indifference in assigning him to work in the chicken house despite their knowledge that such work would affect his medical condition. Work which is not in and of itself cruel and unusual may violate the Eighth Amendment if prison officials are

aware that it will "significantly aggravate" a prisoner's serious medical condition. *Jackson v. Cain*, 864 F.2d 1235, 1246 (5th Cir. 1989). To establish the Eighth Amendment violation, a prisoner must show that the defendants acted with deliberate indifference. *Wilson v. Seiter*, 111 S.Ct. 2321, 2326-27 (1991).

The Supreme Court has recently held that a civil rights claimant "need not show that a prison official acted or failed to act believing that harm actually would befall an inmate" in order to prove deliberate indifference. *Farmer v. Brennan*, 114 S.Ct. 1970, 1981 (1994) (failure-to-protect case). Instead, deliberate indifference may be found if a prison official acted or failed to act despite his knowledge of a substantial risk of serious harm. *Id.* "[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.* Therefore, Brewer must show that the defendants knew of a substantial risk of serious harm posed by human exposure to the chicken vaccines (or, that they so clearly should have known thereof that a jury could properly infer their actual knowledge thereof), and were deliberately indifferent to that known risk when they assigned Brewer to work in the chicken house vaccinating the chickens.

The trial testimony does not support Brewer's allegations.

Dr. Rensimer testified that he could find no indication that Brewer had contracted avian bronchitis or fowlpox, nor did he know of any human having had either disease. Brewer did not produce any

evidence to dispute this.⁵

Defendant Hazelwood testified that he did not know of any instances of humans contracting either fowlpox or avian bronchitis. He stated that he read the literature which accompanied the vaccines; the literature did not recommend protective gear, nor did it warn of any public health significance concerning the vaccines. He explained that the vials containing the vaccines were burned after use to protect the chickens from exposure to the virus in an uncontrolled environment, not because of any potential danger to humans. Hazelwood testified that he was not aware of any potential risks posed by the vaccines which would require a warning to the inmates administering the vaccine. Based on his experience and education, Hazelwood stated that the procedures used in the TDCJ chicken houses were compatible with industry-wide procedures in the United States.

Defendant McGee, Brewer's immediate supervisor, testified that he did not feel that he was placing Brewer in any kind of danger in assigning him to work with the chicken vaccines.⁶

Defendant Jones testified that Brewer had approached him with

⁵ Dr. Rensimer further indicated that Brewer's asthmatic condition antedated the dates of his exposure to the viruses and dust in the chicken house. Although he testified that the conditions in the chicken houses may have exacerbated Brewer's asthma, he also stated that Brewer's smoking habit could be a contributing factor.

⁶ He further stated that dust masks were kept in the office at the chicken house for the inmates' use. Defendant Hazelwood also testified that masks were available for the inmates, although there was no requirement that the masks be worn. Defendant Jones stated that some masks were kept in the brooder house in addition to those in the office area.

a question about the safety of the chicken vaccines. Jones read the packaging for the vaccines and found no warning concerning any danger to humans. Through Hazelwood, Jones got in touch with the Texas A&M University Poultry Department and was advised that there were no instances of any problems with the vaccines. When Brewer complained of his breathing problem, Jones immediately assigned him to drive the tractor for the chicken operation. Jones had never heard of any inmate contracting warts or bronchitis from working around chickens.

TDCJ inmate Freddie Burrough, Jr., testified that he had worked with Brewer in the chicken house of the Eastham Unit and had experienced an aggravation of his preexisting asthmatic condition. On cross-examination, he admitted to having smoked cigarettes for approximately twenty years and conceded that he had never developed any warts from working with the chicken vaccines.

Dr. Rasberry, the TDCJ physician who reviewed Brewer's prison medical records, testified that he was unaware of any potential hazards in the chicken house. He had never heard of any human contracting avian bronchitis or fowlpox and did not believe such a thing was possible. Brewer's complaints about nodules in his neck and warts on his genitals predated his work in the chicken house. Brewer did not complain about asthma until July of 1985, after he had been working in the chicken house for almost one year.⁷ In Dr.

⁷ Dr. Rasberry conceded that the work in the chicken house probably aggravated Brewer's asthma. He did not specify any connection to the vaccines, however; all other testimony concerning the aggravation of the asthma related to the dusty conditions in the chicken house, an issue not before us on appeal.

Rasberry's opinion, Brewer did not contract his rashes, the warts on his face and genitals, or his initial predisposition to asthma from working with the chickens. Based on the medical records, Dr. Rasberry testified that there was no medical reason for TDCJ officials not to have assigned Brewer to work in the chicken house in the first place or later to have moved him from that assignment for medical reasons.

Upon this evidence, the district court concluded, and Brewer's attorney conceded, that there was no evidence of a causal connection between the vaccines and Brewer's symptoms. Upon our reading of the record, we find no evidence that the vaccines posed any risk at all to humans, much less an obvious risk to Brewer. Therefore the jury could not have inferred that the defendants knew, or even should have known, of any danger in using the vaccines. Without such an inference, no reasonable jury could have found that the defendants were deliberately indifferent to the effects of the work in the chicken house on Brewer's medical condition. Indeed, the defendants took measures to prevent any harm to Brewer, including providing dust masks and transferring Brewer to a different job assignment when he complained of his breathing problems.

Brewer also challenges the district court's dismissal, during trial, of his claims against Warden Waldron. We need not reach this issue. Even assuming Waldron was liable to Brewer in a supervisory capacity, Brewer could not prevail against the warden because, as discussed above, he has failed to establish deliberate indifference.

Conclusion

For the reasons stated above, the judgment of the district court is

AFFIRMED.