

April 22, 2003

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20944
Conference Calendar

BOBBY JOE CUNNINGHAM,

Plaintiff-Appellant,

versus

HENSZEL, Warden; GOODWELL, Asst. Warden;
DR. ALAN ZOUD; LLOY ASCHBERGER, P.A.; C.O. BROWN,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-01-CV-4355

Before DAVIS, BARKSDALE, AND STEWART, Circuit Judges.

PER CURIAM:*

Bobby Joe Cunningham, Texas prisoner # 1038645, appeals the dismissal of his civil rights complaint for failure to state a claim. He argues that the defendants were deliberately indifferent to his asthma condition by forcing him to work in extreme temperatures in the Byrd Unit kitchen.

Where prison officials knowingly put a prisoner on a work duty which they know will "significantly aggravate his serious

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

physical ailment," such a decision constitutes deliberate indifference. Jackson v. Cain, 864 F.2d 1235, 1246 (5th Cir. 1989). Cunningham, however, does not challenge the district court's finding that there was no "significant aggravation" of his asthma. That finding is therefore unreviewable, see Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993), and, consequently, Cunningham has failed to demonstrate that the 28 U.S.C. § 1915(e)(2)(B)(ii) dismissal was erroneous. Additionally, Cunningham's argument that Officer C.O. Brown violated his Eighth Amendment rights is frivolous because Cunningham testified that he did not unload the potato truck.

Cunningham's appeal is without arguable merit and should be dismissed. See 5TH CIR. R. 42.2; Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983). Cunningham is informed that the dismissal of this appeal as frivolous counts as a strike for purposes of 28 U.S.C. § 1915(g), in addition to the strike for the district court's dismissal. See Adepegba v. Hammons, 103 F.3d 383, 388 (5th Cir. 1996). We caution Cunningham that once he accumulates three strikes, he may not bring in forma pauperis a civil action or appeal filed while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. See 28 U.S.C. § 1915(g). Cunningham should review any pending appeals and withdraw any that are frivolous.

APPEAL DISMISSED; THREE-STRIKES WARNING ISSUED.