

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40819
Summary Calendar

JAMIE FLETCHER, JR.,

Plaintiff-Appellant,,

versus

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice
Institutional Division, Et. Al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(6:93 CV 518)

(May 1, 1995)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:*

Appellant Fletcher pursued this section 1983 action against various Texas state prison officials complaining of constitutional violations arising from his alleged constant exposure to secondary cigarette smoke, otherwise known as environmental tobacco smoke (ETS). He twice moved for appointment

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

of counsel, but the district court denied the motions, finding that Fletcher's case did not present exceptional circumstances justifying court-appointed counsel. After reviewing affidavits and taking testimony from Fletcher, other plaintiffs (who are not involved in this appeal), and the defendants, the district court granted summary judgment against Fletcher. He appeals, raising the sole issue that counsel should have been appointed. We find no abuse of discretion and affirm.

Generally, "[c]ounsel will be appointed in civil cases only in exceptional circumstances." Richardson v. Henry, 902 F.2d 414, 417 (5th Cir. 1990). In deciding whether to appoint counsel in a civil case, a district court should consider the type and complexity of the case; whether the indigent can adequately investigate the case; and whether the presentation of the evidence would require skill and cross-examination. Ulmer v. Chancellor, 691 F.2d 209, 213 (5th Cir. 1982). This court may reverse a district court's denial of counsel only for abuse of discretion. Richardson, 902 F.2d at 417.

The magistrate judge's report and recommendation, filed April 5, 1994, amply demonstrate that her decision to deny appointed counsel for Fletcher was not an abuse of discretion. First, it appears from her summary of the testimony, together with cross-examination, that Fletcher knew very well what kind of evidence he must offer in order to demonstrate a constitutional violation from his exposure to ETS. Second, Fletcher is acquainted with adversary procedures, having filed numerous grievances as well

as compiled a very thick file in the district court in this case. Third, the standard for liability in this Eighth Amendment case is not complex. Both the magistrate judge and district court applied the standard set forth in Helling v. McKinney, 113 S. Ct. 2475 (1993), in which the Supreme Court held that convicted prisoners are entitled to be free from deliberate indifference to their serious medical needs, possibly including exposure to ETS. Both subjective and objective elements are necessary in an Eighth Amendment case. A plaintiff must show that he himself is being exposed to unreasonably high levels of second-hand smoke. Another component of the objective element is whether society considers the risk to inmates so grave that it violates contemporary standards of decency to expose anyone unwillingly to the risk of ETS. Helling, 113 S. Ct. at 2482. Finally, a plaintiff must show that the defendants acted with deliberate indifference to the problem, determined in light of authority's current attitudes and conduct, including the adoption of smoking policies and the realities of prison administration. Helling, id. Finally, not only is the standard of liability straight-forward, but the relevant facts are also not difficult to obtain. Consequently, Fletcher did not require counsel to investigate the case or conduct probing cross-examination.

The magistrate judge and district court applied the Helling standards to the evidence offered and concluded that Fletcher had not created a genuine, material fact issue on

appellees' liability. That Fletcher lost certainly does not mean, however, that he was erroneously denied counsel.

On appeal, Fletcher again requests appointment of counsel, contending that the issues are complex and require particular skill in presentation. Like the district court, we disagree with these contentions and have had no difficulty in understanding Fletcher's position.

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.