

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Submitted October 24, 2023*

Decided November 8, 2023

Before

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 23-1487

JACKIE W. MCGEE,
Plaintiff-Appellant,

Appeal from the United States District
Court for the Eastern District of Wisconsin.

v.

No. 21-cv-1184-bhl

BILLY PONTOW, et al.,
Defendants-Appellees.

Brett H. Ludwig,
Judge.

ORDER

Jackie McGee, a Wisconsin prisoner who worked as a janitor at the facility, maintains that prison officials violated his constitutional rights in two ways. First, he says, they ignored his risk of contracting COVID-19 in violation of his Eighth Amendment rights by having him briefly encounter COVID-positive prisoners twice

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

daily with only a face mask, gloves, and sanitation supplies to protect himself. Second, he contends, they violated his equal protection rights by not giving him the same protective equipment they gave to other janitors who lived and continuously worked among quarantined prisoners. *See* 42 U.S.C. § 1983. The district court granted the defendants' motion for summary judgment. Because no evidence suggests that the defendants acted with deliberate indifference to McGee's potential exposure to COVID, and rational grounds supported their decision to give the other workers more equipment, we affirm.

We construe all facts in the light most favorable to McGee, the nonmoving party. *Estate of Simpson v. Gorbett*, 863 F.3d 740, 745 (7th Cir. 2017). This appeal centers on events in late 2020, during the COVID-19 pandemic, when McGee was incarcerated at Fox Lake Correctional Institution. In November 2020, McGee lived in wing D of his housing unit. The prison used the A and B wings to quarantine prisoners who had recently arrived, the C wing to isolate prisoners who tested positive for COVID, and the D wing to house prisoners who, like McGee, tested negative for COVID. The prison's security director directed that janitors "continue to perform normal job duties," that they "don PPE [personal protective equipment] as appropriate," and that the housing wings operate "independent of each other."

McGee worked as a janitor. Part of his job entailed going to the C wing twice daily for about five to seven minutes each time to fill bottles and buckets with cleaning chemicals to leave for the prisoners there. He did not clean the C wing. When he went to fill bottles there, he wore a cloth face mask (which he now says was loose) and had access to gloves and personal sanitation supplies. During his five to seven minute visits, he walked through the dayroom, where prisoners who had tested positive for COVID were often unmasked and sometimes spoke to him. Two janitors who both lived and worked on the quarantined A and B wings received N95 masks and face shields. Their work involved bringing meals and ice to prisoners and cleaning those wings.

In late November 2020, McGee told a supervising officer that he wanted to quit going to the C wing. He said he was fearful of contracting COVID because of his age (60) and wanted the same protective equipment that janitors on the A and B wings received. The officer declined McGee's request for additional equipment and warned McGee that, under the prison's rules, if he quit his job, he could not work for at least 90 days and would lose other privileges. McGee did not quit and continued to fill bottles in the C wing. In early December, McGee (and other prisoners in the D wing) tested

positive for COVID and were transferred to the C wing. He says that he experiences long-term health effects from COVID.

As mentioned, McGee raises two claims in this suit. First, he contends that prison officials deliberately ignored the risk that he would contract COVID, in violation of his Eighth Amendment rights. Second, he argues that they treated him differently from janitors who lived and worked in the A and B wings by not giving him the same protective equipment supplied to them, in violation of his equal protection rights. The district court entered summary judgment for the defendants on both claims. It noted that the defendants were not deliberately indifferent to McGee's risk of COVID, and that they had a rational basis for giving janitors in the A and B wings extra equipment because those janitors potentially had continuous exposure to the virus.

On appeal, McGee contests both rulings. He first argues that the defendants ignored the COVID risk he faced, particularly when his supervisor warned him not to quit his job. Second, he contends that they irrationally treated him differently from other janitors. In his view, the C wing was more dangerous than the A or B wings because the C wing housed prisoners who had tested positive for the virus, whereas those in the A or B wings were merely quarantined with an unknown COVID status.

The district court correctly ruled on McGee's first claim that no reasonable jury could find that the defendants deliberately ignored McGee's risk of contracting COVID. To prevail on this claim, McGee had to offer evidence that they (1) exposed him to an excessive risk to his health and (2) knew about but disregarded that risk. *See Williams v. Shah*, 927 F.3d 476, 479–80 (7th Cir. 2019) (citing *Farmer v. Brennan*, 511 U.S. 825, 828–34 (1994)). McGee did not furnish evidence of either element. To begin, he cites no evidence suggesting that his exposure to prisoners in the C wing—twice a day, for only five to seven minutes at a time, while masked, gloved, and able to clean himself—put him at undue risk of contracting COVID (or that it caused his infection). In addition, McGee did not produce evidence that the defendants knew that his mask, gloves, and sanitation options during his brief visits were insufficient to mitigate his risk of exposure. Likewise, the supervisor's warning to McGee about the prison's policy that limits privileges to any prisoner who quits a job does not show that he ignored McGee's risk of contracting COVID. Even though the supervisor knew McGee's age, nothing suggests that the supervisor knew that McGee's equipment and brief exposure inadequately abated the risk of COVID to someone McGee's age.

McGee replies that the defendants must have known—from the prison's directive that they operate each wing "independent of each other"—that COVID was

highly infectious. We may assume so much. Even so, the directive does not tell the defendants that masks, gloves, and sanitation fail to mitigate that risk of infection during brief visits to the C wing twice a day. And insofar as McGee contends that the defendants violated that directive by assigning him to work on the C wing, this alone is not sufficient to constitute a constitutional violation. *See Estate of Simpson*, 863 F.3d at 746.

We also agree with the district court's ruling on McGee's equal protection claim, which McGee formulates as a "class of one" claim, contending that the defendants should not have treated him differently from other janitors. To survive summary judgment on this claim, McGee must present evidence from which a reasonable jury could conclude that the defendants irrationally treated him differently from other similarly situated prisoners. *See Srail v. Village of Lisle*, 588 F.3d 940, 943–44 (7th Cir. 2009). But no reasonable jury could find that the difference in equipment provided to McGee, who briefly visited the C wing twice daily, and the other janitors, who lived and worked continuously in the A and B wings, lacked a rational basis. For starters, the janitors who lived and worked in the A and B wings had ongoing contact with potentially COVID-positive prisoners all day, every day; McGee, in contrast, entered the C wing just twice daily for five to seven minutes each time. Also, these other janitors interacted with potentially COVID-positive prisoners more closely than McGee did—they delivered meals and ice to prisoners and sanitized the entire A and B wings. McGee's job did not require him to interact with the COVID-positive prisoners in the C wing, and he did not have to clean any parts of that wing.

AFFIRMED