

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-10133
Summary Calendar

ALONZO HOWARD PAYNE,

Plaintiff-Appellant,

VERSUS

DR. REVELL, Physician, Clements Unit,
Texas Department of Criminal Justice, ET AL.,

Defendants-Appellees.

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

(2:91-CV-104)

(August 30, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

On May 29, 1991, Alonzo Howard Payne, a state prisoner proceeding pro se and in forma pauperis (IFP), filed a complaint pursuant to 42 U.S.C. § 1983 alleging violations of his civil

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

rights. He named as defendants Drs. Revell and Kelly, two of the four physicians who provided medical services to inmates in the Clements Unit of the Texas Department of Criminal Justice, Institutional Division, (TDCJ) through an interagency contract between the prison and Texas Tech University. Payne, an insulin-dependent diabetic, complained that he had received inadequate medical care and was denied antibiotics for a foot infection.

Defendant Revell was served and filed a motion to dismiss, which was subsequently denied. The complaint sent to defendant Kelly was returned and was marked "Refused." The State represented to the court that Dr. Kelly was no longer employed by the prison.

On October 15, 1992, Dr. Revell filed a motion for summary judgment, asserting the defense of qualified immunity. Payne filed an affidavit in opposition to Dr. Revell's motion for summary judgment. The parties consented to have a magistrate judge conduct all further proceedings in the case with any appeal to this Court. The magistrate judge found that Dr. Revell had shown that there was no genuine issue as to any material fact and that he was entitled to judgment on his plea of qualified immunity as a matter of law. The magistrate judge thus granted his motion for summary judgment. The magistrate judge also entered an order dismissing Payne's claim against Dr. Kelly as frivolous pursuant to 28 U.S.C. § 1915(d).

OPINION

Payne argues that the magistrate judge erred by granting Dr. Revell's motion for summary judgment. He contends that Dr. Revell removed a corn from his foot, but did not treat an obvious

infection on his foot, and that Dr. Revell was aware that Payne was not being served proper food for a diabetic.

This Court reviews the district court's grant of summary judgment de novo. Weyant v. Acceptance Ins. Co., 917 F.2d 209, 212 (5th Cir. 1990). Summary judgment is appropriate when, considering all of the allegations in the pleadings, depositions, admissions, answers to interrogatories, and affidavits, and drawing all inferences in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Newell v. Oxford Management, Inc., 912 F.2d 793, 795 (5th Cir. 1990). There is no genuine issue of material fact, if, taking the record as a whole, a rational trier of fact could not find for the nonmoving party. Id.

Because Dr. Revell was a physician providing medical services to inmates at the TDCJ, he is within the scope of qualified immunity. See Savidge v. Fincannon, 836 F.2d 898, 907 & n.39 (5th Cir. 1988). This Court conducts a bifurcated analysis to assess whether a defendant is entitled to qualified immunity. Harper v. Harris County, Tex., 21 F.3d 597, 600 (5th Cir. 1994). The first step is to determine whether the plaintiff has alleged a violation of a clearly established constitutional right. Id.; Siegert v. Gilley, 500 U.S. 226, 232, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991). This Court uses "currently applicable constitutional standards to make this assessment." Rankin v. Klevenhagen, 5 F.3d 103, 106 (5th Cir. 1993). The second step is to determine "whether

the defendant's conduct was objectively reasonable." Spann v. Rainey, 987 F.2d 1110, 1114 (5th Cir. 1993); see also Harper, 21 F.3d at 600. The reasonableness of the conduct must be assessed in light of the law as it existed at the time of the conduct in question. Harper, 21 F.3d at 601.

Deliberate indifference to a prisoner's serious medical needs violates the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 104-05, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). Thus, Payne has alleged a constitutional violation. See Harper, 21 F.3d at 600 (analyzing the first Siegert step without engaging in a fact-specific analysis vis-a-vis the elements of the claim). But see Foster v. City of Lake Jackson, ___ F.3d ___ (5th Cir. July 27, 1994, No. 93-7196), 1994 WL 387970 at *2 (the first step of the Siegert analysis requires such an analysis).

