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, )

)

*Defendant*. )

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

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

**INTRODUCTION**

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.Plaintiff Erik Hernandez is bringing a discrimination suit under the Americans with Disabilities Act 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 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, Stuart Stockton Systems, 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 approved 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 Stuart Stockton Systems, 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 began contacting attorneys, Pl.’s Appl. for In Forma Pauperis and Appointment of Counsel 2.

On January 24, 2017, Stuart Stockton Systems 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, a process which typically requires candidates to demonstrate their skill and ability to solve complex programming questions, [CITATION]. 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. Over a period of ten months, Mr. Hernandez contacted and was denied by two additional attorneys and sought assistance of the Colorado Legal Aid Society in applying for appointment of counsel. Pl.’s Appl. for In Forma Pauperis and Appointment of Counsel 2 - 3. During his time at Stuart Stockton Systems, 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, he has demonstrated the capacity to proceed pro se correctly filing with the EEOC and this Court, and his claim of discrimination is not sufficiently meritorious as he was fired for poor work performance and absences. 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 council 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. Here, the first factor does not require indigency, only that plaintiff be not able to hire counsel and meet daily expenses and is not at issue. *Id.* at 1422. This memorandum will discuss the remaining Castner factors: 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 the 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. *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 even responded).

Mr. Hernandez should not be appointed counsel because he has not sufficiently attempted 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, in the same region, Mr. Hernandez only contacted three attorneys in ten months. If a plaintiff can contact more attorneys in three days than Mr. Hernandez did in ten months, it suggests that Mr. Hernandez has not been reasonably diligent. In *Jeannin v. Ford Motor Co*., No. CIVA 09-2287-JWL-DJW, 2009 WL 1657544, at \*1 (D. Kan. June 12, 2009), the request for counsel was dismissed because the plaintiff only contacted two attorneys, falling short of the five usually required by the court. Here, Mr. Hernandez has only contacted one more attorney than the plaintiff in *Jeannin* and should similarly be denied appointment of counsel. 2009 WL 1657544, at \*1.

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 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. *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? – Jones v. WFYR Radio, has no EEOC, but still gets counsel. Bradshaw at trial denied counsel despite EEOC, was granted on appeal]

~~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.~~

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*, 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). Congress has not provided a means to compensate appointed counsel, therefore 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.

Mr. Hernandez should not be appointed counsel because he has successfully represented himself thus far by filing a discrimination charge with the EEOC, his complaint, and financial affidavit. Mr. Hernandez filed his application for appointment of counsel with assistance from the Colorado Legal Aid Society but has not demonstrated he will not be able to continue to represent himself. 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 most strenuous aspects 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, meeting all requirements. 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 in *Vera*. 60 F. App’x at 230. Unlike the plaintiff in *McCarthy v. Weinberg*, 753 F.2d 836, 839 (10th Cir. 1985), who was debilitated by multiple sclerosis which impaired their ability to communicate due to sight and hearing loss, here, the plaintiff’s nausea and headaches have not that 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. Mr. Hernandez may reach a point where he is unable to represent himself, but it is premature to appoint counsel.

[ENDING SUMMARY PARAGRAPH, REITERATE THESIS]

**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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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