**UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

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No. 92-5562
Summary Calendar

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HERMUNTH SHIIMI,

Plaintiff-Appellant,

versus

ASHERTON I.S.D.,

Defendant-Appellee.

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Appeal from the United States District Court
For the Western District of Texas
(SA-89-CA-1655)

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(January 8, 1993)

Before POLITZ, Chief Judge, KING and BARKSDALE, Circuit Judges.

POLITZ, Chief Judge:[*]

Hermunth Shiimi appeals an adverse summary judgment in his employment discrimination suit. He also challenges the denial of his motion to amend, the court's refusal to appoint counsel, and various rulings by the magistrate judge, including an adverse award of sanctions. Finding no error, we affirm.

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[*]Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

## Background

Shiimi, a black male from Namibia, Africa, was hired in 1987 as a math teacher by the Asherton Independent School District. His contract was probationary. At the time of his employment Shiimi held a bachelor's degree in science and a master's in education, and he had Texas teacher's certificates in math, chemistry, and biology. On March 9, 1988 Shiimi received a letter from the school board notifying him that his contract would not be renewed the next year.[1] Shiimi requested and was given a hearing.[2] Following the hearing the board confirmed its decision not to renew the contract.

Shiimi's suit against the school district alleges employment discrimination under Title VII and 42 U.S.C. § 1981. The school district moved for summary judgment, asserting that Shiimi's termination was based upon unsatisfactory job performance, particularly his inability to maintain classroom discipline. After the filing of the motion for summary judgment, Shiimi's counsel withdrew.

Four months after the pleading deadline Shiimi sought to add claims asserting violations of his procedural and substantive due

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[1] The letter provided:

> This letter is the written notification required by Texas School Law 13.103 that the Board of Trustees of Asherton ISD will terminate your employment with the District at the end of your contract.

[2] Shiimi was provided with the written rationale for his termination. He retained counsel and sought a hearing before the board. On the evening of the hearing, however, Shiimi's attorney was delayed in court and the board refused to delay the hearing.

process rights and claiming that the school district failed to comply with the statutory requirements of the Texas Term Contract Nonrenewal Act [TCNA].[3] The attempted amendment was rejected as untimely.

Throughout the course of these proceedings, Shiimi filed numerous motions for appointment of counsel, and at least 13 motions for contempt and sanctions against the school district. In addition, he refused to consent to a full referral of the matter to the magistrate judge. Based upon the adverse rulings and an award of sanctions against him, Shiimi alleges that the magistrate judge lacked impartiality.

## Analysis

### I. The Motion to Amend

Generally, leave to amend the pleadings "shall be freely given when justice so requires."[4] The decision to deny a motion for such leave, however, is reviewed only for abuse of discretion.[5] We find no such abuse. Failure to comply with the court's scheduling order is ample reason for denying the amendment.[6] The district court's

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[3] See Tex. Educ. Code §§ 21.201-21.211.

[4] Fed.R.Civ.P. 15(a).

[5] **Overseas Inns S.A. P.A. v. United States**, 911 F.2d 1146 (5th Cir. 1990).

[6] **Avatar Exploration, Inc. v. Chevron U.S.A., Inc.**, 933 F.2d 314 (5th Cir. 1991).

scheduling order required the filing of all amendments to the pleadings by July 20, 1990, and provided a discovery cut-off date of August 20, 1990. On November 19, 1990 Shiimi moved for leave to file his supplemental pleading.[7] The motion appropriately was denied as untimely.

Amendments may also be denied for futility. Even if Shiimi had been granted leave to amend to assert his claim under the TCNA, the claim would fail. As a probationary teacher, his contract was not governed by the TCNA but by chapter 13 of the Education Code.[8] The claimed statutory protection did not exist.

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[7] Evincing his propensity to file repetitious pleadings, on December 6, 1990 Shiimi filed a motion to amend and a supplement to the November 19 motion -- both seeking the same relief as the November 19 motion.

[8] Section 21.211 of the Education Code provides: "This subchapter does not apply to teachers who are employed under the provisions of the probationary or continuing contract law as set out in Subchapter C of Chapter 13 of this code."

Section 13.103 provides that a probationary teacher may be terminated "if in [the Board's] judgment the best interests of the school district will be served thereby." Upon receiving notice of the board's intent to terminate, the probationary teacher "shall have the right upon written request to a hearing before the board of trustees, and at such hearing, the teacher shall be given the reasons for termination of his employment." Tex. Educ. Code § 13.104. Although under the TCNA, a teacher must have written notice of the board's proposed termination before the decision is made, see **Salinas v. Central Education Agency**, 706 S.W.2d 791 (Tex. App. 1986), Section 13.104 contemplates that the board has already made a decision when notice is given. The hearing provides an opportunity to reconsider and "confirm or revoke its previous action of termination; but in any event, the decision of the board of trustees shall be final and non-appealable." Tex. Educ. Code § 13.104.

II. The Motion to Appoint Counsel

The district court in a Title VII action may appoint counsel "in such circumstances as the Court may deem just."[9] The refusal to appoint counsel, however, is reviewed only for abuse of discretion.[10] Among the factors the district court should consider in exercising that discretion are:

> (1) the merits of the plaintiff's claims of discrimination;
> (2) the efforts taken by plaintiff to obtain counsel; and
> (3) the plaintiff's financial ability to retain counsel.[11]

The magistrate judge, in considering Shiimi's request for appointed counsel, determined that the last two factors militated in favor of appointing counsel; however, the court found these factors outweighed by the fact that the plaintiff's claims, in light of the summary judgment evidence, lacked merit. The district court also may consider the plaintiff's ability to represent himself.[12] The district court carefully considered all circumstances and concluded that Shiimi was able to represent himself. We find no abuse of discretion in this ruling.

