[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14558

D.C. Docket No. 8:16-cv-00998-MSS-SPF

SHANE DAVIS,

Plaintiff-Appellant,

versus

MIKE CARROLL, WILEEN R. WEAVER,
& PAULINE RILEY

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(March 13, 2020)

Before JILL PRYOR and GRANT, Circuit Judges, and ROYAL,[*] District Judge.

GRANT, Circuit Judge:

Discovering that someone has a serious, life-long illness can strike a terrible blow. Especially when the one suffering is a child. That is the hardship J.D.D. and his adoptive parents have endured since learning that J.D.D. was HIV-positive—a condition he likely contracted at birth but that went unnoticed until he was 14 years old. On behalf of his son, Shane Davis sued two state social workers for failing to request an HIV screening when the State of Florida took custody of J.D.D. shortly after his birth. The district court granted the social workers' summary judgment motion because it found that qualified immunity protected them from suit. After careful review and with the benefit of oral argument, we affirm.

I.

J.D.D. was born in a hospital on April 10, 2000, to a mother who was tragically unfit for parenting. Shortly after his birth, the hospital filed an abuse report with the Pinellas County Sheriff's Office. The report explained that J.D.D.'s mother tested positive for cocaine, that she had no prenatal care, and that other children had already been removed from her care.[1]

After his birth, J.D.D. remained at the hospital for a week because of complications stemming from his cocaine exposure, low birthweight, and low

[*] Honorable C. Ashley Royal, Senior District Judge of the Middle District of Georgia, sitting by designation.

[1] The parties dispute many of the relevant facts. Because this case comes to us after the district court granted the defendants' motion for summary judgment, we draw all inferences in favor of Davis.

oxygen. When he was released, the Florida Department of Children and Families took custody of him directly from the hospital. At that time, the hospital provided the department with an Infant Discharge Summary, which noted several normal findings about J.D.D.'s health—but said nothing about HIV. No records suggest that the hospital tested him for HIV.

Within ten days of J.D.D.'s hospital discharge, social workers Wileen Weaver and Pauline Riley, the defendants here, were working with J.D.D. They soon learned about his case. Case staffing notes record that the last four children from J.D.D.'s mother tested positive for cocaine and were then cared for by family members. Riley also knew that J.D.D.'s mother had little or no prenatal care and that J.D.D. himself had been exposed to cocaine at birth. And Weaver had access to J.D.D.'s file, which contained information about both the lack of prenatal care and his cocaine exposure. Neither Weaver nor Riley sought HIV screening.

An investigator for the Sheriff's Office later petitioned a county court to place J.D.D. in foster care. The petition summarized other abuse reports filed after J.D.D.'s mother had given birth to her previous children. One case summary mentioned alleged "domestic violence," and noted that J.D.D.'s "mother 'smokes crack like it was cigarettes.'" Other police investigations in 1993 and 1995 uncovered that J.D.D.'s mother had been treated for heroin and had been arrested in 1983 for soliciting prostitution, but the custody petition for J.D.D. did not include these details. "To the best of writer's knowledge," the petition read, "mother has no criminal history." The petition also stated that "neither the mother nor the child has any medical problems or physical abnormalities."

J.D.D. was placed with a foster family that same year. J.D.D.'s foster parents took him to see Dr. Richard Gonzalez for typical childhood illnesses like common colds and asthma. Like the hospital staff, Dr. Gonzalez knew about J.D.D.'s cocaine exposure, and about his mother's drug addiction and lack of prenatal care. And like the hospital staff, Dr. Gonzalez did not pursue HIV screening for J.D.D.

Shane and Patricia Davis adopted J.D.D. when he was three years old. Eleven years later, at age fourteen, J.D.D. developed thrush, a mouth infection somewhat common for infants but rare for teenagers. His infection prompted physicians to conduct immunological testing. The doctors diagnosed him with AIDS, and treatment began immediately.

