

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Bernard L. Smith v. ADE-WIFCO Steel Products, et al.

No. 25-3136-DDC-BGS (D. Kan. Mar. 23, 2026) · No. 25-3136-DDC-BGS · Decided March 23, 2026

SUMMARY

The United States District Court for the District of Kansas denied pro se plaintiff Bernard L. Smith’s second motion for appointment of counsel in an employment discrimination action. Applying the factors governing appointment of counsel in civil cases, the court found that although plaintiff had proceeded in forma pauperis and diligently sought counsel, his ability to present the case and the unresolved merits did not support appointment.

CASE DETAILS

COURT	United States District Court for the District of Kansas
WRITING FOR THE COURT	Brooks G. Severson
JURISDICTION	United States District Court for the District of Kansas
DECIDED	March 23, 2026
DOCKET	25-3136-DDC-BGS
DISPOSITION	other
PROCEDURAL POSTURE	Pro se plaintiff in an employment-discrimination action moved for appointment of counsel under 28 U.S.C. § 1915(e)(1). The magistrate judge denied the motion.
STANDARD OF REVIEW	Abuse-of-discretion framework governing discretionary appointment of counsel in civil cases; the court applied the Castner factors.
PRECEDENTIAL VALUE	unpublished district court memorandum and order; persuasive rather than precedential
PARTIES	Bernard L. Smith v. ADE-WIFCO Steel Products, et al.

TOPICS

- civil procedure
- employment discrimination

PRACTICE AREAS

- civil procedure
- employment law
- civil rights

QUESTIONS PRESENTED

1. Whether the court should appoint counsel for an indigent pro se plaintiff in a civil employment-discrimination action under 28 U.S.C. § 1915(e)(1).
2. Whether the Castner factors—financial ability, diligence in seeking counsel, merits, and capacity to investigate and present the case—supported appointment of counsel.

HOLDINGS

1. Appointment of counsel was not warranted because, despite Smith's indigence and diligence in seeking counsel, the unresolved merits factor was nondeterminative and Smith had not shown that he lacked the capacity to investigate and present his claims without counsel.

KEY QUOTATIONS

“The decision whether to appoint counsel “is left to the sound discretion of the district court.””

“The burden is on the applicant to convince the court that there is sufficient merit to his claim to warrant the appointment of counsel.”

“Because the merits remain unresolved and Plaintiff’s capacity to present his case weighs against appointment, the balance does not support granting the motion.”

FACTUAL BACKGROUND

Bernard Smith brought a pro se employment-discrimination action and was granted in forma pauperis status. He represented that he could not afford counsel, had contacted eight attorneys, and would need discovery, depositions, and possibly expert witnesses. The court noted that Smith had filed a coherent response to defendants' dispositive motion containing factual and legal analysis and found no unusual complexity requiring appointed counsel.

PROCEDURAL HISTORY

Smith filed the action pro se in July 2025 and was granted leave to proceed in forma pauperis. A prior motion for appointment of counsel was denied after the court found that the issues were not complex and that Smith appeared capable of presenting the facts and arguments. After defendants filed a motion to dismiss and a motion to strike, Smith filed a second motion for appointment of counsel. The court denied the second motion because, although Smith satisfied the financial-need and diligence factors, the merits factor was unresolved and his demonstrated capacity to present the case without counsel weighed against appointment.

DISPOSITION

other

CASES CITED

- Hill v. SmithKline Beecham Corp., 393 F.3d 1111, 1115 (10th Cir. 2004)
- Beaudry v. Corr. Corp. of Am., 331 F.3d 1164, 1169 (10th Cir. 2003)

- *Lynn v. Willnauer*, Case No. 19-3117-HLT, 2021 WL 1390384, at *22 (D. Kan. Apr. 13, 2021)
- *Commodity Futures Trading Comm’n v. Brockbank*, 316 F. App’x 707, 712 (10th Cir. 2008)
- *Lyons v. Kyner*, 367 F. App’x 878, n.9 (10th Cir. 2010)
- *McCarthy v. Weinberg*, 753 F.2d 836, 838-39 (10th Cir. 1985)
- *Castner v. Colorado Springs Cablevision*, 979 F.2d 1417, 1420-22 (10th Cir. 1992)
- *Martinez v. Pickering*, No. 22-CV-4027-JWB-RES, 2022 WL 1604616, at *2 (D. Kan. May 20, 2022)
- *Lane v. Brewer*, No. 07-3225-JAR, 2008 WL 3271921, at *2 (D. Kan. Aug. 7, 2008)
- *Cox v. Ann (LNU)*, 924 F. Supp. 2d 1269 (D. Kan. 2013)
- *McLain v. Sedgwick Co. Sheriff’s Office*, No. 25-4036-JWB-BGS, 2025 WL 1696525, at *2-3 (D. Kan. June 17, 2025)

OPINION

Bernard L. Smith v. ADE-WIFCO STEEL PRODUCTS, et al.

