

Case No. 14-30067

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Elzie Ball, Nathaniel Code, and James Magee
Plaintiffs-Appellees,

v.

James M. LeBlanc, Secretary of the Louisiana Department of Public Safety
and Corrections, Burl Cain, Warden of the Louisiana State Penitentiary,
Angelia Norwood, Warden of Death Row, and the Louisiana Department of
Public Safety and Corrections,
Defendants-Appellants

Appeal from The United States District Court
Middle District of Louisiana, Case No. 3:13-cv-00368
Hon. Brian A. Jackson

Amicus Brief of American Federation of State County Municipal Employees
Local 3807 (Texas Correctional Employees) in Support of Plaintiffs-
Appellees in Favor of Affirmance

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Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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1. **Plaintiffs/Appellees:** Elzie Ball, Nathaniel Code, and James Magee;
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5. **Defendants/Appellants:** James M. LeBlanc, Secretary of the Louisiana Department of Public Safety and Corrections, Burl Cain, Warden of the Louisiana State Penitentiary, Angela Norwood, Warden of Death Row, and the Louisiana Department of Public Safety and Corrections;
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1. **Amicus Curiae:** American Federation of State County Municipal Employees Local 3807 (Texas Correctional Employees)
2. **Amicus Curiae Affiliation:** American Federation of State County Municipal Employees
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The undersigned is unaware of any other interested persons or entities.

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Interest of Amicus Curiae

American Federation of State County Municipal Employees Local 3807 (Texas Correctional Employees) (hereinafter, the “Texas Correctional Employees Union” or “Union”) is a local Texas union affiliated with the American Federation of State, County & Municipal Employees. The Texas Correctional Employees Union advocates on behalf of correctional officers and other Texas Department of Criminal Justice Employees on labor issues, pay, and benefits. The Texas Department of Criminal Justice houses over 152,000 inmates, making it the largest state run penal system in the United States.

Excessive heat in Texas prisons has been a primary concern for the Texas Correctional Employees Union. The Texas Department of Criminal Justice does not provide mechanical cooling or climate control in most inmate areas of Texas prisons. Due to the excessive heat in the summer months, Texas correctional officers have been suffering heat-induced medical conditions that affect both their health and their ability to keep Texas prisons safe and secure. The Texas Correctional Employees Union has been working to convince the Texas Department of Criminal Justice for years to take heat-related illnesses more seriously, but thus far, the Union’s efforts have not been successful.

One of the primary issues in this case is the district court's factual findings regarding the effects of high heat index. The Union wishes to convey to the Court that it supports the district court's findings based on the experience of the Union and its members – the correctional officers charged with safeguarding and safekeeping Texas prisons. Heat sees no difference between inmates and officers.

Neither the Texas Correctional Officers Union nor its counsel received or expects to receive any compensation for the preparation of this brief.

Source of Authority to File

In accordance with Rule 29 of the Federal Rules of Appellate Procedure, the parties have consented to the filing of this *amicus* brief.

No party's counsel has authored the brief in whole or in part. No party or party's counsel has contributed money intended to fund preparing or submitting this brief. No person has contributed money that was intended to fund preparing or submitting this brief.

Argument

Texas Correctional Officers Union represents correctional officers in Texas. The Union shares one vast area of common ground with Plaintiffs-Appellees: the knowledge of what heat can do to the human body. Heat sees no difference in an inmate or an officer. It does not choose its victims based on their moral character, their criminal history, or their uniform. And heat continues to get worse.

For this reason, the Union has been trying for years to convince the Texas Department of Criminal Justice (the “TDCJ”) to adopt more stringent heat guidelines and to implement mechanical cooling at its facilities. But the TDCJ has still not adopted measures to control temperature or heat index in inmate areas. And even though air-conditioning exists in certain parts of Texas prison facilities – such as offices – many correctional officers perform their jobs in areas where no mechanical cooling exists.

The Union and its members have seen first-hand how Texas heat affects inmates as well as the correctional officers who work to ensure the safety and security of Texas prisons. In this case, the parties dispute whether the district court’s findings are “clearly erroneous.”¹ *See Alberti v.*

¹ Appellants’ Brief, p. 6; Appellees’ Brief, p. 15.

Klevenhagen, 790 F.2d 1220, 1224 (5th Cir. 1986) (district court factual findings to be reviewed under the clearly erroneous standard). In addition to the reasons Appellees present in their brief,² the Union’s first-hand knowledge of heat-related injuries to correctional officers in Texas confirms the district court’s findings.

