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*. )

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MEMORANDUM IN SUPPORT OF DEFENDANT'S OPPOSITION TO PLAINTIFF'S APPLICATION FOR IN FORMA PAUPERIS AND APPOINTMENT OF COUNSEL

**INTRODUCTION**

Plaintiff Erik Hernandez is bringing a discrimination suit against his former employer Defendant Stuart Stockton Systems. Stuart Stock Systems 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 now suing pro se for discrimination. He requests the court grant him In Forma Pauperis and appointment of counsel.

**STATEMENT OF FACTS**

Mr. Hernandez is claiming disability discrimination on the part Stuart Stockton Systems, his former employer despite never communicating his formal cancer diagnosis. On December 9, 2016 Mr. Hernandez met with his supervisor to discuss his work performance, Compl. for Emp’t Discrimination 2. Subsequently complaining of headaches, blurry vision and nausea, Mr. Hernandez requested a modified work schedule. *Id.* His supervisor was unable to grant the modified schedule because a new software product was due to be released requiring absences be kept to a minimum, Pl.’s Appl. for In Forma Pauperis and Appointment of Counsel 1, and Mr. Hernandez had already missed two previous project deadlines, Compl. for Emp’t Discrimination 2*.* Mr. Hernandez informed his supervisor that due to a scheduled CT scan, 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.* Due to this information his supervisor approved an exception to the policy to minimize absences and approved Mr. Hernandez’s additional time off. *Id.*

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. On January 24, 2017, Stuart Stockton Systems was forced to dismiss Mr. Hernandez due to his repeated unnotified and unapproved absences. *Id.* On March 30, 2017, Mr. Hernandez’s former supervisor received a telephone call inquiring about his job reliability and performance. She answered truthfully informing the caller that Mr. Hernandez had missed work due to health reasons and missed several deadlines, Answer 3.

**ARGUMENT**

This court should not appoint plaintiff counsel because this 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 did not discriminate against plaintiff’s disability, but in fact accommodated it, and properly terminated him as a result of poor work performance. In civil proceedings the court may appoint counsel for a requesting plaintiff asserting claims under Title VII of the Civil Rights Act of 1964 (“Title VII”) “in such circumstances as the court may deem just.” 42 U.S.C. § 2000e-5(f)(1). The Tenth Circuit has identified four factors to evaluate motions for appointment of council in Title VII cases. *Castner v. Colorado Springs Cablevision*, 979 F.2d 1417, 1420 – 21 (10th Cir. 1992). 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. Here, the first factor does not require indigency, and is not at issue. This court has broad discretion regarding appointment of counsel. This memorandum will discuss the prematurity of plaintiff’s motion, the merits of his’s claims, his capacity to represent himself, and his attempts to secure counsel.

1. **PLAINTIFF HAS NOT MET THE REQUIREMENT OF THE SECOND CASTNER FACTOR BECAUSE HE HAS ONLY CONTACTED THREE ATTORNEYS IN THE SPACE OF TEN MONTHS.**

This court has determined a plaintiff must demonstrate that he or she has made a “reasonably diligent effort under the circumstances to obtain counsel.” *Castner*, 979 F.2d at 1422. Plaintiffs need not exhaust all possibilities, but the number of attorneys contacted, availability of counsel in the area, and the plaintiff’s skill at obtaining such help. *Id*. at 1422. Attorneys must have denied their assistance to the plaintiff, and so plaintiffs must give attorneys a reasonable time to respond to their request. *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). The District of Kansas found that a plaintiff must seek counsel from at least five attorneys to meet the requirement of “reasonably diligent.” *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 did not meet the requirement of the second Castner factor as she had only contacted two attorneys).

Mr. Hernandez does not meet the requirements to be appointed counsel because he has not sufficiently attempted to secure counsel. [Continue Rule Application]

1. **PLAINTIFF’S REQUEST FOR APPOINTMENT OF COUNSEL IS PREMATURE BECAUSE HE HAS DEMONSTRATED HIS CAPACITY TO PROCEED THUS FAR.**

To determine the plaintiff’s ability to proceed without counsel the 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 to be considered. *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 v. Weinberg*, 753 F.2d 836, 839 (10th Cir. 1985) (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 thus far. In *Vera*, the plaintiff did not have legal training to deal with the complex issues present in his case but was denied appointment of counsel because he had presented his case diligently and articulately. Here, Mr. Hernandez has successfully proceeded thus far, meeting all requirements. Additionally, Mr. Hernandez has completed one year of law school, citation, giving him familiarly and understanding of legal research and proceedings above that of the general populace. Like in *Vera*, Mr. Hernandez has successfully and articulately presented himself and so should be appointed counsel. In *McCarthy*, the plaintiff was debilitated by multiple sclerosis and with impaired ability to communicate due to sight and hearing lose. Here, the plaintiff’s nausea and headaches have not reached the level of impairment shown in *McCarthy*, and so should not be appointed counsel. In *Castner* this Court notes that Congress has not provided a means to compensate appointed counsel. Volunteer counsel is a limited resource requiring prudent dispersal so that willing counsel may be found without the need to make coercive appointments. *Castner*, 979 F.2d at 1421. If counsel is doled out without discretion it may not be available for those in greatest need such as plaintiffs in *McCarthy*. Mr. Hernandez may reach a point where he is unable to represent himself, but it is premature to appoint counsel.

[Rule Application for flood gates of litigation argument. FIND CASE. Is argument still worth making if I can’t find a case to support it?]

1. **PLAINTIFF’S HAS NOT MEET THE REQUIREMENT OF THE THIRD CASTNER FACTOR BECAUSE HIS CLAIM IS NOT SUFFICIENTLY MERITORIOUS.**

For case to be meritorious, it must be non-frivolous. A claim is frivolous if it consists of irrelevant and illogical arguments based on factual misrepresentations or when the result is obvious. *Wheeler v. C.I.R.*, 528 F.3d 773, 776 (10th Cir. 2008). 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*, 753 F.2d at 838. The EEOC’s administrative finding is considered “highly probative” of the merits of the case. *Castner*, 979 F.2d at 1422; *compare Jones v. Pizza Hut, Inc.*, No. CIVA10CV00442WYD-KMT, 2010 WL 1268048, at \*2 (D. Colo. Mar. 30, 2010) (refusing appointment of counsel because of EEOC determination of a lack of violation provided strong evidence case lacked merit), *with* [CASE WHERE GRANTED]. The district court must determine merits independent of the EEOC. *Castner*, 979 F.2d at 1422. [Would a case showing a court going against the EEOC help?]

Plaintiff should not be appointed counsel has his claim is not sufficiently meritorious. Here, plaintiff has been granted a Right to Sue Notification from the EEOC, which does suggest his claim has merits. the plaintiff notified his employer of his upcoming CT scan, and that he might have cancer, he never informed SSS of his formal diagnosis. During the period before the plaintiff's termination, his employer was in critical process of preparing to release a new software product. He missed several deadlines and was frequently absent without notice. He only informed his employer of reasons for his absences when confronted with his poor work performance. SSS in fact accommodated his condition. When he communicated with his supervisor that he might have cancer, she granted him a week off, however, without further communication missed two more days of work after this week, returned, then missed two more. Acting on what information they had been given, SSS accommodated Mr. Hernandez, but his repeated absences from work required dismissal.

**CONCLUSION**

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

Respectfully submitted,

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

Student’s Anonymous Identifier  
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**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: \_\_\_\_\_\_\_\_\_\_\_\_words.

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Student’s Anonymous Identifier