PER CURIAM.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

BERNARD L. SMITH,

Plaintiff, v. Case No. 25-3136-DDC-BGS ADE-WIFCO STEEL PRODUCTS, et al., Defendant.

MEMORANDUM & ORDER ON

MOTION TO APPOINT COUNSEL

Plaintiff Bernard Smith filed this action pro se in July 2025, alleging employment discrimination. (Doc. 1.) In conjunction with his federal court Complaint (*id.*), Plaintiff filed a motion to proceed without prepayment of fees (IFP motion, Doc. 3, sealed), with a supporting financial affidavit (Doc. 3-1, sealed). At the time, the case was assigned to District Judge John Lungstrum, who granted IFP status to Plaintiff. (Doc. 4, text Order.) Plaintiff subsequently filed a motion requesting appointment of counsel. (Doc. 7.) This motion was also resolved by Judge Lungstrum, who denied the request for counsel, finding that “(1) the issues [in this case] are not complex, and (2) Plaintiff appears capable of adequately presenting facts and arguments.” (Doc. 10, at 6 (citing *Hill v. SmithKline Beecham Corp.*, 393 F.3d 1111, 1115 (10th Cir. 2004) (internal citation omitted)).) The case was ultimately reassigned to District Judge Daniel Crabtree. The case has progressed, resulting in Defendants filing a motion to dismiss for failure to state a claim. (Doc. 17.) Defendants have also filed a motion to strike (Doc. 23) Plaintiff’s surreply to the dispositive motion, arguing that the surreply is unnecessary and Plaintiff did not seek leave to file it. Both motions are currently pending. Plaintiff subsequently filed a second motion requesting appointment of counsel. (Doc. 24.) Therein, Plaintiff argues that counsel should be appointed because he cannot afford counsel, he has been diligent in searching for counsel, he has alleged “meritorious allegations of discrimination,” and because his case requires a significant amount of discovery, including depositions and expert witnesses. (Doc. 24, at 1-2.) For the reasons set forth

below, this motion is DENIED. Motion for Appointment of Counsel As an initial matter, the Court notes there is no constitutional right to have counsel appointed in civil cases such as this one. *Beaudry v. Corr. Corp. of Am.*, 331 F.3d 1164, 1169 (10th Cir. 2003); *Lynn v. Willnauer*, Case No. 19-3117-HLT, 2021 WL 1390384, *22 (D. Kan. April 13, 2021). “[A] district court has discretion to request counsel to represent an indigent party in a civil case” pursuant to 28 U.S.C. § 1915(e) (1). *Commodity Futures Trading Comm’n v. Brockbank*, 316 F. App’x 707, 712 (10th Cir. 2008). The decision whether to appoint counsel “is left to the sound discretion of the district court.” *Lyons v. Kyner*, 367 F. App’x 878, n.9 (10th Cir. 2010) (citation omitted). The Tenth Circuit has identified four factors to be considered when a court is deciding whether to appoint counsel for an individual: (1) plaintiff’s ability to afford counsel, (2) plaintiff’s diligence in searching for counsel, (3) the merits of plaintiff’s case, and (4) plaintiff’s capacity to prepare and present the case without the aid of counsel. *McCarthy v. Weinberg*, 753 F.2d 836, 838-39 (10th Cir. 1985) (listing factors applicable to applications under the IFP statute); *Castner v. Colorado Springs Cablevision*, 979 F.2d 1417, 1421 (10th Cir. 1992). Thoughtful and prudent use of the appointment power is necessary so that willing counsel may be located without the need to make coercive appointments. The indiscriminate appointment of volunteer counsel to undeserving claims will waste a precious resource and may discourage attorneys from donating their time. *Castner*, 979 F.2d at 1421. For the reasons discussed below, the Court finds that, on balance, the above factors weigh against appointing counsel. Under the first factor, the Court notes that Plaintiff has been given leave to proceed in forma pauperis in this case. (Doc. 4, text Order.) This weighs in favor of appointing counsel. The second factor relates to Plaintiff’s diligence in searching for counsel. Plaintiff must show that he has “made a reasonably diligent effort under the circumstances to obtain an attorney.” *Martinez v. Pickering*, No. 22-CV-4027-JWB-RES, 2022 WL 1604616, at *2 (D. Kan. May 20, 2022). Here, Plaintiff’s motion indicates that he has contacted eight attorneys, which establishes his diligence. Thus, this factor also weighs in favor of appointing counsel. The next factor is the viability of Plaintiff’s claims in federal court. See *McCarthy*, 753 F.2d at 838-39 (10th Cir. 1985); *Castner*, 979 F.2d at 1421. In regard to this factor, “[t]he burden is on the applicant to convince the court that there is sufficient merit to his claim to warrant the appointment of counsel.” *Hill*, 393 F.3d at 1115 (quoting *McCarthy v. Weinberg*, 753 F.2d 836, 838 (10th Cir. 1985)). As discussed above, a motion to dismiss Plaintiff’s claims is currently pending before the District Court. The present Order makes no determination as to the validity of that dispositive motion and/or the merits of Plaintiff’s claims. Thus, the Court finds this factor to be nondeterminative for purposes of analyzing Plaintiff’s request for counsel. Regardless of the potential viability of Plaintiff’s claims, and notwithstanding that two factors weigh in favor of appointment, the Court’s analysis turns to the final *Castner* factor, – Plaintiff’s capacity to prepare and present their case without the aid of counsel. 979 F.2d at 1420-21. In considering this factor, the Court must look to the complexity of the legal issues and Plaintiff’s ability to gather and present crucial facts. *Id.* at 1422. Merely

