NONPRECEDENTIAL DISPOSITION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 April 4, 2025*
Decided April 17, 2025

Before

DIANE S. SYKES, *Chief Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

JOSHUA P. KOLAR, *Circuit Judge*

No. 24-2798

BOOKER T. SHIPP,
Plaintiff-Appellant,

v.

KENNETH LOBENSTEIN, et al.,
Defendants-Appellees.

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

No. 21-cv-167-jdp

James D. Peterson,
Judge.

O R D E R

Booker T. Shipp, a Wisconsin prisoner, sued prison officials alleging that, during a COVID-19 outbreak, they violated his Eighth Amendment rights by quarantining him

* 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).

with his cellmate who had tested positive for COVID-19. 42 U.S.C. § 1983. The district judge granted the defendants' motion for summary judgement. The judge ruled that, by seeking and acting on the unanimous recommendation of medical professionals, prison officials reasonably responded to an outbreak of COVID-19 by quarantining cellmates together rather than putting more prisoners at risk. Because no reasonable jury could find that the defendants displayed deliberate indifference, we affirm.

We recount the facts in the light most favorable to Shipp, the party opposing summary judgment. *Moore v. W. Ill. Corr. Ctr.*, 89 F.4th 582, 590 (7th Cir. 2023). Shipp was housed at New Lisbon Correctional Institution in New Lisbon, Wisconsin, when the prison was devising a strategy in August 2020 for separating prisoners who were exposed to or tested positive for COVID-19. At this time, COVID-19 test results took three days to receive, and so an uninfected prisoner could be housed for days with a cellmate who had the virus but had not yet received a positive test result.

While the infection rate was low, the prison's policy tracked guidance from the Centers for Disease Control and Prevention: For prisoners who tested positive for COVID-19, staff isolated them by moving them to "wet cells" (cells with a toilet and sink) for 14 days. For prisoners who had close contact with infected prisoners but who did not test positive for the virus, staff quarantined them (presumably in "dry" cells) separate from those with confirmed infections. The prison could place up to 300 prisoners in wet cells. At the time, the prison was at or over capacity—most or all of the cells were occupied.

In the fall of 2020, COVID-19 was spreading at the prison. Testing in October revealed that 50 prisoners in two units were infected. Anticipating an outbreak, the warden asked the supervisor of the health services, Roslyn Huneke, to seek advice from the Department of Corrections' Bureau of Health Services about appropriate housing. Huneke contacted the Bureau's medical director, Dr. Paul Bekx, and associate medical director, Dr. Daniel La Voie. Huneke said (perhaps incorrectly) that the prison lacked enough empty wet cells to isolate all COVID-positive prisoners. She proposed isolating and quarantining cellmates together within each affected unit. Although the prison's internal policy was to separate COVID-positive prisoners, she favored her proposal because prisoners who tested negative had already spent days with cellmates who had tested positive. La Voie agreed: "Cohorting in place [was] the best option"—everyone in an affected unit should be locked down with little to no movement. He gave two reasons. First, everyone in an affected unit will have already been exposed to the virus. Second, the policy was used at another facility and appeared to be mitigating the spread

there. Bekx echoed that ideally the prison should separate out the COVID-positive prisoners, but because the virus had likely already spread to others in an affected unit, it made sense to "simply restrict all movement" to reduce the spread.

A few days after Huneke's exchange with La Voie and Bekx, 11 prisoners in Shipp's unit tested positive in October for COVID-19. These infected prisoners were not relocated from their dry cells to wet cells. Also, contrary to orders from the warden providing that infected prisoners in Shipp's unit must generally remain isolated in their cells, these prisoners were allowed to interact freely with other prisoners and staff.

By early November 2020, 145 prisoners in Shipp's unit tested positive for COVID-19 and 103 tested negative. Shipp tested negative, but his cellmate tested positive. The warden adopted the "cohorting" policy discussed by Huneke, Bekx, and La Voie: The entire unit was locked down, and Shipp quarantined in his cell with his cellmate. Shipp asked his unit manager to move him to a cell with a prisoner who had tested negative, but the manager refused. Shipp soon tested positive for COVID-19, and he ultimately developed symptoms including body aches, headaches, bloody cough, vomiting, and loss of smell.

Shipp sued the warden and others, alleging that prison staff violated his Eighth Amendment rights and Wisconsin law by quarantining him with his infected cellmate and thereby deliberately ignoring his risk of contracting COVID-19. The district judge entered summary judgment for the defendants, but because the defendants had failed to disclose certain evidence, we vacated the judgment. *See Shipp v. Lobenstein*, No. 22-2260, 2023 WL 2424590, at *1 (7th Cir. Mar. 9, 2023). On remand, the defendants again sought summary judgment, arguing that the cohort policy was a reasonable response to the health risk posed by COVID-19. Shipp replied that the policy was reckless. In his view, the cohort policy wrongly ignored CDC guidelines, the prison's internal guidance, and was based on Huneke's "lie" to Bekx and La Voie that the prison lacked enough wet cells to house infected prisoners. He added that, by allowing 11 infected prisoners to leave their cells in October, prison officials needlessly caused the mass COVID-19 outbreak in November.