The Court next considers whether Dr. Revell's conduct was objectively reasonable. To prevail on an Eighth Amendment claim for deprivation of medical care, a prisoner must allege acts or omissions by the physician that constitute deliberate indifference to a serious medical need. Id. The facts underlying a claim of deliberate indifference 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 complaint that medical personnel have been negligent in diagnosing a medical condition is not sufficient to show deliberate indifference. Gamble, 429 U.S. at 105-06. The legal conclusion of deliberate indifference must rest on facts clearly evincing wanton

actions on the part of the defendants. Johnson, 759 F.2d at 1238. Deliberate indifference is established by the intentional delay or denial of appropriate medical care or through the unnecessary and wanton infliction of pain. Gamble, 429 U.S. at 104-05.

In his affidavit in support of his motion for summary judgment, Dr. Revell stated that Payne saw Dr. Kelly, another physician in the Clements Unit, on September 21, 1990, and complained of redness of his toe. Although Payne visited the clinic daily for insulin injections, he did not complain of further problems with his foot until December 31, 1990. Dr. Revell examined Payne's feet on January 4, 1991, and recommended that he do no prolonged walking and no lifting of more than thirty-five pounds. Payne's feet were examined again on January 12, 1991, but there were no areas of broken skin and the nurse did not observe any infection. Dr. Revell examined Payne's feet again on January 21, 1991, and pared a corn on one of his toes; however, he observed no broken skin and no infection. On January 24, 1991, the nurse applied acid to Payne's corns, but noted no infection. On January 31, 1991, a nurse noted that Payne's foot was red and inflamed. On February 5, 1991, Payne saw Dr. Franklin, who diagnosed a foot infection. Dr. Franklin prescribed a one-time injection of the antibiotic Kefzal, antibiotic tablets, and whirlpool treatment. The Kefzal was ordered for Payne because it was not available at the clinic. On February 9, 1991, Dr. Revell discontinued the order for Kefzal because Payne's infection was responding to the antibiotic tablets. On February 14, 1991, Payne's foot was found

to be "much improved." Dr. Revell presented copies of Payne's medical records in support of his sworn statement. Payne also attached copies of his medical records to his affidavit in opposition to the motion for summary judgment; however, the medical records support Dr. Revell's motion for summary judgment.

In his affidavit in opposition to Dr. Revell's motion for summary judgment, Payne disputes that he was examined by Dr. Revell on January 4, 1991; however, the medical records indicate otherwise. Mere conclusory allegations are not competent summary judgment evidence and are insufficient to defeat a motion for summary judgment. Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir.), cert. denied, 113 S. Ct. 82 (1992). Further, Payne presented no evidence to suggest that Dr. Revell was responsible for the preparation of the food by the prison cafeteria. At the evidentiary hearing before the magistrate judge, Payne conceded that Dr. Revell was not responsible for the "diet line," and informed the magistrate judge that his diet was not part of his complaint. Although Payne contends that he was not able to obtain a proper diet while on lockdown, correspondence between Dr. Revell and Payne indicates that Payne's condition during lockdown was being monitored by Dr. Revell and that the food being served during lockdown, in Dr. Revell's medical judgment, contained all of the required elements of Payne's diet.

Because Dr. Revell met his burden of establishing the absence of a genuine issue of material fact, Payne was required to produce evidence to show the existence of a genuine issue for trial. See

Celotex v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Payne has not met this burden. Dr. Revell was entitled to judgment as a matter of law because, at most, he negligently failed to diagnose the infection on Payne's foot, which is not sufficient to show deliberate indifference to a serious medical need. See Gamble, 429 U.S. at 104-05. There is no support in the record for Payne's conclusory allegations that Dr. Revell's affidavit in support of his motion for summary judgment was "falsified." Thus, the magistrate judge did not err by granting Dr. Revell's motion for summary judgment on the ground of qualified immunity.

Payne argues that the magistrate judge abused his discretion by dismissing his claims against Dr. Kelly pursuant to 28 U.S.C. § 1915(d) without conducting a Spears hearing. He contends that Dr. Kelly had knowledge of his foot condition, but failed to treat it.

A complaint filed IFP can be dismissed sua sponte if the complaint is frivolous. 28 U.S.C. § 1915(d); Cay v. Estelle, 789 F.2d 318, 323 (5th Cir. 1986). A complaint is frivolous if it lacks an arguable basis in law or fact. Ancar v. Sara Plasma, Inc., 964 F.2d 465, 468 (5th Cir. 1992).

