**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO**

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)

ERIK HERNANDEZ, )

)

*Plaintiff*, )

v. ) No. 17-0264

)

STUART STOCKTON SYSTEMS, ) JUDGE SUSAN A. CAMACHO

)

*Defendant*. )

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

DEFENDANT’S MEMORANDUM IN OPPOSITION TO PLAINTIFF’S APPLIATION FOR IN FORMA PAUPERIS AND APPOINTMENT OF COUNSEL

**INTRODUCTION**

Plaintiff Erik Hernandez, a former employee of Defendant Stuart Stockton Systems. Citing poor work performance and repeated absences, Stuart Stock Systems terminated Mr. Hernandez’s employment. 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, Compl. for Emp’t Discrimination 2. His supervisor was unable to grant the modified schedule because a new software product was due to be released requiring all employees to keep absences 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, Compl. for Emp’t Discrimination 2. 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, Compl. for Emp’t Discrimination 2. Mr. Hernandez informed his supervisor that his neurological exam had shown an abnormality, which could be cancer, and requested an additional week off, Compl. for Emp’t Discrimination 2. Due to this information his supervisor approved an exception to the policy to minimize absences and approved Mr. Hernandez’s additional time off, Compl. for Emp’t Discrimination 2.

After his week off, Mr. Hernandez had a further two 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, Compl. for Emp’t Discrimination 3. 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**

My client should prevail 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).

[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).

[Rule Application]

1. **Additional Policy Arguments (flood gates of litigation / attorneys limited resource). PS Can’t have only 1 sub-heading. Either add another or combine with previous point heading.**

[There’s not Rule Explanation to be done here, its just policy, so it might work best in the RA section of other headings]

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

Concede Bradshaw, BUT bring up Jenkins

The burden 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)

**CONCLUSION**

The Plaintiff should not be appointed counsel.

Respectfully submitted,

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

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: \_\_\_\_\_\_\_\_\_\_\_\_words.

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Student’s Anonymous Identifier