

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000484-MR

LASHANE MORRIS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 07-CI-01073

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF CORRECTIONS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; ACREE AND COMBS, JUDGES.

COMBS, JUDGE: LaShane Morris appeals the order of the Franklin Circuit Court dismissing his petition for declaration of rights. After our review of the record and the law, we affirm.

While an inmate at Eastern Kentucky Correctional Complex (EKCC), Morris, who suffered from asthma, claimed that his condition was aggravated by second-hand or environmental tobacco smoke. He filed a grievance with the Department of Corrections in March 2007. In May 2007, a staff member responded to the grievance, stating: “We have requested a transfer of Mr. Morris to a smoke-free facility.” In June 2007, the Commissioner of the Department of Corrections denied Morris’s transfer request and admonished the staff of EKCC to be more diligent in enforcement of non-smoking areas. In July 2007, Morris filed a petition for declaration of rights in Franklin Circuit Court requesting injunctive relief consisting of transfer to a non-smoking facility and money damages of one million dollars. The record indicates that between the time of the commissioner’s denial and September 17, 2007, Morris was transferred to the Kentucky State Reformatory, which is a non-smoking facility. Nonetheless, Morris continued to pursue his action in Franklin Circuit Court.

On February 1, 2010, Morris filed a notice of submission of case for final adjudication. Examining the substance of the form, the trial court at first treated it as a motion for a judgment on the pleadings. Because Morris relied on medical records that were not included in the pleadings, the trial court decided the motion as one for summary judgment. The trial court dismissed the petition, finding that Morris’s claims were either moot or that he failed to state a claim upon which relief could be granted. This appeal follows.

The issue before us is whether the trial court correctly found that Morris failed to state an actionable claim.

Morris argues that his exposure to tobacco smoke at EKCC constituted a violation of his rights under the Eighth Amendment of the U.S. Constitution because he was subjected to cruel and unusual punishment. The Supreme Court of the United States has held that in the medical context, “in order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.” *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 929 (1976).

Morris argues that the Department of Corrections demonstrated deliberate indifference when it failed to transfer him out of EKCC. We agree with the trial court that the Department did not treat Morris with deliberate indifference and that, therefore, there was no actionable claim.

Our nation’s highest court has stated that it is possible for a prisoner “to prove an Eighth Amendment violation based on exposure to ETS.”¹ *Helling v. McKinney*, 509 U.S. 25, 35, 113 S.Ct. 2475, 2481 (1993). However, in order to prove that prison officials act with deliberate indifference, a petitioner must show that the officials acted with “obduracy and wantonness.” *Whitley v. Albers*, 475 U.S. 312, 319, 106 S.Ct. 1078, 1084 (1986).

We have not discovered a case in which Kentucky courts have addressed the precise issue at hand. However, the District of Columbia Circuit has provided

¹ Environmental tobacco smoke.

some guidance. In a case involving Eighth Amendment claims based on exposure to tobacco smoke within a prison, that court held that as long as an institution made a good faith effort to enforce its restricted smoking policy, it did not exhibit deliberate indifference. *Scott v. District of Columbia*, 139 F.3d 940 (D.C. Cir. 1998). Instead, such a claim – if any – would be one for negligence. *Id.* at 944.

In this case, the record shows that EKCC had a restricted smoking policy. Smoking was allowed only in certain areas. Morris has not shown that EKCC failed to exercise good faith in its enforcement. He actually has provided records that show that the staff at EKCC tried to have him transferred to a smoke-free facility. At some point, they were successful. We agree with the trial court that Morris has not demonstrated a cognizable Eighth Amendment claim.

The Department of Corrections has urged us to consider that Morris’s claim is prohibited by governmental immunity. However, we need not analyze that argument because of the threshold failure to state a claim.

Accordingly, we affirm the Franklin Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lashane Morris, *pro se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jonathan S. Milby
Justice & Public Safety Cabinet
Frankfort, Kentucky