The Union presents two arguments in support of affirmance:

- Documented heat-related injuries to Texas correctional officers show how excessive heat is “objectively serious” and poses a “substantial risk of harm.”
- Defendants misconstrue *Gates v. Cook*: the district court’s findings reflect today’s standards, as supported by current knowledge of heat-related effects.

1. Documented heat-related injuries to Texas correctional officers show how excessive heat is “objectively serious” and poses a “substantial risk of harm.”

Appellants ask the Court to consider how the injunction order at issue might affect prison facilities in Texas and Mississippi as well as those in Louisiana.³ But just as the injunction order and the Court’s decision in this

² See Appellees’ Brief, pp. 17-30.

³ Appellants’ Brief, p. 4.

case could ripple into Texas and Mississippi, documented heat-related injuries from Texas prisons support Appellees' legal position here.

This Court recently acknowledged that an Eighth Amendment suit against a prison official requires consideration of two elements.

- The act or omission must be “objectively serious.” *Blackmon v. Garza*, 484 F. App'x 866, 869 (5th Cir. 2012) (unpublished).
- The plaintiff must establish that the prison “official was ‘deliberate[ly] indifferen[t] to inmate health or safety.’” *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)).

To meet the first element, “the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm.” *Farmer*, 511 U.S. at 834. The district court’s findings on this element are consistent with the complaints and reports submitted to the Union by several correctional officers the Union represents.

The Union maintains a reporting system allowing its members to report workplace injuries.⁴ Recent reports from this system have documented a number of heat-related injuries and complaints, including the following.

⁴ The reporting system consists of an online submission form available at <http://tdcjunior.com/heat/index.html>.

- A correctional officer in the O.L. Luther Unit in Navasota, Texas received medical advice about complications to his diabetes caused by the regular workplace heat exceeding 90 degrees that the officer regularly endures.⁵
- An officer in the Reverend C.A. Holliday Transfer Facility in Huntsville, Texas has complained about almost passing out from the heat when “no fans were working” at the time.⁶
- An officer with hypertension at the W. J. “Jim” Estelle Unit in Huntsville, Texas has complained of summer temperatures regularly exceeding 100 degrees in the Estelle Unit’s main building.⁷
- A different correctional officer in Huntsville, Texas has reported to the Union that “several coworkers have passed out and have had [sic] suffered heat exhaustion.”⁸

⁵ Report Received September 5, 2013 (Identity of Correctional Officer Withheld).

⁶ Report Received September 6, 2013 (Identity of Correctional Officer Withheld).

⁷ Report Received March 18, 2014 (Identity of Correctional Officer Withheld).

⁸ Report Received February 10, 2014 (Identity of Correctional Officer Withheld).

- An officer in the Mark W. Stiles Unit in Beaumont, Texas has described how excessive heat continually fogs up the officer’s eyewear resulting in decreased “visibility and reaction time to emergencies.”⁹
- A correctional officer in the James “Jay” H. Byrd Unit in Huntsville, Texas suffers from heat-related complications to a blood pressure condition that has resulted in being sent to the hospital four times by emergency medical personnel.¹⁰
- An officer in the Eastham Unit in Lovelady, Texas has suffered from heat exhaustion “at least three or four times.” The officer laments the security risk in the event the symptoms of heat exhaustion arise when the officer is tending to offenders out of their cells.¹¹

The effects of excessive heat in combination with the TDCJ’s refusal to deploy climate control technology at its facilities has forced the Union to take steps to educate its members about protecting themselves. The Union has relied on federal guidelines from the Occupational Safety and Health Administration (“OSHA”) to convey the serious risks of excessive heat

⁹ Report Received March 30, 2014 (Identity of Correctional Officer Withheld).

¹⁰ Report Received May 31, 2014 (Identity of Correctional Officer Withheld).

¹¹ Report Received May 26, 2014 (Identity of Correctional Officer Withheld).

index to Texas correctional officers. OSHA’s comprehensive guide to heat index for employers details the increasing risk levels accompanying increasing heat, as measured by heat index.¹² And in addition to OSHA, the Union has incorporated analysis from the United States Army and the National Institutes of Health into its heat advisory to its members.¹³

The steps the Union has had to take to counsel its members and the documented complaints and reports of Texas correctional officers support Appellees’ position here: excessive heat is “objectively serious” and poses a “substantial risk of harm.” *Blackmon*, 484 F. App’x at 869; *Farmer*, 511 U.S. at 834. If anything, excessive heat poses more risk of harm to inmates who remain confined in their cells for 23 hours a day than to correctional officers who endure the heat for their shifts before having the opportunity to cool down in portions of prison facilities that do use mechanical cooling and climate control technology.

