UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 94-40190

Summary Calendar

ALBERT NORRIS ROWE,

Plaintiff-Appellant,

VERSUS

JAMES A. SHAW, JR.,
Warden, etc., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Texas

(6:93-CV-632)

(October 25, 1994)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[*]

This is an appeal from the dismissal of a prisoner's civil rights suit against a number of Texas prison wardens and medical officials. The suit concerns a disagreement as to the necessity

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

for special shoes that had once been prescribed for the treatment of a foot injury sustained by the prisoner during a prior incarceration at a Texas prison. We affirm.

The appellant, Albert Norris Rowe, contends that the district court improperly dismissed his complaint. Specifically, he contends that: 1) prison officials were deliberately indifferent to his serious medical needs; 2) the district court erred by not allowing discovery; 3) the district court improperly denied his motion to file a supplemental complaint; 4) he was subjected to retaliatory harassment; and 5) the magistrate judge's conclusions were not supported by the record.

We may affirm a district court's dismissal of an IFP proceeding under § 1915(d) when it lacks an arguable basis in fact or law. Ancar v. Sara Plasma, 964 F.2d 465 (5th Cir. 1992). The standard of review is abuse-of-discretion. Id.

DELIBERATE INDIFFERENCE

The crux of Rowe's argument is that because he was allegedly prescribed special shoes during a prior incarceration, the prison officials' failure to provide him with special shoes during a subsequent incarceration constituted a failure to give him proper medical treatment tantamount to deliberate indifference.

Prison officials violate the Eighth Amendment's proscription against cruel and unusual punishment when they demonstrate deliberate indifference to a prisoner's serious medical needs, constituting an unnecessary and wanton infliction of pain. Wilson v. Seiter, 501 U.S. 294, 297, 302-05, 111 S. Ct. 2321, 115 L. Ed.

2d 271 (1991). A prison official is not deliberately indifferent "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." Farmer v. Brennan, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811 (1994). Deliberate indifference is a legal conclusion which must rest on facts evincing wanton action on the part of the defendant. Walker v. Butler, 967 F.2d 176, 178 (5th Cir. 1992). And, in order to constitute deliberate indifference, the facts must "clearly evince the medical need in question and the alleged official dereliction." Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985).

A physician must have a culpable state of mind before he can be found deliberately indifferent. Mendoza v. Lynaugh, 989 F.2d 191, 193 (5th Cir. 1993). "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). Accordingly, a physician's negligent treatment or diagnosis of a medical condition does not constitute a violation of the Eighth Amendment. Id. Nor does an inmate's disagreement with his medical treatment establish a constitutional violation. See Varnado, 920 F.2d at 321.

Rowe admits that on September 21, 1992, Dr. Ford observed Rowe walk and conducted a tactile examination of Rowe's feet. Dr. Ford's diagnosis does not indicate any disregard of an excessive health risk nor that the doctor drew an inference of a substantial

risk of serious harm. See Farmer, 114 S. Ct. at 1979. Additionally, Rowe was treated three times with Lidocaine injections for his foot ailments and was also provided with arch supports. Rowe has established only a disagreement as to his treatment, or, at best, negligence, which is insufficient to support a claim of deliberate indifference. See Jackson v. Cain, 864 F.2d 1235, 1246 (5th Cir. 1989).

Rowe has likewise failed to set out a claim against the other defendants, including various prison wardens and the health administrator. His complaint against the wardens is that they failed to investigate the circumstances surrounding Rowe's request for special shoes. Because Rowe has failed to show a constitutional violation regarding deliberate indifference, and because his claims against the wardens stem from the deliberate-indifference allegations, he has not stated a claim against the wardens. See Daniel v. Ferguson, 839 F.2d 1124, 1128 (5th Cir. 1988) (to establish a § 1983 claim, a plaintiff must show the deprivation of a constitutional right).

Likewise, Rowe's claim against Bill Layton, the prison medical examiner, fails. Rowe does not assert that Layton had any personal involvement with his case beyond receiving Rowe's complaint concerning his requests to see a doctor. To the extent that Rowe's claim is premised upon the doctrine of respondeat superior, that doctrine does not generally apply to a § 1983 case. Williams v. Luna, 909 F.2d 121, 123 (5th Cir. 1990). Likewise, a suit against a government official in his official capacity is properly treated

as a suit against the government entity. Hafer v. Melo, 502 U.S. 21, 112 S. Ct. 358, 361, 116 L. Ed. 2d 301 (1991). A government entity may be liable only if official policy or governmental custom caused the deprivation of a constitutional right. Monell v. New York City Dep't of Social Services, 436 U.S. 658, 690-94, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Rowe has not alleged any official policy or governmental custom. His claim against Layton fails.