Dr. Carina Rodriguez, who treated J.D.D. after his diagnosis, said that J.D.D. probably contracted HIV at birth from his mother, although no direct evidence shows that she had HIV. The doctor also explained that HIV-positive newborns are usually asymptomatic at birth. Another expert opined that if J.D.D. had been tested and treated for HIV within six weeks of his birth, "it is highly unlikely he would have developed an HIV infection, and highly unlikely that his HIV infection would have progressed to AIDS."

About two years after J.D.D.'s diagnosis, his adoptive father sued social workers Weaver and Riley in their individual capacities.[2] Davis's second amended complaint alleged that they were liable under 42 U.S.C. § 1983 for violating

[2] He also sued Weaver, Riley, and the Secretary of the Florida Department of Children and Families in their official capacities. The district court granted the defendants' motion for summary judgment on these claims, and Davis does not challenge that decision on appeal.

J.D.D.'s clearly established federal rights. Specifically, Davis claimed that by not requesting HIV screening, Weaver and Riley showed deliberate indifference to J.D.D.'s serious risk of contracting HIV. Davis also alleged violation of J.D.D.'s federal right to prompt medical assistance under the Medicaid Act. *See* 42 U.S.C. § 1396a(a)(8). The district court disagreed, and granted the defendants' motion for summary judgment based on qualified immunity. Davis now appeals.

II.

We review de novo the district court's granting of a summary judgment motion based on qualified immunity. *Whittier v. Kobayashi*, 581 F.3d 1304, 1307 (11th Cir. 2009) (per curiam). In doing so, we "resolve all issues of material fact in favor of the plaintiff, and then, under that version of the facts, determine the legal question of whether the defendant is entitled to qualified immunity." *Id.*

III.

On appeal, Davis challenges the district court's determination that qualified immunity shields Weaver and Riley from suit. "In order to receive qualified immunity, the public official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." *Carruth v. Bentley*, 942 F.3d 1047, 1054 (11th Cir. 2019) (quotation marks and citation omitted). The parties agree that Weaver and Riley were acting within the scope of their discretionary authority as foster caseworkers. Given this agreement, the burden shifts to Davis "to show that qualified immunity is not appropriate." *Id.* (citation omitted).

To defeat qualified immunity, Davis must show that the defendants "violated clearly established federal statutory or constitutional rights of which a reasonable person would have known." *Priester v. City of Riviera Beach*, 208 F.3d 919, 926 (11th Cir. 2000). He contends both that Weaver and Riley were deliberately indifferent to J.D.D.'s serious risk of HIV and that they violated his clearly established federal statutory right to HIV screening. Neither argument persuades us.

A.

We have held that "a foster child can state a 42 U.S.C. § 1983 cause of action under the Fourteenth Amendment if the child is injured after a state employee is deliberately indifferent to a known and substantial risk to the child of serious harm." *H.A.L. ex rel. Lewis v. Foltz*, 551 F.3d 1227, 1231 (11th Cir. 2008) (per curiam) (citing *Taylor v. Ledbetter*, 818 F.2d 791, 794–96 (1987) (en banc)). "To survive summary judgment on a deliberate indifference failure-to-protect claim, a plaintiff must produce sufficient evidence of (1) a substantial risk of serious harm; (2) the defendants' deliberate indifference to that risk; and (3) causation." *Caldwell v. Warden, FCI Talladega*, 748 F.3d 1090, 1099 (11th Cir. 2014) (quotation marks and citation omitted).

For the second element—deliberate indifference to the risk—"a plaintiff must produce evidence that the defendant actually (subjectively) knew" about the "substantial risk of serious harm." *Id.* (punctuation and citation omitted). In other words, "a state official acts with deliberate indifference only when he disregards a risk of harm of which he is *actually aware*." *Ray v. Foltz*, 370 F.3d 1079, 1083

(11th Cir. 2004) (citing *Farmer v. Brennan*, 511 U.S. 825, 836 (1994)). It is not enough for the official to "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists"—"he must also draw the inference." *Farmer*, 511 U.S. at 837. That said, proving actual awareness does not require a smoking gun; a factfinder could conclude that an "official knew of a substantial risk from the very fact that the risk was obvious." *Id.* at 842.

