IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3640
Summary Calendar

WALTER L. COLLINS,

Plaintiff-Appellant,

VERSUS

AVONDALE SHIPYARD, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
CA 90 3905 "J"

August 18, 1993

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Walter Collins, proceeding pro se and in forma pauperis, appeals a district court order adopting a magistrate judge's findings dismissing with prejudice his title VII complaint. Agreeing that Collins's complaint has no merit, we affirm.

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[*] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Collins, a black man, began working at Avondale Industries, Inc. ("Avondale"), as a sheet metal mechanic in January 1987. His duties included using a torch to lay out and cut sheet metal. During his tenure at Avondale, Collins had a history of absenteeism and below-average work production. On June 5, 1987, Collins received an official warning notice for absenteeism. On July 13, 1988, he received another official warning, this time for being absent from his assigned work area. On July 26, 1988, he received a third official warning for absenteeism listing thirteen days he had missed work since January 1, 1988. Collins signed each of these warnings.

On August 27, 1988, Collins left a material box, used for holding nuts and bolts, in the hull of a ship. Despite Avondale's policy forbidding the use of material boxes to store personal tools, Collins was using this box to store his tools.[1] Collins's supervisor, Ken Edler, told him to remove the material box from the vessel by the end of the day. The next day, August 28, while inspecting the vessel, Edler noticed the material box on the vessel.

On August 29, Edler consulted with his supervisor, Arthur Schloegel, and reviewed Collins's personnel record. They agreed to discharge Collins. The next day, Edler told Collins that Avondale had decided to terminate him for insubordination and absenteeism. Edler testified that while Collins's absenteeism was an aggravating

[1] Avondale sent a memorandum to employees explaining this policy.

factor in the decision, the primary reason was Collins's insubordination in refusing to remove his material box.

Edler also testified that he had twenty-five sheet metal workers under his supervision)) eleven white, fourteen black)) and that most of the recent hires had been black. He went on to list five white employees discharged in 1988 and 1989 for absenteeism or insubordination.

Collins filed a complaint against Avondale in January 1991, alleging a violation of title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, and seeking damages of $4,650,000.[2] In March 1992, the magistrate judge conducted a telephone trial.[3] The magistrate judge found that Collins most likely did not prove a prima facie case of racial discrimination because he did not show that he was treated less favorably than similarly situated non-minority workers. Even assuming, however, that Collins made a prima facie showing, the magistrate judge went on to determine that Avondale's reason for discharging Collins)) insubordination and to a lesser extent absenteeism)) was not pretextual, as various white employees had been terminated for the same reasons. The magistrate judge concluded that there was no evidence that Edler's discharge of Collins was racially motivated, and he recommended dismissal.

The district court adopted the magistrate judge's findings and

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[2] Collins initially also alleged violations of 42 U.S.C. §§ 1981 and 1983. The magistrate judge recommended dismissal of these claims. The district court adopted this recommendation and remanded only the title VII claim for further proceedings.

[3] The magistrate conducted the trial by telephone because Collins was incarcerated at Dixon Correctional Institute in Jackson, Louisiana.

recommendation and entered judgment dismissing the case with prejudice.

II.

Collins argues that the motivation for his discharge was racial animus. In a title VII case, a plaintiff bears the initial burden of making out a prima facie case of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). He does so by showing that "(1) the plaintiff is a member of a protected group; (2) the plaintiff was qualified for the job that was held; (3) the plaintiff was discharged; and (4) after the employer discharged the plaintiff, the employer filled the position with a person who is not a member of a protected group." Valdez v. San Antonio Chamber of Commerce, 974 F.2d 592, 596 (5th Cir. 1992) (citation omitted).

Once such a case is made, the employer must rebut the presumption of illegal discrimination by articulating "a legitimate nondiscriminatory reason for the termination." Valdez, 974 F.2d at 596. If the employer does so, the burden shifts back to the plaintiff to show, by a preponderance of the evidence, that the employer's proffered reason for the discharge was but a pretext for a racially motivated discharge. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). Ultimately, the plaintiff must show discrimination based upon race or gender. Valdez, 974 F.2d at 596.

We review the district court's (or, in this case, the

magistrate judge's) findings of fact in a title VII discrimination suit under the clearly erroneous standard. Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982). A finding is clearly erroneous only when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

There is no dispute that Collins is a member of a protected class, that he was a qualified sheet metal mechanic, and that he was discharged. Edler testified that, since Collins's discharge, most of the new hires were black and that, of the fifteen sheet metal mechanics employed at the time of trial, nine were black. No evidence shows the race of Collins's immediate replacement.

