

**UNITED STATES COURT OF APPEALS
for the Fifth Circuit**

No. 92-4775
No. 92-4919
Summary Calendar

CHRISTOPHER JAMES MURPHY,
Plaintiff-Appellant,

VERSUS

T. A. SHARP, ET AL.,
Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Texas
(CA-6-88-497)

(February 26, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:¹

Murphy appeals the take-nothing judgment entered against him following an adverse jury verdict. We find no error and affirm.

Christopher Murphy is an inmate under the custody of the Texas Department of Criminal Justice (TDCJ). Murphy filed a pro se action under 42 U.S.C. § 1983 contending that prison officials

¹Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

retaliated against him for his attempts to exercise his right of access to courts. Murphy suffered two dismissals, one before a **Spears** hearing and another following a **Spears** hearing. Murphy appealed those dismissals, both of which we vacated.

After the second remand, the parties consented to conducting all further proceedings before a magistrate judge. The magistrate judge denied Murphy's motion for summary judgment and the case proceeded to trial before a jury. The district court, in accordance with the jury responses to interrogatories, dismissed Murphy's action with prejudice. The magistrate judge also denied Murphy's motion for a new trial.

On appeal, Murphy raises a number of issues, only two of which require discussion: whether the district court erred in its earlier ruling denying Murphy's motion for summary judgment and whether the evidence is sufficient to support the jury verdict.

II.

A.

Before considering the merits of the appeal, we pause to consider our appellate jurisdiction. On July 16, 1992, the magistrate judge entered judgment dismissing Murphy's action. Murphy filed a notice of appeal on July 27. This appeal was docketed as No. 92-4775. Murphy served the new trial motion on July 16. The district court entered an order denying that motion on August 12. Murphy filed a second notice of appeal on August 31. This appeal was docketed as No. 92-4919.

The first notice of appeal is a nullity because Murphy filed it during the pendency of his new trial motion. **Acosta v. La. Dep't. of Health and Human Resources**, 478 U.S. 251, 254, 106 S.Ct. 2876, 96 L.Ed.2d 192 (1986); Fed. R. App. P. 4(a)(4). We therefore dismiss the appeal that has been docketed as No. 92-4775 for lack of jurisdiction. The appeal docketed as a result of Murphy's timely notice of appeal from the denial of his new trial motion (No. 92-4919), was timely. This court therefore has jurisdiction over the denial of that ruling and the underlying merits. **See** Fed. R. App. P. 4(a)(4).

B.

Murphy argues that the district court erred in denying his motion for summary judgment. It is unclear whether this ruling is reviewable. **See Black v. J.I. Case, Co., Inc.**, 973 F.2d 1226, 1228-29 (5th Cir. 1992), **vacated and withdrawn**, 1992 WESTLAW 224536 (5th Cir. 1992). However, assuming without deciding that this ruling is reviewable, we conclude that issues of material fact existed that required the district court to deny that motion.

To prevail on his retaliation claim, Murphy would have to show that a governmental official harassed him because of his reasonable attempt to exercise his right of access to courts. **Gibbs v. King**, 779 F.2d 1040, 1046 (5th Cir), **cert. denied**, 476 U.S. 1117 (1986). In his summary judgment motion and a supporting affidavit, Murphy asserted that prison officials pursued a false disciplinary action against him for sexual misconduct in retaliation for his exercise of his right of access to courts. According to Murphy, he was

charged with masturbating while looking at a female officer, Ms. Galindo, even though Galindo was not employed by the prison unit where the offense allegedly occurred and even though Murphy was not present at the time and place listed in the disciplinary report.

This is insufficient to carry Murphy's summary judgment burden. Even if some of the factual details in the disciplinary report were incorrect, Murphy failed to show that a reasonable trier of fact would have to determine that the discipline was motivated by retaliation for his exercise of his right of access to courts. The magistrate judge did not err by refusing to grant Murphy's motion for summary judgment.

C.

Murphy argues next that the district court erred in denying his motion for new trial because the evidence is insufficient to support the jury's verdict. To analyze such a sufficiency challenge, this court views the evidence "in a light most favorable to the jury's verdict" and affirms "unless the evidence points so strongly and overwhelmingly in favor of one party that the [C]ourt believes that reasonable persons could not arrive at a contrary verdict." **Id.**

During the trial, the defendants introduced the offense report, which stated that an officer observed Murphy

watching officer Galindo as [Murphy's] hands were in his pocket and masturbating It should be noted on or about 1-21 at approx. 2000 hrs. Inmate Murphy was reprimanded for such a same violation. On said date inmate was observed mast[u]rbating and was ordered by myself and officer Pyle COIII to strip search. Inmate[']s pants contained two large holes in both pockets and inmate had no underwear on at that time.

The defendants also introduced a written statement in which another inmate stated that he had seen Murphy masturbating while he was looking at a female officer. This evidence supports a reasonable inference that Murphy had failed to carry his burden of showing that the discipline in question was motivated by retaliation for Murphy's exercise of his right of access to the courts. The evidence that Murphy relies on to show a retaliatory motive is circumstantial. Murphy has not shown that the district court abused its discretion in rejecting his new trial motion based on sufficiency of the evidence.²

² Murphy raises four additional points that we discuss summarily for sake of completeness. He argues first that he should have been provided a trial transcript. This argument is without merit because Murphy does not identify any appellate issue that requires the trial transcript. **See Harvey v. Andrist**, 754 F.2d 569, 571 (5th Cir.), **cert. denied**, 471 U.S. 1126 (1985).

Murphy also complains that he did not receive a fair trial because of remarks counsel made during closing argument. Murphy made no contemporaneous objection to counsel's argument and therefore the plain error standard applies. Neither the arguments Murphy complains of so "seriously affected the fairness or integrity of the proceedings and resulted in a miscarriage of justice." **United States v. Hatch**, 926 F.2d 387, 394 (5th Cir. 1991). Consequently, Murphy has not shown that the magistrate judge committed plain error in permitting these arguments. The magistrate judge did not abuse his discretion by refusing to grant a new trial on this ground.

Murphy challenges a jury interrogatory regarding the standard of liability. The interrogatory asked the jury whether a defendant "retaliated against the plaintiff with a false disciplinary report for sexual misconduct due to the plaintiff filing grievances and assisting other inmates in filing grievances or for the purpose of discouraging the plaintiff from exercising such legal rights in the future?" Murphy contends that he should not have been required to prove what mental state the defendant would have in the future.

Murphy included this ground in his new trial motion, but because he did not object to the interrogatory during the trial, the plain-error standard applies. Murphy's argument is based on a

For the reasons stated above, we dismiss the appeal that has been docketed as No. 92-4775. The judgment of the district court, however, is affirmed in the appeal docketed as No. 92-4919.

misunderstanding of the nature of the interrogatory. It required the jury to answer "yes" if they found such a retaliatory motive as to **either** past or future exercise of legal rights. Therefore, Murphy was not required to prove a future mental state. Even if inclusion of that language was erroneous, it did not operate to Murphy's detriment, so he has not shown plain error. **See Hatch**, 926 F.2d at 394. The magistrate judge did not abuse his discretion by refusing to grant a new trial.

Murphy contends that the magistrate judge should have cited authorities to support his ruling on the new trial motion. Even if the magistrate judge should have included such citations, Murphy has not shown that the result of the ruling is incorrect, so he has not shown that the judgment in favor of the defendants should be disturbed.