Payne argues that the district court prematurely dismissed his complaint without a Spears hearing. Although a district court is not required to conduct a Spears hearing before dismissing an IFP complaint as frivolous, Green v. McKaskle, 788 F.2d 1116, 1120 (5th Cir. 1986), a dismissal pursuant to § 1915(d) is inappropriate if the plaintiff's allegations may pass § 1915(d) muster with further

factual development. Eason v. Thaler, 14 F.3d 8, 10 (5th Cir. 1994). Thus, this Court must determine whether Payne's allegations, if developed by a questionnaire or in a Spears hearing, might have presented a nonfrivolous § 1983 claim.

In his complaint, Payne alleged that Dr. Kelly failed to properly examine and treat his foot condition. As discussed above, to prevail on an Eighth Amendment claim for deprivation of medical care, a prisoner must allege acts or omissions by the physician that constitute deliberate indifference to a serious medical need. Gamble, 429 U.S. at 104-05.

A complaint that medical personnel have been negligent in diagnosing a medical condition is not sufficient to show deliberate indifference. The legal conclusion of deliberate indifference must rest on facts clearly evincing wanton actions on the part of the defendants. Johnson, 759 F.2d at 1238. Deliberate indifference is established by the intentional delay or denial of appropriate medical care or through the unnecessary and wanton infliction of pain. Gamble, 429 U.S. at 104-05.

An "Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." Farmer v. Brennan, ___ U.S. ___, 114 S. Ct. 1970, 1981, 128 L. Ed. 2d 811 (1994). "Whether a prison official had the requisite knowledge of a substantial risk i[s] a question of fact subject to demonstration in the usual ways, including inference from

circumstantial evidence, . . . and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." Id.

Payne alleged that Dr. Kelly failed to properly examine and treat his foot condition. Specifically, he alleged that Dr. Kelly failed to examine his feet on October 29, 1990, although he told Dr. Kelly that his feet were red and hurting. The medical records presented by Payne in support of his complaint indicate, however, that although Payne saw Dr. Kelly on October 29, 1990, he did not complain about his feet. The magistrate judge did not abuse his discretion by dismissing Payne's claim against Dr. Kelly as frivolous without providing an opportunity for Payne to offer a more detailed set of factual claims. Although the Government also argues that the dismissal of Dr. Kelly could be affirmed on the basis of Fed. R. Civ. P. 4(j), the Court does not reach this issue because of its disposition on the merits.

In his brief, Payne also alleges that he was retaliated against by prison personnel and that his witnesses were harassed. This Court does not address issues not considered by the district court. "[I]ssues raised for the first time on appeal are not reviewable by this [C]ourt unless they involve purely legal questions and failure to consider them would result in manifest injustice." Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). This Court will not address these issues raised by Payne for the first time in his appellate brief because they are not purely legal.

Finally, Payne argues that the magistrate judge erred by failing to impose sanctions against Dr. Revell for failing to file a pre-trial order. On September 17, 1992, the district court set the case for trial in December 1992, with a pre-trial order deadline of November 17, 1992. On October 15, 1992, Dr. Revell filed his motion for summary judgment, asserting the defense of qualified immunity. On October 20, 1992, Dr. Revell filed a motion to vacate the trial setting and to stay the pre-trial notice and order while his motion for summary judgment on the qualified immunity defense was pending. Payne filed a motion in opposition. On October 30, 1993, the magistrate judge denied Dr. Revell's motion to vacate the trial setting and to stay the pre-trial notice and order as moot, in light of the order granting Dr. Revell's motion for summary judgment.

The magistrate judge ultimately granted Dr. Revell's motion for summary judgment based upon the defense of qualified immunity. Thus, the magistrate judge did not abuse his discretion by failing to sanction Dr. Revell for failing to file a pre-trial order while his motion for summary judgment on the qualified immunity defense was pending. See Union City Barge Line, Inc. v. Union Carbide Corp., 823 F.2d 129, 135 (5th Cir. 1987) (district court has broad discretion to control its own docket).

AFFIRMED.