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[9] 42 U.S.C. § 2000E-5(f)(1).

[10] **Caston v. Sears, Roebuck & Company**, 556 F.2d 1305 (5th Cir. 1977).

[11] **Gonzalez v. Carlin**, 907 F.2d 573, 580 (5th Cir. 1990) (citations omitted).

[12] **Poindexter v. Federal Bureau of Investigation**, 737 F.2d 1173 (D.C. Cir. 1984).

III. Magistrate Judge's Conduct

Shiimi claims that because he refused to consent to a referral of the case to the magistrate judge under 28 U.S.C. § 636(c), it was improper for the magistrate judge to issue any rulings. He takes issue with the rulings on numerous motions and contends that the magistrate judge was not impartial. We find these contentions wholly without merit.

Consent of the parties is not required for the district court's referral of any pretrial, discovery, or other non-dispositive motion to a magistrate judge.[13] The court may likewise refer motions for summary judgment for the magistrate judge's proposed findings and recommendations.[14] It is only when the magistrate judge is to conduct all proceedings to conclusion that consent of the parties is required.[15] In this cause, Magistrate Judge Primomo made rulings on discovery matters and he issued proposed findings and recommendations on the summary judgment motion. His actions were within the authority of the applicable statute and the court's referral.

Shiimi's assertion that the magistrate judge was partial to the defendant is also without merit. A judge must disqualify himself if a reasonable person would have a rational basis for

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[13] 28 U.S.C. § 636(b)(1)(A).

[14] 28 U.S.C. § 636(b)(1)(B).

[15] 28 U.S.C. § 636(c).

questioning his partiality. "The nature of the bias, however, must be personal and not judicial."[16] Shiimi presents no factual basis for the claimed impartiality. The mere fact that the magistrate judge did not rule in Shiimi's favor is not grounds for recusal.[17]

IV. Summary judgment

We review an order granting summary judgment *de novo*.[18] A summary judgment will be upheld "if no genuine issues of material

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[16] 28 U.S.C. §§ 144, 145(a); **Liljeberg v. Health Services Acquisition Corp**., 486 U.S. 847 (1988).

[17] Shiimi also challenges several rulings, including the imposition of sanctions. Review of the record reveals that these claims are without merit. After Shiimi filed 12 motions for contempt and sanctions, often raising issues which previously had been decided, the magistrate judge ordered Shiimi to refrain from filing repetitious pleadings. When Shiimi filed his thirteenth motion for contempt and sanctions, again raising issues previously decided, the magistrate judge determined that Shiimi was unnecessarily increasing the costs of the litigation and imposed sanctions, ordering him to pay $500 in attorney's fees to the defendant. We find neither error nor abuse of discretion.

[18] **Thurman v. Sears, Roebuck & Co.**, 952 F.2d 128 (5th Cir. 1992), cert. denied, 113 S.Ct. 136 (1992).

Shiimi appears to misunderstand the meaning of *de novo* review. He complains that the district court conducted an improper *de novo* review without allowing him an opportunity to be heard before granting summary judgment. Shiimi already had submitted responses to the motion for summary judgment. *De novo* review does not mean that the district court conducts an additional hearing; it simply means that the district court independently reviews matters in the record. When a motion for summary judgment is referred to the magistrate judge for findings and recommendations, the district judge "shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). This the district court did; we cannot fault the court for doing precisely what the law required.

fact exist and if the defendants are entitled to judgment as a matter of law."[19] The party seeking summary judgment bears the initial burden of establishing the basis for its motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact.[20] The opposing party must present affirmative evidence in order to defeat a properly supported motion for summary judgment.[21]

Shiimi contends that the trial court erred in granting summary judgment because the court relied on cases overruled by the Civil Rights Act of 1991 and, further, because genuine issues of material fact were presented. He errs on both counts. We have held that the 1991 Act, specifically section 101 thereof upon which Shiimi relies, does not apply to conduct occurring before its effective date.[22] Accordingly, the district court did not err in relying on **Patterson v. McLean Credit Union**.[23] Further, the summary judgment record discloses no genuine issue of material fact.

On the merits, the summary judgment properly was granted.

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[19] **Jones v. Roadway Express, Inc.**, 931 F.2d 1086, 1088 (5th Cir. 1991) (citations omitted); Fed.R.Civ.P. 56(c).

[20] **Celotex Corp. v. Catrett**, 477 U.S. 317 (1986).

[21] **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242 (1986).

[22] **Johnson v. Uncle Ben's, Inc.**, 965 F.2d 1363 (5th Cir. 1992).

[23] 491 U.S. 164 (1989).

Shiimi asserts discriminatory treatment. His contract was for one year and was on a probationary basis. The school district declined to rehire him the next year. The summary judgment record establishes the reason for this action -- Shiimi's job performance was inadequate. It was poor job performance, including an inability to maintain classroom discipline, and not race or national origin which led to the decision not to renew Shiimi's employment contract. That is the reason assigned by the defendant for its action.[24] The record is devoid of any credible proof that this reason was pretextual. Shiimi bears the burden of establishing that the reason assigned by the school authorities was pretextual. He has not acquitted this burden.[25] His conclusionary statements neither suffice to create a genuine issue of material fact nor to rebut the legitimate business reason assigned by the school superintendent for the board's hiring decision.

The judgment of the district court is AFFIRMED.

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[24] See **Barnes v. Yellow Freight Systems**, 830 F.2d 61 (5th Cir. 1987).

[25] **Texas Dep't of Community Affairs v. Burdine**, 450 U.S. 248 (1981).