IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

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ERIK HERNANDEZ, )

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*Plaintiff*, )

v. ) No. 17-0264

)

STUART STOCKTON SYSTEMS, )

)

*Defendant*. )

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_)

DEFENDANT’S MEMORANDUM IN OPPOSITION TO PLAINTIFF’S APPLICATION FOR APPOINTMENT OF COUNSEL

**INTRODUCTION**

My client should prevail because the Court has broad discretion in employment discrimination cases to determine that Plaintiff’s motion is premature, that Plaintiff is able to proceed pro se, as he has demonstrated, and that Stuart Stockton Systems (“SSS”) did not discriminate against Plaintiff’s disability, but in fact accommodated it, and properly terminated him as a result of poor work performance.Plaintiff Erik Hernandez is bringing a discrimination suit under the Americans with Disabilities Act against his former employer, Defendant SSS. SSS terminated Mr. Hernandez’s employment due to poor work performance and repeated absences. Following his termination Mr. Hernandez contacted the Equal Employment Opportunity Commission (“EEOC”) and is suing pro se. He now requests appointment of counsel.

**STATEMENT OF FACTS**

The plaintiff, Mr. Hernandez, is seeking counsel for an underlying discrimination action against defendant and former employer, SSS, despite never communicating his formal cancer diagnosis. On December 9, 2016 Mr. Hernandez met with his supervisor to discuss his work performance because he had missed two project deadlines, Compl. for Emp’t Discrimination 2. Complaining of headaches, blurry vision and nausea, Mr. Hernandez requested a modified work schedule, *Id.*, which his supervisor was unable to grant because a software product due to be released required absences be kept to a minimum, Pl.’s Appl. for In Forma Pauperis and Appointment of Counsel 1. During this meeting Mr. Hernandez informed his supervisor that due to a scheduled neurological exam, he would need miss an upcoming meeting, which his supervisor said would be fine. *Id.*

Following this meeting Mr. Hernandez missed several days of work without notifying his supervisor, and she called him into her office on January 3, 2017 to discuss his continued inadequate work performance. *Id.* Mr. Hernandez informed his supervisor that his neurological exam had shown an abnormality, which could be cancer, and requested an additional week off. *Id.* His supervisor accommodated this, approving an exception to the policy to minimize absences and granted Mr. Hernandez’s additional time off. *Id.* Following this meeting, on January 10, 2017, Mr. Hernandez filed a discrimination charge with the EEOC, Pl.’s Appl. for In Forma Pauperis and Appointment of Counsel 1. On January 13, 2017 Mr. Hernandez was diagnosed with neuro glioblastoma, *Id.*, a fact never disclosed to SSS, Answer 2. After his week off, Mr. Hernandez had two further unexcused absences, returning to work on January 18, 2017, Answer 2, and subsequently missed the following two days of work without approval, Compl. for Emp’t Discrimination 3. While absent from work for illness, on January 20, 2017, Mr. Hernandez contacted Davis Graham, a local attorney, about representing him, Pl.’s Appl. for In Forma Pauperis and Appointment of Counsel 2.

On January 24, 2017, SSS dismissed Mr. Hernandez due to his repeated unnotified and unapproved absences. *Id.* On March 10, 2017 Mr. Hernandez applied for a position with another employer, successfully passing three rounds of interviews, Compl. for Emp’t Discrimination 3. On March 30, 2017, Mr. Hernandez’s former supervisor received a telephone call from the potential employer, inquiring about Mr. Hernandez’s job reliability and performance. She answered truthfully informing them that Mr. Hernandez had missed work due to health reasons and missed several deadlines, Answer 3. Over a period of ten months, Mr. Hernandez contacted and was denied by two additional attorneys, sought assistance of the Colorado Legal Aid Society in applying for appointment of counsel, and received a “Notice of Right to Sue” letter from the EEOC. Pl.’s Appl. for In Forma Pauperis and Appointment of Counsel 2 - 3. During his time at SSS, Mr. Hernandez completed two semesters of law school, giving him an appreciation of the relevant legal issues. *Id.*

**ARGUMENT**

The Court should not appoint counsel to the plaintiff Mr. Hernandez because he has not diligently sought counsel, contacting only three attorneys over ten months, his claim of discrimination is not sufficiently meritorious as he was terminated for poor work performance and absences, and he has demonstrated the capacity to proceed pro se correctly filing with the EEOC and this Court. In discrimination actions under § 706(f)(1) of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e-5(f)(1), the court may appoint counsel for a requesting plaintiff “in such circumstances as the court may deem just.”; it has been incorporated into the Americans with Disabilities Act, 42 U.S.C. § 12117(a). The Court has broad discretion regarding appointment of counsel. To help the court evaluate motions for appointment of counsel in Title VII cases, the Tenth Circuit has identified four factors. *Castner v. Colorado Springs Cablevision*, 979 F.2d 1417, 1420 – 21 (10th Cir. 1992). Under this four-factor test, the plaintiff must: (1) be financially unable to pay for counsel; (2) have diligently attempted to secure counsel; (3) have a meritorious claim for discrimination; and (4) not have the capacity to represent herself. *Id*. at 1421. The first factor does not require indigency, only that a plaintiff be not able to hire counsel and meet daily expenses. *Id.* at 1422. This factor is not at issue here. This memorandum will discuss the remaining Castner factors: the plaintiff’s lack of diligence in seeking to secure counsel, merits of the plaintiff’s discrimination claim, and the plaintiff’s capacity to represent himself.