If his replacement had been black, Collins would have failed to prove a prima facie case. Nevertheless, after Edler and Collins testified, the magistrate judge stated, "Frankly, I think that I'm probably incorrect at finding that it's a prima facie case, but I'm going to find it simply so we can have [other Avondale employees'] testimony."

Proceeding under the assumption that Collins had made out a prima facie case, the magistrate judge then examined Avondale's articulation of a non-discriminatory motive for the discharge. Edler explained at length that he fired Collins because he failed to obey Edler's order to remove his material box at the end of the day from the area of a ship in which he was working. This order was in compliance with company policy. Edler stated that Collins's

record of absences carried some weight as evidence of his apparent inability to cooperate. The termination, Edler emphasized, was for insubordination resulting from Collins's failure to carry out a direct order. The absences were a minor consideration.

The burden then shifted back to Collins to show by a preponderance of the evidence that Edler's reason was not credible or that the motivation was more likely racial. Collins conceded that he failed to obey Edler's order but attempted to meet his burden by asserting that he had an excuse for not removing his material box and that, at most, he should have received a sanction less severe than termination.

Collins attempted, without success, to show that racial animus motivated Edler to fire him. Collins asserted, for example, that Edler's age (late 40's) indicated that he was of a generation that deprived blacks of privileges and benefits. Collins provided no facts tending to show that Edler maintained any specific racial animus. By contrast, a black sheet metal mechanic, who was a senior employee under Edler, testified to Edler's race-neutral supervision. Furthermore, Collins could name no white sheet metal mechanic who had been favored over black mechanics, either by receiving a higher salary or by receiving different discipline for similar infractions.

Even accepting the magistrate judge's assumption that Collins had proven a prima facie case, we are firmly convinced that Collins did not show that Avondale's reason for discharging him was pretextual. Avondale presented credible evidence that it termi-

nated Collins for violating workplace rules. Collins could not present a shred of evidence that Avondale maintained a racially discriminatory intent. In short, we do not believe that the magistrate judge's findings, adopted by the district court, were clearly erroneous.

III.

Collins makes a host of procedural arguments, mostly complaining that errors by the district court prejudiced him. We briefly address each in turn.

A.

Collins first argues that the district court should have appointed counsel to represent him. Title VII grants no automatic right to appointment of counsel. Gonzalez v. Carlin, 907 F.2d 573, 579 (5th Cir. 1990); see also Ulmer v. Chancellor, 691 F.2d 209, 212 (5th Cir. 1982) (civil rights complainant has no right to automatic appointment of counsel). A district court may appoint counsel to represent title VII litigants "in such circumstances as the court may deem just." 42 U.S.C. § 2000e-5(f)(1); see Gonzalez, 907 F.2d at 579. The decision rests within the court's sound discretion. Gonzalez, 907 F.2d at 579. The court determines whether to appoint counsel by looking to the nature of the case and the indigent's ability to represent himself in presenting and investigating the case and evidence. Id.

In Jackson v. Cain, 864 F.2d 1235, 1242 (5th Cir. 1989), we

found no error in a trial court's denial of a pro se plaintiff's motion for appointment of counsel, because the case was "not particularly complex," and the plaintiff proved "capable of self-representation." The present case is not complicated, and Collins proved capable of representing himself coherently. He showed knowledge of burdens of proof and timely filed numerous motions. The district court did not err in denying appointment of counsel.

B.

Collins next argues that the district court improperly ignored his motion to compel production of documents relating to all promotions and discharges at Avondale. We review the denial of a motion to compel for abuse of discretion. See Mills v. Damson Oil Corp., 931 F.2d 346, 350 (5th Cir. 1991). On December 17, 1991, Collins filed a motion to compel production of documents he had requested two months earlier. He requested, among other things, wide-ranging information about the hiring, promotion, and termination of all sheet metal mechanics hired during a period extending two years before his hire to three months after his termination. Collins also sought information about his absences. Since the district court never ruled on this motion, we shall treat it as a denial.

The information Collins requested goes beyond that which he needed to make out a case of discrimination. While some of the requested information might have shed light on Collins's prima facie case, the magistrate assumed that he had made out a prima

facie case even without the requested information. In addition, in light of Avondale's uncontested assertion that a majority of sheet metal mechanics, including those in grades above Collins's, are black, information about Avondale's hiring practices would have been of no benefit. The denial)) or omission to rule)) was not an abuse of discretion.