¹² “Using the Heat Index: A Guide for Employers,” The Occupational Safety and Health Administration, available at https://www.osha.gov/SLTC/heatillness/heat_index/pdfs/all_in_one.pdf.

¹³ The Union’s online resources are available at <http://tdcjunior.com/heat/educate.html>. See also “Heat Emergencies,” MedlinePlus, a service of the U.S. National Library of Medicine and the National Institutes of Health, available at <http://www.nlm.nih.gov/medlineplus/ency/article/000056.htm>.

For these reasons, the Union agrees with Appellees about the objective element of their Eighth Amendment claim. The Court should likewise agree with Appellees and their substantial expert evidence establishing the substantial risk of harm associated with excessive heat conditions at Angola. At the very least, the district court’s findings were not “clearly erroneous.”

2. Appellants misconstrue *Gates v. Cook*: the district court’s findings reflect today’s standards, as supported by current knowledge of heat-related effects.

In *Gates v. Cook*, this Court affirmed the district court’s injunction ordering the Mississippi Department of Corrections to provide inmates “fans, ice water, and daily showers when the heat index” exceeded 90 degrees. *Gates v. Cook*, 376 F.3d 323, 339 (5th Cir. 2004). Appellants argue that *Gates* supports their position in this case because the district court here ordered measures exceeding those at issue in *Gates*.¹⁴ Appellants appear to argue that any order requiring more than “fans, ice water, and daily showers” must be based on the “subjective opinions” of the district court

¹⁴ Appellants’ Brief, p. 21.

judge.¹⁵ But the Court should reject Appellants' attempt to use *Gates* to support their position for at least three reasons.

First, *Gates* does not establish any minimum or maximum heat-related remedial measures as a matter of law, and thus, has limited precedential value here, given the specific facts of this case. This Court in *Gates* applied the “clearly erroneous” standard of review, just as the parties agree it should apply here.¹⁶ *Gates*, 376 F.3d at 340. Accordingly, the remedial measures in *Gates* were not “set forth by this Court,” as Appellants claim.¹⁷ To the contrary, the Court in *Gates* simply concluded that the district court did not clearly err in requiring “fans, ice water, and daily showers.” *Id.* at 340.

Second, *Gates* belies the notion that heat index is an unreliable measure for heat, as Appellants extensively argue.¹⁸ The district court in *Gates* expressly fashioned its injunction order to apply either generally from May through September or “when the **heat index** is 90 degrees or above....” *Id.* at 339 (emphasis added). Information from the Union’s members supports the use of heat index, a measure that accounts for humidity as well

¹⁵ Appellants’ Brief, p. 21.

¹⁶ Appellants’ Brief, p. 6; Appellees’ Brief, p. 15.

¹⁷ Appellants’ Brief, p. 21.

¹⁸ *See, e.g.*, Appellants’ Brief, pp. 8-11.

as temperature. For example, one Texas correctional officer has reported the effects of high temperature and humidity on eye wear, creating vision problems that affect both the health of the correctional officer and the security of the facility.¹⁹ And the Union’s educational efforts rely on government sources using heat index as a major indicator for heat-related injuries – not simply temperature.²⁰

Third, the district court’s findings reflect current standards. Appellants argue that the district court’s order here “suggests that at some point over the past decade, inmates have obtained a constitutional right to mechanical cooling....”²¹ But this characterization essentially ignores the well-established precedent directing courts to apply “evolving standards of decency” to their Eighth Amendment analysis. *See, e.g., Miller v. Alabama*, 132 S.Ct. 2455, 2463 (2012); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). This Court in *Gates* expressly acknowledged that “evolving standards of decency” must be applied when examining prison conditions under the Eighth Amendment. *Gates*, 376 F.3d at 333.

¹⁹ Report Received March 30, 2014 (Identity of Correctional Officer Withheld).

²⁰ The Union’s online resources are available at <http://tdcjunior.com/heat/educate.html>.

²¹ Def. Br., p. 22.

Today, society knows more about the effects of heat than it did 10 years ago when the Court decided *Gates*. Public advisories about heat-related stress and injuries have been posted by federal agencies, non-profit groups, and academic institutions.²² The American Bar Association has published a report directly addressing heat in prisons.²³ Several international reports have documented the effects of excessive heat in jails and prison facilities.²⁴ These public sources combined show an evolving standard when it comes to heat in prisons.