Davis does not have any direct evidence that Weaver and Riley were actually aware of a substantial risk that J.D.D. (or even his mother) had HIV. In Davis's view, though, J.D.D.'s mother had such an obvious risk of HIV that Weaver and Riley must have concluded that by extension J.D.D. also faced a substantial risk. After all, he says, J.D.D.'s mother had multiple risk factors: her lack of prenatal care, use of cocaine, removal of four of her previous children for drug exposure, domestic violence, and J.D.D.'s ambiguous paternity.

We do not view the risk as being obvious. Like most newborns with HIV, J.D.D. did not have any physical symptoms. Although Davis sees warning signs of the hidden illness, several of his proposed risk factors would show little or no risk at all. Davis says one risk factor is the uncertainty of J.D.D.'s paternity. Yet record documents repeatedly reference Ernest "Keith" Majors as the biological father, and Davis has not directed us to any contrary evidence. Moreover, there is no reason that an allegation of domestic violence would suggest an HIV risk—especially when that allegation, as the custody petition for J.D.D. noted, resulted in a closed case "with no indicators of any abuse or neglect." Even the strongest risk factor, cocaine usage, may not be strong as it first appears: the record reflects that

J.D.D.'s mother mainly—if not exclusively—ingested cocaine through smoking rather than injection. For example, the petition filed by an investigator in J.D.D.'s case only discusses his mother as "smok[ing] crack."

More importantly, although J.D.D. received treatment from several medical professionals, none of them thought to have him tested for HIV. Hospital staff and doctors cared for J.D.D. not only at his birth but also for his week-long stay after his birth. The hospital's abuse report shows that medical staff knew that J.D.D. was exposed to his mother's cocaine, that his mother had no prenatal care, and that J.D.D. had low oxygen. Still, they did not request HIV screening. In fact, the hospital's Infant Discharge Summary noted several normal health findings for J.D.D., and did not so much as hint about the possibility of HIV. Nor did Dr. Gonzalez, who saw J.D.D. many times during his time in foster care, detect the need for screening—even though he also knew about J.D.D.'s cocaine exposure and his mother's addiction. Under these circumstances, a jury could not reasonably conclude that a substantial risk of HIV was obvious to social workers when the risk was overlooked by many medical professionals.

Davis counters that only the defendants (and not the doctors and nurses) were aware that J.D.D.'s mother had been treated for prior heroin use and had been arrested in the 1980's for soliciting prostitution. It strikes us as speculative to assume that they would have known this information because, as the district court explained, these details were "not included in any document summarizing J.D.D.'s case or on any document containing Weaver and Riley's signature." Instead, these facts came from police abuse reports for previous children of J.D.D.'s mother.

Even if we assume that the defendants read the old police reports, we could not embrace Davis's argument. True, the prostitution arrest and heroin usage raise a yellow flag. But they do not make the risk obvious. And at any rate, the older police reports were undermined by the custody petition filed by an investigator in J.D.D.'s own case—which said that, to the best of the author's knowledge, J.D.D.'s "mother has no criminal history," and that "neither the mother nor the child has any medical problems or physical abnormalities." Lacking evidence that the risk was obvious, Davis can only hope to show that the defendants were negligent—but "deliberate indifference entails something more than mere negligence." *Farmer*, 511 U.S. at 835.

In short, the record does not show that Weaver and Riley actually inferred that J.D.D. had a substantial risk of contracting HIV. No actual inference of risk means no deliberate indifference. And without deliberate indifference, there can be no constitutional violation—clearly established or otherwise. The defendants are thus immune from suit on this claim.

B.

