

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-5341  
Conference Calendar

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CECIL LLOYD ALLEN,  
Plaintiff-Appellant,

Plaintiff-Appellant,

versus

RONALD REED, Dr.,  
Unit Doctor, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Eastern District of Texas  
USDC No. 9:93-CV-94  
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(March 24, 1994)

Before KING, DAVIS, and DeMOSS, Circuit Judges.

BY THE COURT:

Cecil Lloyd Allen's motion for leave to proceed in forma pauperis (IFP) is hereby DENIED as moot. The district judge implicitly granted Allen leave to proceed IFP when he dismissed Allen's complaint as frivolous. Because Allen's appeal requires no further briefing, we proceed to consider the merits of the appeal. See Clark v. Williams, 693 F.2d 381, 382 (5th Cir. 1982)(reviewing court may dispose of appeal on motion to proceed IFP on appeal).

A reviewing court will disturb a district court's dismissal of a pauper's complaint as frivolous only on finding an abuse of discretion. A district court may dismiss a complaint as

frivolous "`where it lacks an arguable basis either in law or in fact.'" Denton v. Hernandez, \_\_\_ U.S. \_\_\_, 112 S.Ct. 1728, 1733-34, 118 L.Ed.2d 340 (1992)(quoting Neitzke v. Williams, 490 U.S. 319, 325, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989)).

Denial of medical care to an imprisoned convict is governed by the Eighth Amendment. To prevail, a plaintiff "must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Prison officials may be liable for their deliberate indifference to conditions that are likely to cause health complications for inmates. Helling v. McKinney, \_\_\_ U.S. \_\_\_, 113 S.Ct. 2475, 2480-81, 125 L.Ed.2d 22 (1993)(environmental tobacco smoke). "The legal conclusion of `deliberate indifference[]' . . . must rest on facts clearly evincing `wanton' actions on the part of the defendants." Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985).

The dismissal of Allen's HIV-exposure claim was premature. Assuming, without deciding, that Allen's allegations are true, it is arguable that he faced an increased risk of infection with HIV by being forced to shower under the conditions he alleges prevailed in the prison showers. Expert medical testimony or other medical evidence might be helpful in determining the level of risk Allen faced. Additionally, Allen alleges that he was persistent in seeking a medical shower pass or a plastic bag to cover his foot. It is arguable, if Allen's allegations prove

true, that prison officials knew of Allen's condition and of conditions in the shower, yet failed to respond adequately. On remand, the defendants should be served and the district court should allow Allen an opportunity to develop his claim. See Eason v. Thaler, 14 F.3d 8, 9 (5th Cir. 1994).

The dismissal of Allen's tuberculosis-testing claim and his claim regarding the treatment of his infected foot, on the other hand, was not an abuse of discretion. "Unsuccessful medical treatment does not give rise to a § 1983 cause of action. Nor does [m]ere negligence, neglect or medical malpractice." Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991)(citations omitted).

Allen was treated for tuberculosis in 1992. He does not allege that he suffered symptoms of the disease when he sought a second test. He merely disagrees with the testing procedures of the prison. At most, his complaint alleges negligence by Nurse Marshall. Additionally, Allen alleges that prison medical personnel treated his foot by means other than giving him a bag or a medical shower pass. His contention that he received inadequate treatment for his infection therefore amounts to a mere disagreement with the prescribed treatment.

AFFIRMED in part; REVERSED and REMANDED in part.