

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

| | | |
|------------------------|---|--------------------------|
| ROBERTO TORRES, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | Case No. 13-1245-EFM-KGG |
| |) | |
| BODYCOTE INTERNATIONAL |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

**NUNC PRO TUNC
ORDER ON
MOTION TO PROCEED WITHOUT PREPAYMENT OF FEES
AND MOTION FOR APPOINTMENT OF COUNSEL**

In conjunction with his federal court Complaint alleging employment discrimination and personal injury, Plaintiff Roberto Torres has filed a Motion to Proceed Without Prepayment of Fees (*IFP* Application, Doc. 3, sealed), with an accompanying Affidavit of Financial Status (Doc. 3-1, sealed). He also has filed a Motion for Appointment of Counsel. (Doc. 4.) Having reviewed Plaintiff's motions, as well as his Complaint (Doc. 1), the Court is prepared to rule.

I. Motion to Proceed *In Forma Pauperis*

Under 28 U.S.C. § 1915(a), a federal court may authorize commencement of an action without prepayment of fees, costs, etc., by a person who lacks financial means. 28 U.S.C. § 1915(a). In so doing, the court considers the affidavit of

financial status included with the application. *See id.*

There is a liberal policy toward permitting proceedings *in forma pauperis* when necessary to ensure that the courts are available to all citizens, not just those who can afford to pay. *See generally, Yellen v. Cooper*, 828 F.2d 1471 (10th Cir. 1987). In construing the application and affidavit, courts generally seek to compare an applicant's monthly expenses to monthly income. *See Patillo v. N. Am. Van Lines, Inc.*, No. 02-2162, 2002 WL 1162684, at *1 (D.Kan. Apr. 15, 2002); *Webb v. Cessna Aircraft*, No. 00-2229, 2000 WL 1025575, at *1 (D.Kan. July 17, 2000) (denying motion because "Plaintiff is employed, with monthly income exceeding her monthly expenses by approximately \$600.00").

In his supporting financial affidavit, Plaintiff indicates he is 57 years old and is separated from his wife, who lives in Missouri. (Doc. 3-1, at 1-2.) He lists his 3 minor nieces, who live in Mexico, as dependents. (*Id.*, at 2.) Although it is commendable that Plaintiff provides financial assistance to his nieces, the Court notes that because they are not Plaintiff's biological or adopted children, they are not legally considered his dependents.

Plaintiff has been employed for close to two years, earning a modest monthly wage and receiving health insurance. (*Id.*, at 3-4.) He does not list any unemployment benefits or any other source of income or government assistance.

(*Id.*, at 5-6.)

Plaintiff does not own real property, but does own a modest automobile. (*Id.*, at 3-4.) He indicates a relatively small amount of cash on hand. (*Id.*, at 4.) He enumerates typical monthly expenses, most of which are reasonable, including rent, utilities, and telephone. (*Id.*, at 6.) He has previously filed for bankruptcy.

Considering all of the information contained in the financial affidavit, Plaintiff has reasonable monthly expenses which exceed his monthly income by only a few hundred dollars (even less when considering the amount of monthly assistance he gives his nieces). Although he has cash on hand, this amount is not enough to cover his monthly rent payment. Thus, the Court finds Plaintiff has established that he is entitled to file this action without payment of fees and costs. The Court **GRANTS** Plaintiff leave to proceed *in forma pauperis* and directs that this case be filed without payment of a filing fee.

II. Motion for Appointment of Counsel.

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) (listing factors applicable to applications under Title VII). 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.

Having granted Plaintiff *IFP* status, the Court finds that he has a limited ability to afford counsel, thus satisfying the first *Castner* factor. The Court also finds that Plaintiff has been diligent in his search for counsel, satisfying the second factor. (*See* Doc. 4, 4-5.) The Court sees no glaring concerns on the face of Plaintiff's federal court Complaint (including the factual allegations contained in the attached EEOC charge of discrimination), satisfying the third factor. (Doc. 1.)

Plaintiff has, however, failed to establish the fourth *Castner* factor – that he is incapable of representing himself in this matter. 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. The Court notes that the factual and legal issues in this employment discrimination case are

not unusually complex. *See Kayhill v. Unified Govern. of Wyandotte*, 197 F.R.D. 454, 458 (D.Kan. 2000) (finding that the “factual and legal issues” in a case involving a former employee’s allegations of race, religion, sex, national origin, and disability discrimination were “not complex”).

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. To the contrary, Plaintiff has shown his ability to represent himself by drafting his agency charge of discrimination and federal court Complaint, which set out the operative facts to support his claims. (*See generally*, Doc. 1.) Further, although Plaintiff is not trained as an attorney, and while an attorney might present his case more effectively, this fact alone does not warrant appointment of counsel.

The Court therefore finds that Plaintiff appears to be an articulate individual with the ability to gather and present facts crucial to his case. As such, his Motion to Appoint Counsel is **DENIED**.

IT IS THEREFORE ORDERED that Plaintiff’s Motion to Proceed Without Prepayment of Fees (Doc. 3, sealed) is **GRANTED**.

IT IS FURTHER ORDERED that the Clerk’s office shall proceed to issue summons in this case.

IT IS FURTHER ORDERED that Plaintiff's Motion for Appointment of Counsel (Doc. 4) is **DENIED**.

IT IS SO ORDERED.

Dated at Wichita, Kansas, on this 16th day of July, 2013.

S/ KENNETH G. GALE

KENNETH G. GALE

United States Magistrate Judge