Next, Davis points to the Medicaid Act to overcome qualified immunity. Under the Act, Florida must create a plan that provides "medical assistance" with "reasonable promptness to all eligible individuals." 42 U.S.C. § 1396a(a)(8) (2000); *see id.* § 1396a(a)(10) (listing covered individuals). That medical assistance includes early and periodic screening, such as "laboratory tests" and other treatment "to correct or ameliorate defects" and physical "illnesses and conditions." *Id.* § 1396d(r)(1)(B)(iv), (5).

To the extent Davis seeks to tack this statutory argument onto his constitutional one, his attempt flounders. We have already explained that the defendants did not violate J.D.D.'s constitutional rights. And officials "sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." *Davis v. Scherer*, 468 U.S. 183, 194 (1984).

At the same time, "we have acknowledged the possibility that some federal statutory provisions will be sufficiently clear on their own to provide defendants with fair notice of their obligations under the law." *Gonzalez v. Lee Cty. Hous. Auth.*, 161 F.3d 1290, 1301 (11th Cir. 1998). To provide sufficient notice to Weaver and Riley, the statutory provisions and regulations must be so clear that any "reasonable public official, having read the plain terms of this statute, certainly would have understood that federal law makes it unlawful" not to request HIV screening. *Id.* at 1302.

That level of clarity is not present here. None of the provisions Davis cites, as the district court put it, "mandate HIV testing specifically, nor do they unmistakably instruct that the failure to refer a child for such a test is illegal." We do not doubt that a state plan's required coverage of "laboratory tests" includes screening for HIV. Still, we cannot say that this language puts social workers on notice that they must diagnose an HIV risk and pursue screening, or else face personal financial liability.

To be sure, we have identified "a federal right to reasonably prompt provision of assistance under section 1396a(a)(8) of the Medicaid Act." *Doe 1-13*

ex rel. Doe, Sr. 1-13 v. Chiles, 136 F.3d 709, 719 (11th Cir. 1998). Although Davis leans on this holding in *Doe*, the case cannot withstand the weight he understandably wishes to place on it. There, Medicaid-eligible patients waited several years for treatment of their known medical conditions. *Id.* at 711. We held that they had a federal right, enforceable through § 1983, to prompt state treatment under the Medicaid Act. *Id.* at 715–19. But a state's duty to provide prompt care for known medical needs does not imply—let alone "clearly establish"—that an individual social worker must request specific tests for an unknown medical need.

Nor would state law have put Weaver and Riley on notice. According to a Florida statute, the Department of Children and Families "is authorized to have a medical screening performed on the child." Fla. Stat. § 39.407(1) (1999). The statute also says that the "medical screening shall be performed by a licensed health care professional and shall be to examine the child for injury, illness, and communicable diseases." *Id.* Davis argues that the statute "clearly and unequivocally states DCF 'shall' have the child examined for illness and 'communicable diseases.'" We do not read the statute to authorize screening in one sentence only to mandate screening in the next. The "shall be" language does not obligate social workers to initiate any screening; rather, that language explains who can perform medical screening and what kind of screening the department is authorized to request. Far from creating a clear requirement to initiate screening, the language becomes relevant only *after* a social worker decides to pursue a screening.

Davis also looks to a now-repealed Florida regulation to make up for the law's lack of clarity on the screening issue. The regulation provided several examples of children who "should be considered at risk" and "should be tested" for HIV. Fla. Admin. Code. R. 65C-13.017(7) (1992) (repealed in 2008). Those children include any "abandoned newborn" and children who tested positive for "drugs commonly self-administered by injection," although the regulation also notes that hospital "staff will normally discover these [drug-positive] children and request appropriate permission" for testing. *Id.* We can assume for argument's sake that J.D.D. "should" have been considered at risk. But *should* indicates a recommendation, not a requirement. Again, hospital staff and doctors—those who, as the regulation indicates, are often best positioned to detect the need for testing—also did not see a need for HIV screening. Simply put, none of the statutes or regulations commanded Weaver and Riley to detect the HIV risks and request screening.

* * *

At bottom, no federal law mandated HIV screening here—much less "clearly established" such a requirement. Weaver and Riley are therefore immune from suit. We **AFFIRM** the judgment of the district court.