The district judge entered summary judgment for the defendants, ruling that no jury could find that they deliberately disregarded a substantial risk of serious medical harm to Shipp. First, the judge noted, the CDC guidelines Shipp cited allowed for a policy like the one the prison adopted; and in any case, a violation of CDC guidelines alone is not a constitutional violation. Shipp, the judge also said, had not shown that when Huneke told Bekx and La Voie about a wet-cell shortage, Huneke knew that her

statement was wrong, let alone that she lied to create an unwarranted medical risk of infection. Finally, regarding the decision to allow 11 infected prisoners to leave their cells, the judge explained that no evidence showed that any defendant was involved in that decision, or that it caused the November outbreak. The judge also relinquished supplemental jurisdiction over the state-law claims. 28 U.S.C. § 1367.

We review the district judge's decision de novo. *Moore*, 89 F.4th at 590. Shipp cannot stave off summary judgment unless he presented evidence that the defendants were deliberately indifferent to a substantial risk of serious medical harm to him. *See Farmer v. Brennan*, 511 U.S. 825, 828–29 (1994); *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976). A prison official is not deliberately indifferent unless "the official knows of and disregards an excessive risk of inmate health or safety." *Farmer*, 511 U.S. at 837.

Shipp argues that he met his burden to get to trial. He begins by insisting that, contrary to the district judge's view, the CDC guidelines (and the prison's similar internal guideline) prohibited the cohort policy that the prison adopted. Instead, he continues, the guidelines mandate that those testing positive for COVID-19 must always isolate from their close contacts. Finally, he concludes, the prison's refusal to follow those guidelines shows the defendants' deliberate indifference to his well-being.

We disagree for three reasons. First, as the district judge concluded, violating prison policy or CDC guidelines is not itself a constitutional violation. *See Est. of Simpson v. Gorbett*, 863 F.3d 740, 746 (7th Cir. 2017); *Mays v. Dart*, 974 F.3d 810, 823 (7th Cir. 2020). Second, even if the cohort policy conflicted with the guidelines, no evidence suggests that any defendant was aware that a divergence created a substantial risk of harm. Third, the defendants cannot be liable if they responded reasonably (a matter to which we grant them deference, *see Mays*, 974 F.3d at 820–21) to a substantial risk to prisoner health. *See Hunter v. Mueske*, 73 F.4th 561, 566 (7th Cir. 2023). The undisputed evidence shows that is the case. The warden reasonably adopted the cohort policy after properly seeking guidance from medical experts about a suitable approach to an outbreak. These experts unanimously endorsed the policy for legitimate medical reasons: The time lag to receive test results meant that cellmates remained exposed to the virus even after they tested negative; moving infected prisoners would expose even more people; and the experience from another facility showed that the cohort policy reduced the spread of COVID-19 infections. Further, even if we assume that another approach would have resulted in fewer infections (and Shipp provides no evidence supporting this assumption), Shipp cannot succeed merely by showing that the defendants failed to choose the best course of action. *Id*.

Shipp next argues that he adduced proof of deliberate indifference with evidence that Huneke incorrectly told Bekx and La Voie that the prison lacked enough wet cells to isolate the prisoners who tested positive for COVID-19. But even if we assume that Huneke's statement was wrong, Shipp cannot get past summary judgment. The undisputed evidence is that the prison did not develop the cohort policy because of Huneke's assessment of the number of wet cells. Rather, the prison implemented it because the three medical professionals all concluded that, given the lag in getting test results, the risk of spread by moving prisoners, and the success of the cohort policy elsewhere in mitigating the spread of COVID-19, the policy was reasonably prudent.

Finally, Shipp argues that the district judge should have relied on the evidence that 11 infected prisoners were permitted to move around his unit in October as proof of the defendants' deliberate indifference to Shipp's well-being. But liability under § 1983 requires personal involvement, *see Horshaw v. Casper*, 910 F.3d 1027, 1029 (7th Cir. 2018), and Shipp presents no evidence that any named defendants participated in allowing the 11 infected prisoners to move freely through the unit. To the contrary, the undisputed evidence is that the warden ordered the infected prisoners to remain in their cells. Shipp argues that the mass outbreak that affected him would not have occurred if the prison policy had retained its prior, internal policy. But he provides no medical evidence to support his point (let alone that the defendants were aware of it), and his lay assertions alone are not enough. *See Johnson v. Myers*, 53 F.4th 1063, 1068 (7th Cir. 2022).

AFFIRMED