alleging that counsel could assist in presenting the “strongest possible case” does not justify granting such a motion. *Lane v. Brewer*, No. 07-3225-JAR, 2008 WL 3271921, at *2 (D. Kan. Aug. 7, 2008). In this regard, Plaintiff argues this case will require “extensive documentary discovery,” including depositions. (Doc. 24, at 2.) He also indicates he “may need expert witnesses for the testimony of multiple witnesses, personal involvement of multiple defendants in this case.” (Id.) Further, he argues that this “case may not be won without a high degree of SKILLS based on a firm foundation of depositions and other [pretrial] discovery and preparation that is beyond the ability of a Pro se litigant.” (Id. (capitalization in original).) As discussed above, the District Court has already determined that the issues in this case “are not complex” and that “Plaintiff appears capable of adequately presenting facts and arguments.” (Doc. 10, at 6.) There is nothing presently before the Court that would lead the undersigned Magistrate Judge to find otherwise. Plaintiffs’ case is not unusually complex in comparison to litigants who represent themselves pro se in federal cases on a regular basis. See e.g. *Cox v. Ann* (LNU), 924 F. Supp. 2d 1269 (D. Kan. 2013) (denying the appointment of counsel in a case alleging §1983 claims for violation of right to medical care as pretrial detainee under the 14th Amendment, deliberate indifference in rejecting a medical request, official custom or policy permitting denial of medical request, and related state tort claims); *McLain v. Sedgwick Co. Sheriff’s Office*, No. 25-4036-JWB-BGS, 2025 WL 1696525, at *2-3 (D. Kan. June 17, 2025) (denying the appointment of counsel in a case wherein the pro se plaintiffs contend there were “complex federal civil rights claims involving multiple government entities, systematic violations of constitutional and statutory rights, and an alleged pattern of racketeering activity designed to suppress Plaintiffs’ federally protected rights under the ADA and Fair Housing Act”). The Court understands that Plaintiff believes in his employment discrimination claim and believes that he deserves an attorney to represent him. These beliefs, however, do not constitute valid bases for the Court to appoint an attorney. Plaintiff has filed a coherent response to Defendants’ dispositive motion, citing both case law and federal statutes while containing factual and legal analysis. (See generally Doc. 20.) While the Court does not doubt that a trained attorney would handle the matter more effectively, the Court sees no basis to distinguish Plaintiff from the many other untrained individuals who represent themselves pro se on various types of claims in courts throughout the United States on any given day. In other words, although Plaintiff is not trained as an attorney, this alone also does not warrant appointment of counsel. While Plaintiff has satisfied the threshold financial and diligence in searching for counsel factors, *Castner* requires affirmative showings on the first three requisite factors. *Castner*, 979 F.2d at 1421. Because the merits remain unresolved and Plaintiff’s capacity to present his case weighs against appointment, the balance does not support granting the motion. As such, Plaintiff’s request for counsel (Doc. 24) is DENIED. IT IS THEREFORE ORDERED that Plaintiff’s motion for appointment of counsel (Doc. 24) is DENIED. IT IS SO ORDERED. Dated at Wichita, Kansas, on this 23rd day of March, 2026.

/S/ BROOKS G. SEVERSON

Brooks G. Severson United States Magistrate Judge

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