

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-40900  
Summary Calendar

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ZEDORE ORPHEY,

Plaintiff-Appellant,

VERSUS

SHELBY BERNARD, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Western District of Louisiana  
(93-CV-134)

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(April 28, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:<sup>1</sup>

Zedore Orphey appeals from the dismissal of his civil rights claims. We **AFFIRM**.

I.

Orphey, *pro se* and *in forma pauperis*, is incarcerated at the Avoyelles Correctional Center in Louisiana. He filed a complaint pursuant to 42 U.S.C. § 1983 against Shelby Bernard, Richard Mitchel, Todd Chatelain, Charles Oberdorf, and Richard Wall.<sup>2</sup>

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1 Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

2 Wall was named in Orphey's amended complaint.

Orphey alleged that these prison officials violated his constitutional rights by issuing false disciplinary reports in retaliation for his making complaints about Bernard's conduct.

A magistrate judge recommended dismissing Wall and Mitchel, but denied the motion for summary judgment filed by Bernard, Oberdorf, and Chatelain. The district court adopted the magistrate judge's recommendation and referred the remaining claims to the magistrate judge for an evidentiary hearing.

Following the hearing, the magistrate judge concluded that none of the disciplinary reports were retaliatory. Accordingly, the magistrate judge recommended dismissing with prejudice Orphey's claims against Bernard, Oberdorf, and Chatelain. The district court adopted the recommendation, and dismissed the action with prejudice.

A.

Orphey contends that the district court erred in concluding that defendants did not write false, retaliatory disciplinary reports. We review the district court's factual findings for clear error. Fed. R. Civ. P. 52(a). "If the district court's findings are plausible in light of the record viewed in its entirety, [the court] must accept them, even though [it] might have weighed the evidence differently if [it] had been sitting as a trier of fact." **Price v. Austin Indep. Sch. Dist.**, 945 F.2d 1307, 1312 (5th Cir. 1991) (citations omitted). The district court's legal conclusions are reviewed *de novo*. **Id.**

Our review of the record reveals an adequate basis for the district court's conclusion that defendants did not retaliate against Orphey.<sup>3</sup> For each disciplinary report, there was evidence that Orphey committed the reported violation and that the report was not retaliatory. The district court adopted the magistrate judge's detailed account of each report and found no retaliation. The district court's findings are plausible in view of the record as a whole; there is no clear error. See **Price**, 945 F.2d at 1312.

B.

Orphey contends that the magistrate judge erred in denying his motion for appointment of counsel, asserting that he was entitled to counsel because an evidentiary hearing was held.<sup>4</sup> Orphey did not appeal the ruling to the district court. Appeals from a magistrate judge's ruling must first be made to the district court; we lack jurisdiction over a magistrate judge's ruling not so appealed. **Boren v. N.L. Indus., Inc.**, 889 F.2d 1463, 1465 (5th Cir. 1989), *cert. denied*, 497 U.S. 1029 (1990).

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3 Orphey complains that the magistrate judge did not consider his witnesses' testimony. The magistrate judge's report discusses the testimony of all of Orphey's witnesses except Renee Roy. That the magistrate judge did not mention Roy's testimony does not mean he did not consider it.

4 Orphey first motion for appointed counsel was filed and denied early in the case. Orphey filed another motion after Mitchel and Wall were dismissed; the magistrate judge deemed the motion premature because the district court had not ruled on his report and recommendation and no evidentiary hearing had been scheduled. The magistrate judge stated that if and when an evidentiary hearing is scheduled, Orphey could refile the motion. After the evidentiary hearing was scheduled, Orphey filed another motion for the appointment of counsel which the magistrate judge denied.

C.

Orphey contends that the magistrate judge erred when he admitted into evidence 20 pages of prison records which did not pertain to the incidents made the basis of the instant suit. Orphey objected to this evidence at the hearing, contending that the records were tantamount to inadmissible character evidence. The magistrate judge responded:

I understand what your objection is and I can assure you that if they have no relevancy or if they are inadmissible for some other reason; ... I certainly don't think I can consider these as evidence of prior bad acts, ... they are not - I don't know that I could consider them as convictions that I could use to consider as impeachment evidence.... I certainly will not let [the records] influence me if they are either irrelevant or if they are inadmissible.

"District courts are given broad discretion in rulings on the admissibility of evidence; we will reverse an evidentiary ruling only when the district court has clearly abused this discretion and a substantial right of a party is affected." *Rock v. Huffco Gas & Oil Co.*, 922 F.2d 272, 277 (5th Cir. 1991) (internal punctuation and citations omitted). Inasmuch as the magistrate judge was explicit that the records would not be used to Orphey's prejudice, Orphey does not show that a "substantial right" was affected by their admission into evidence or that the district court abused its discretion in admitting them.

III.

For the foregoing reasons, the judgment is

**AFFIRMED.**