C.

Collins contends that the trial before the magistrate judge was improper because he did not consent to it. In McLeod, Alexander, Powel & Apffel, P.C. v. Quarles, 925 F.2d 853, 857 (5th Cir. 1991), we stated that "[a] party waives his objection when he participates in a proceeding before a magistrate and fails to make known his lack of consent or fails to object to any other procedural defect in the order referring the matter to the magistrate until after the magistrate has issued her report and recommendations." See also Parker v. Mississippi State Dep't of Pub. Welfare, 811 F.2d 925, 928-29 (5th Cir. 1987).

At the beginning of trial, Collins announced that he was ready for trial. He made no objection to the trial before the magistrate judge until after the magistrate judge's report was issued. Collins therefore waived any objection he may have had to the trial before the magistrate judge.

D.

Collins maintains that trial by telephone was ineffective

because a meaningful trial required either his or an attorney's presence. He argues that he could not hear all of the proceedings; several times during the trial, he expressed an inability to hear the testimony in the courtroom. Each time, the words were repeated, and the trial proceeded without any indication that Collins did not ultimately hear. Collins received a full and adequate opportunity to present his case. Moreover, he did not object to proceeding by telephone until he filed objections to the magistrate judge's report. Therefore, he waived his challenge to this aspect of the proceedings. See McLeod, 925 F.2d at 857.

E.

Collins then argues that he should have been allowed to introduce at trial an "Absentee File Inquiry" that lists his absences from work. The district court rejected Collins's contention because the magistrate judge allowed him to testify about the information in the document. We shall not disturb an evidentiary ruling unless the district court abused its discretion and thereby caused a party substantial prejudice. Williams v. Chevron U.S.A., Inc., 875 F.2d 501, 504 (5th Cir. 1989); see also Seidman v. American Airlines, 923 F.2d 1134, 1138-39 (5th Cir. 1991).

Collins was allowed to testify about the contents of the document. The record of his absences was not in dispute. Furthermore, his absences were only marginally relevant to the issue of Avondale's motivation in terminating Collins. Because

Collins suffered no substantial prejudice, no abuse of discretion exists here.

F.

Collins next asserts that the magistrate judge was not impartial because his conclusions included his opinion that Collins had unfairly burdened Avondale and the judicial system with the instant suit and because the magistrate judge had recommended the dismissal of a prior action filed by Collins.[4] Adverse rulings alone are insufficient to show bias. United States v. MMR Corp., 954 F.2d 1040, 1045 (5th Cir. 1992) (citing Berger v. United States, 255 U.S. 22 (1921)). So, the fact that the magistrate judge previously had dismissed a suit by Collins is of no relevance to this proceeding.

In addition, the general rule is that bias sufficient to disqualify a judge must stem from an extrajudicial source, except where "`such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party.'" Parliament Ins. Co. v. Hanson, 676 F.2d 1069, 1075 (5th Cir. 1982) (quoting Davis v. Board of Sch. Comm'rs, 517 F.2d 1044 (5th Cir.

[4] In his recommendation, the magistrate judge commented that

> [i]t is a tragedy that we even had to come this far in resolving this particular case because this sets a bad precedent, in my opinion, when we have such clear evidence that race played no part in this termination of Mr. Collins. It's because of cases like this which I think brings Title VII of the Civil Rights Act under so much attention every year, that when we get a case as frivolous as this one and are required to go to trial on it, we somehow, in my opinion, create an injustice to those claims that are not frivolous . . . .

1975), cert. denied, 429 U.S. 944 (1976)). Applying this standard to the magistrate judge's comments, we conclude that they evidenced no pervasive bias or prejudice. Our review of the record convinces us that the magistrate judge conducted the trial with complete impartiality, allowing Collins every opportunity to prove his case.

G.

Collins finally argues that the district court should have granted him a new trial. We review a district court's ruling on a motion for new trial for abuse of discretion. Dawson v. Wal-Mart Stores, 978 F.2d 205, 208 (5th Cir. 1992). Collins did not make out a case of racial discrimination. He provided no evidence that he was treated differently from similarly treated whites, nor did he show that any racial animus existed. Since nothing in the motion for new trial places that determination in doubt, the district court was wholly within its discretion in denying a new trial.

AFFIRMED.