The remaining defendant, John Kelly, was sued because Kelly, the grievance lieutenant, denied Rowe's grievances. Rowe's initial grievance seeking a medical examination was granted. Thus, his subsequent appeals of that grievance were properly denied because he received the relief sought. Likewise, Rowe's second grievance was denied because in Dr. Ford's opinion, special shoes were not required. Rowe does not allege that he was denied access to the grievance procedure but only disagrees with the result. Even assuming that he has alleged a violation of prison regulations, he has not stated a constitutional violation in light of the determination that his deliberate-indifference claim is without merit. See Hernandez v. Estelle, 788 F.2d 1154, 1158 (5th Cir. 1986).

DISCOVERY

Rowe next contends that the district court improperly denied him an opportunity to engage in discovery because the record does not contain a copy of his 1989 HS-18. He does not specifically allege that the district court denied any discovery requests, nor does the record indicate that any were made. Even if the district

court had obtained a copy of the 1989 HS-18, in light of Rowe's own admission concerning Dr. Ford's September 1992 examination, the HS-18 would, at best, indicate a dispute in medical diagnosis. Rowe's contention is factually frivolous and unavailing.

SUPPLEMENTAL COMPLAINT

Rowe next contends that the district court abused its discretion by denying his motion to file a supplemental complaint. He premises his argument on an incorrect assertion that his complaint was dismissed "on the merits of his filing a supplemental complaint out of compliance with the court; on a mistake, inadvertent [sic], and a [sic] excusable negligent one." He contends that because he was proceeding pro se, his failure to comply with the Federal Rules of Civil Procedure should be forgiven. He is mistaken.

Rowe filed a motion for leave to file a supplemental complaint with his supplemental complaint attached. His supplemental complaint sought to add corrections officer Troy Watkins as a defendant. A comparison of the two complaints indicates that Rowe attempted to add allegations against Watkins regarding access to the writ room in November 1993, and by Rowe's own admission, the allegations concern "some issues that have come up since [he had] filed [his initial] complaint" in October 1993. The district court informed Rowe at the Spears hearing that his additional claims appeared to be part of "another lawsuit that [Rowe could] file as opposed to slowing [the instant] lawsuit down." After the Spears hearing, the magistrate judge denied Rowe leave to file a

supplemental complaint, stating that he was seeking to add "one new defendant to the eight defendants originally sued and to add numerous claims which occurred since the filing of his original complaint." The magistrate judge also determined that supplementation "would result in considerable complication and delay of [the instant] litigation."

Because no responsive pleading was ever served on him, Rowe had the absolute right to file the supplemental pleading and to have the district court consider it. Fed R. Civ. P. 15(a); Barksdale v. King, 699 F.2d 744, 746-47 (5th Cir. 1983). Thus, the district court was in error. However, a remand is not necessary because the Texas two-year statute of limitations does not bar Rowe from filing another action relating to the events occurring from October 1993 onward. See Tex. Civ. Prac. & Rem. Code §16.003(a) (West 1986); Burrell v. Newsome, 883 F.2d 416, 418 (5th Cir. 1989).

RETALIATORY HARASSMENT

Rowe alleges that he was subjected to retaliatory harassment due to his use of the prison grievance system. To prevail on a retaliation claim, Rowe must show that the defendants harassed him because of his reasonable attempt to exercise his right of access to the courts. Gibbs v. King, 779 F.2d 1040, 1046 (5th Cir.), cert. denied, 476 U.S. 1117 (1986). He has not done so. He fails to state how he was harassed other than to note that Layton summoned Rowe to Layton's office to inquire whether Rowe could work in the fields. Rowe was never assigned to field work and, by his own admission, worked in the kitchen. Furthermore, to the extent

that his retaliation claim concerns allegations regarding action by Officer Watkins, the defendant he sought to add in his supplemental complaint, those claims are not part of this lawsuit.

RECORD SUPPORT FOR FACTUAL CONCLUSIONS

Rowe also contends that the magistrate judge misquoted or misconstrued his testimony on a number of occasions, obviating support for her factual conclusions. A comparison of his allegations to the Spears transcript indicated that he correctly points to a number of instances where the magistrate judge incorrectly referred to an event by an improper date. However, none of these minor inconsistencies cast serious doubt on the factual findings underpinning the legal conclusion that no deliberate indifference occurred. In other words, Rowe does not challenge the magistrate judge's finding that Dr. Ford told him that he, in Dr. Ford's medical opinion, did not need special shoes.

For all the foregoing, judgment of the district court is AFFIRMED.