²² See, e.g., “Deadly Heat in Texas Prisons,” University of Texas School of Law Human Rights Clinic, April 2014, available at: https://www.utexas.edu/law/clinics/humanrights/docs/HRC_EH_Report_4-7-14_FINAL.pdf; “Using the Heat Index: A Guide for Employers,” The Occupational Safety and Health Administration, available at https://www.osha.gov/SLTC/heatillness/heat_index/pdfs/all_in_one.pdf; “Heat: A Major Killer,” National Weather Service, Office of Climate, Water and Weather Services, available at <http://www.nws.noaa.gov/os/heat/index.shtml>; Joseph Torey Nalbone, “Evaluation of Building and Occupant Response to Temperature and Humidity: Non-Traditional Heat Stress Considerations: A Comparison of Different Construction Types Used by the Texas Department of Criminal Justice 7 (Dec. 2004) (unpublished Ph.D. dissertation, Texas A&M University), available at <http://repository.tamu.edu/bitstream/handle/1969.1/1504/etd-tamu-2004C-ITDE-Nalbone.pdf?sequence=1>.

²³ ABA Standards for Criminal Justice: Treatment of Prisoners 79-81 (3d. 2011).

²⁴ See, e.g., Report on the Human Rights of Persons Deprived of Liberty in the Americas, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II., doc. 64 ¶ 402 (Dec. 31, 2011); U.N. Subcommittee on Prevention of Torture, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Benin, CAT/OP/BEN/1, ¶ 180 (2011).

This evolving standard is not undercut simply because certain state agencies – such as the TDCJ and Defendants here – refuse to deploy mechanical cooling. The Union posits that these state agencies represent a diminishing minority position. The Inter-American Commission on Human Rights has already announced it will conduct a hearing in October 2014 regarding excessive heat in Texas prisons.²⁵

Moreover, in Texas alone, the TDCJ’s position has been rejected by its sister agency the Texas Commission on Jail Standards (the “Commission”), which has imposed temperature standards arguably more stringent than the district court’s order in this case. The Commission monitors and sets minimum requirements for Texas county and municipal jails. Tex. Gov’t Code § 511.009; Tex. Admin Code § 251.1. The Commission requires temperature “in all occupied areas” to be kept between 65 and 85 degrees in county and municipal jails, ranging from maximum to minimum security facilities. Tex. Admin Code § 259.160; Tex. Admin Code § 261.160; Tex. Admin Code § 261.255; Tex. Admin Code § 261.350.

²⁵ “Inter-American Commission on Human Rights Announces Hearing on Texas Extreme Prison Heat,” Press Release from the University of Texas School of Law, September 29, 2014, available at: <https://www.utexas.edu/law/clinics/humanrights/work/Heat-in-TX-Press-Release-on-IACHR-Hearing-September292014.pdf>.

In sum, the remedial measures ordered 10 years ago in *Gates* may have been sufficient at the time. The actual holding in *Gates* does not support Appellants' position, as the Court did not set any minimum or maximum remedial measures as a matter of law. But even if *Gates* were as expansive a decision as Appellants imply, the Union believes that society's current knowledge of heat effects contributes to a changing standard of decency reflected in the district court's opinion. With the bulk of support for Plaintiffs' position, the Court should not conclude that the district court's findings were "clearly erroneous." And the Court should certainly not consider the district to have clearly erred given that all Texas county and municipal jails – maximum to minimum security – are simply not permitted to allow temperatures to exceed 85 degrees.

Conclusion

Excessive heat in prisons affects correctional officers as well as inmates. In today's world, the lack of mechanical cooling and climate control in prison facilities makes them less safe and secure for correctional officers and inmates alike. Among other findings not explored in this brief, the district court in this case determined that Plaintiffs' expert evidence established that the excessive heat at Angola was objectively serious and created a substantial risk of harm to Plaintiffs. The district court's findings

comport with Union's understanding of heat effects and the reports the Union has received from its members about the effects of heat on inmates and officers. And in any case, the Union does not believe the district court's findings on heat effects can be considered "clearly erroneous."

For these reasons, the Texas Correctional Officers Union respectfully asks the Court to affirm the decision of district court.

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Certificate of Compliance with Rule 32(a)

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because this brief contains 2,802 words, excluding the parts of the brief exempted Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2014 software in Times New Roman 14-point font.

September 30, 2014

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Certificate of Service

I hereby certify that on September 30, 2014, a copy of the foregoing has this date been served on all parties through their respective counsel of record by operation of the Court's electronic filing system and has been filed electronically with the Clerk of the Court using the CM/ECF System.

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