

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 94-10881

TEDDY ROBINSON,
Plaintiff-Appellant,

versus

RANDY McLEOD, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(2:93-CV-81)

(April 20, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:*

Plaintiff Robinson appeals the district court's dismissal of his Section 1983 claims. We affirm.

I. FACTS

At all times relevant to this case, appellant Teddy Robinson was an inmate in the Bill Clements Unit, Texas Department of Criminal Justice, Institutional Division (TDCJ). Robinson brought this action under Section 1983 against Randy McLeod, former Warden of the Bill Clements Unit, Reed Smith, and Rick Hudson, Assistant Wardens of the Unit.

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

In his complaint filed April 5, 1993, Robinson alleged that on November 14, 1992, a crew began construction work on 4 Building in his Unit. This resulted in air pollution from welding smoke, dust, and gases. Robinson filed a grievance with appellee Hudson, asking to be moved from 4 Building because of his allergies, high blood pressure, and breathing problems.

The magistrate judge ordered Robinson to file an amended complaint stating relevant facts with specificity. Robinson complied on March 18, 1994. In his amended complaint, he alleged that he had been diagnosed as having asthma, relative to which he was given a medical test in February 1994. Robinson also alleged that Assistant Warden Hudson's refusal to move him was retaliation.

In denying Robinson's request to be moved, Hudson stated on January 8, 1993, that a review of Robinson's medical records showed that he had "a sinus condition [but] no known allergies or asthma." Hudson stated that the professional opinion of the prison medical department was that the dust in 4 Building was not hazardous to Robinson's health.

Magistrate Averitte held a Spears hearing at which Robinson, prison physician T. Revell, and two other prison officials testified. Dr. Revell testified from medical records that Robinson first complained of shortness of breath on November 2, 1992. Examination revealed that his lungs were clear, which indicated that Robinson did not have asthma at that time. He had no prior history of asthma. On August 27, 1993, Robinson was not wheezing, but there was a decrease of air entering his lungs, so the doctor

gave him an inhaler.

Dr. Revell and another witness testified that the construction work was completed in late February 1993. Robinson admitted that he did not know the date of completion; he said he got the June 1993 date from records in the maintenance shop. Dr. Revell testified that an investigatory report showed that Hudson had consulted with Licensed Practical Nurse Gallop and Mike Jones of the medical department, who expressed the opinion that the dust in 4 Building was not hazardous to Robinson's health. Dr. Revell also testified that exposure to dust can cause asthma.

Robinson testified that Hudson had retaliated against him by denying other grievances, because "he's a party to the suit." He did not advert to his allegation that Hudson had refused to move him as retaliation.

When Robinson was asked what Warden McLeod did to him, he said that McLeod "knew they were doing construction over there." However, Robinson did not have any direct contact with McLeod or with Assistant Warden Smith. He opined that they were liable to him because they were "heads," i.e. high-ranking prison officials.

The magistrate judge recommended dismissal of Robinson's action as frivolous, pursuant to 28 U.S.C. § 1915(d). He concluded that "[a]t most, Defendants may have been negligent in failing to transfer [Robinson] to another building," but that negligence is not actionable under § 1983. The magistrate judge held similarly "[t]o the extent that [Robinson's] complaint is one for deliberate indifference to his medical needs." Robinson filed objections to

the report, complaining that the magistrate judge did not allow him to contact witnesses who could have testified to his condition, or to file discovery motions "before granting summary [judgment]." He also asserted that Dr. Revell testified that he could have contracted asthma as a result of the air pollution during the construction. The district court, adopting the report, dismissed the action.

II. DISCUSSION

A district court may dismiss an in forma pauperis complaint as frivolous pursuant to 28 U.S.C. § 1915(d) "if it lacks an arguable basis in law or fact." Eason v. Thaler, 14 F.3d 8, 9 (5th Cir. 1994). "Such dismissals can be based on medical and other prison records if they are adequately identified or authenticated." Banuelos v. McFarland, 41 F.3d 232, 234 (5th Cir. 1995)(citation and quotation marks omitted). Appellant Robinson's medical and other prison records are authenticated by three notarized affidavits of prison officials.

Robinson contends that the district court erred by dismissing his action as frivolous. He argues that "the court failed to recognize conditions of confinement that subject[ed] him to health hazards that caused him [to contract asthma]," in violation of the Eighth Amendment proscription of cruel and unusual punishment. Robinson asserts that the three appellees violated "[their] own procedures under the Texas Department [of Occupational] Safety Guide of T.D.C.J." Robinson does not mention retaliation in his brief.

"A prison official's `deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." Farmer v. Brennan, 114 S. Ct. 1970, 1974 (1994). The Supreme Court has rejected an objective test for deliberate indifference, "hold[ing] instead that a prison official cannot be found liable ... unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id. at 1979.

Robinson does not dispute the fact that Assistant Warden Hudson denied his request for the transfer because the prison medical department believed that the dust in 4 Building was not hazardous to Robinson's health. This was based on medical records which showed that Robinson had "a sinus condition [but] no known allergies or asthma." Robinson "never [has] alleged that he suffered from asthma at the time of the [construction]."

Robinson asserts that there was a conspiracy to deprive him of his civil rights because "[t]he only name at the bottom of the grievance was Warden Hudson's name." Dr. Revell testified without contradiction, however, that an investigatory review report showed that Hudson obtained the medical opinion that Robinson's health was not endangered from LPN Gallop and Mike Jones of the medical department. As an allegation of conspiracy to deprive Robinson of his civil rights, this is legally frivolous. See Hale v. Harney, 786 F.2d 688, 690 (5th Cir. 1986).

Assuming arguendo that Robinson contracted asthma as a result of being confined in 4 Building during the construction work, he has no claim as a matter of law against Hudson, McLeod, or Smith. Robinson never has alleged that any of these three wardens knew of and disregarded an excessive risk that he might contract asthma if he was not transferred to another building. In fact, he conceded that McLeod and Smith did not even know of his situation - he asserted only that they knew of the construction work.

III. CONCLUSION

For the reasons given above, the district court did not err by dismissing the action as frivolous. Accordingly, the district court's dismissal is AFFIRMED.