1. **PLAINTIFF HAS NOT DILIGENTLY SOUGHT TO OBTAIN COUNSEL BECAUSE HE HAS ONLY CONTACTED THREE ATTORNEYS IN THE SPACE OF TEN MONTHS.**

This Court has determined a plaintiff need not “exhaust the legal directory”, but a plaintiff must still demonstrate that he or she has made a “reasonably diligent effort under the circumstances to obtain counsel.” *Castner*, 979 F.2d at 1422; *Jeannin v. Ford Motor Co*., No. CIVA 09-2287-JWL-DJW, 2009 WL 1657544, at \*1 (D. Kan. June 12, 2009) (ruling that plaintiff could not be appointed counsel because she had only contacted two attorneys; a plaintiff must seek counsel from at least five attorneys to meet the requirement of “reasonably diligent.”); *Bradshaw v. Zoological Soc. of San Diego*, 662 F.2d 1301, 1319 (9th Cir. 1981) (holding that the plaintiff had shown more than the requisite degree of diligence in efforts to secure counsel by contacting more than ten attorneys). Plaintiffs must demonstrate that contacted attorneys are unable to assist them. *See* *McCarter v. Potter*, No. 09-CV-01674-MSK-KMT, 2009 WL 10685431, at \*1 (D. Colo. Dec. 1, 2009) (holding that plaintiff should have provided the attorney’s denials to his requests because plaintiff filed only three days after contacting potential attorneys and it was not clear if attorneys had responded).

Mr. Hernandez should not be appointed counsel because he has not made a reasonably diligent effort to secure counsel. In *McCarter v. Potter*, No. 09-CV-01674-MSK-KMT, 2009 WL 10685431, at \*1 (D. Colo. Dec. 1, 2009), the plaintiff supplied a list of four attorneys, but failed to provide the attorneys’ responses to his requests for representation. In *Bradshaw v. Zoological Soc. of San Diego*, 662 F.2d 1301, 1319 (9th Cir. 1981), plaintiff showed she contacted more than ten attorneys, each of whom declined to represent her. Here, Mr. Hernandez has shown the responses of the attorneys contacted, however he has not contacted a sufficient number of attorneys. In *McCarter*, a plaintiff in Denver contacted four attorneys over the course of three days. 2009 WL 10685431, at \*1. Here Mr. Hernandez resides in the same region as the plaintiff in *McCarter*, butonly contacted three attorneys in ten months, showing he has not been reasonably diligent. 2009 WL 10685431, at \*1. In *Jeannin v. Ford Motor Co*., No. CIVA 09-2287-JWL-DJW, 2009 WL 1657544, at \*1 (D. Kan. June 12, 2009), a request for counsel was dismissed because the plaintiff only contacted two attorneys, falling short of the five required by the court. Here, Mr. Hernandez has only contacted three attorneys, one more attorney than the plaintiff in *Jeannin*, and should similarly be denied appointment of counsel. 2009 WL 1657544, at \*1.

1. **PLAINTIFF’S CLAIM OF DISCRIMINATION IS NOT SUFFICIENTLY MERITORIOUS BECAUSE STUART STOCK SYSTEMS ACCOMODATED HIS DISABILILTY AND TERMINATED HIS EMPLOYEMENT FOR POOR PERFORMANCE.**

For counsel to be appointed, a claim must be non-frivolous, showing basis either in law or in fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). This court has broad discretion regarding the appointment of counsel, and it is “is upon the applicant to convince the court that there is sufficient merit to his claim to warrant the appointment of counsel.” *McCarthy v. Weinberg*, 753 F.2d 836, 838 (10th Cir. 1985). The EEOC’s administrative finding is considered “highly probative” of the merits of the case, however the district court must determine merits independent of the EEOC. *Castner*, 979 F.2d at 1422. Unnotified absences on the part of a plaintiff weaken discrimination claims. *Brooks v. Supervalu*, No. 04-CV-00336 0ES-CBS, 2005 WL 1635446, at \*8 (D. Colo. July 12, 2005) (granting summary judgement for employer-defendant in a discrimination suit because plaintiff’s unnotified absences resulted in unsatisfactory performance); *Branham v. Delta Airlines*, 184 F. Supp. 3d 1299, 1308 (D. Utah 2016), aff'd, 678 F. App'x 702 (10th Cir. 2017) (granting summary judgement for the defendant where defendant-employer demonstrated termination occurred due to unnotified absences). Congress has not provided a means to compensate appointed counsel, therefore volunteer counsel is a limited resource requiring prudent dispersal. *Castner*, 979 F.2d at 1421. “The indiscriminate appointment of volunteer counsel to undeserving claims will waste a precious resource and may discourage attorneys from donating their time.” *Id.* at 1421.

The plaintiff has sufficiently stated his claim as a matter of law, but the facts do not give merit to his discrimination allegations. Mr. Hernandez has received a “Notice of Right to Sue” letter from the EEOC, however the Court has broad discretion in determining the merits independent of the EEOC notice. In *McCarthy v. Weinberg*, 753 F.2d 836, 839 (10th Cir. 1985), the plaintiff was wheelchair bound, suffering from multiple sclerosis, and sued for lack of accommodation of his illness. Mr. Hernandez’s illness has no such visual signs, requiring SSS to be notified to accommodate him. Mr. Hernandez filed with the EEOC before informing his supervisor of his potential diagnosis. After informing them of his potential diagnosis, he was granted a week-long leave of absence. SSS was never told of his formal diagnosis, and so did accommodate him further. In *Brooks v. Supervalu*, No. 04-CV-00336 0ES-CBS, 2005 WL 1635446, at \*8 (D. Colo. July 12, 2005), it was determined that the plaintiff was terminated for repeated unnotified absences and unsatisfactory performance after several warnings, rather than discrimination. Here, Mr. Hernandez was repeatedly absent during a critical time without notification, missing several deadlines, demonstrating he was terminated for poor work performance and not discrimination. Thus, SSS’s communication with Mr. Hernandez’s potential employer, disclosing the reasons behind his termination, was not discriminatory.

1. **PLAINTIFF HAS THE CAPACITY TO REPRESENT HIMSELF BECAUSE HE HAS COMPLETED TWO SEMESTERS OF LAW SCHOOL AND HAS PRESENTED HIS CASE WITH ACCURACY AND DILIGENCE THUS FAR.**

To determine the plaintiff’s ability to proceed without counsel a court should look to the complexity of the legal issues and the plaintiff’s ability to gather and present the facts. *Castner*, 979 F.2d at 1422. The plaintiff’s ability weighs more heavily than the complexity of the issue. *Compare* *Vera v. Utah Dep't of Human Servs*., 60 F. App'x 228, 230 (10th Cir. 2003) (deciding that plaintiff would not be appointed counsel because he “had conducted his case in a diligent and organized manner and was able to articulate his claims and views” despite the complexity of the issue), *with* *McCarthy*, 753 F.2d at 838 (appointing counsel because plaintiff was wheelchair bound, debilitated by multiple sclerosis with impaired ability to communicate due to failing eyesight and unpredictable hearing).

Mr. Hernandez should not be appointed counsel because he has successfully represented himself in the most strenuous aspects of the case. In *Vera v. Utah Dep't of Human Servs*., 60 F. App'x 228, 230 (10th Cir. 2003), the plaintiff did not have legal training in the complex issues of the case but was still denied appointment of counsel because he had presented his case diligently and articulately. Here, Mr. Hernandez has successfully proceeded thus far, filing a discrimination charge with the EEOC and his complaint and financial affidavit with the Court. Additionally, Mr. Hernandez has completed one year of law school, giving him familiarly and understanding of legal research and proceedings above that of the general populace. Accordingly, the Court should deny Mr. Hernandez’s request because it is even more unnecessary than the plaintiff’s in *Vera*. 60 F. App’x at 230. Mr. Hernandez filed his application for appointment of counsel with assistance from the Colorado Legal Aid Society, but he has given no indication he will be unable to continue to represent himself. Unlike the plaintiff in *McCarthy v. Weinberg*, 753 F.2d 836, 839 (10th Cir. 1985), who was debilitated by multiple sclerosis which impaired his ability to communicate due to sight and hearing loss, here, the plaintiff’s nausea and headaches have not reached a similar level of impairment, which further illustrates that appointed counsel would be inappropriate at this time. If counsel is doled out without discretion it may not be available for those in greatest need such as plaintiffs in *McCarthy*. 753 F.2d at 839; *Castner*, 979 F.2d at 1421.

Mr. Hernandez motion to be appointed counsel should not be granted because he has not diligently sought counsel, his claim is not sufficiently meritorious, and he has demonstrated he has the capacity to proceed pro se. The plaintiff was not reasonably diligent in attempting to secure counsel because only three attorneys were contacted over the course of ten months. His allegations of discrimination are not meritorious because SSS terminated Mr. Hernandez for repeated absences and poor work performance. Finally, Mr. Hernandez has demonstrated his capacity to represent himself as he has completed two semesters of law school, properly filed with the Court and EEOC, and has not reached a level of impairment necessitating appointment of counsel.

**CONCLUSION**

For the reasons stated here, the plaintiff should not be appointed counsel.

Respectfully submitted,

Dated: February 11, 2018 \_\_\_\_\_\_\_\_3401\_\_\_\_\_\_\_\_\_\_\_\_\_

Student’s Anonymous Identifier  
1800 Broadway,

Boulder, CO 80302

Attorney for Defendant Stuart Stockton Systems

**CERTIFICATE OF COMPLIANCE**

I certify that

1. this document has been prepared using Microsoft Word, Times New Roman, 12-point

and

1. this document contains: 2311 words.

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Student’s Anonymous Identifier