

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OLIVIA DRAKE,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 01-CV-6968
	:	
STEAMFITTERS LOCAL UNION 420,	:	
Defendant.	:	

**ORDER**

AND NOW, this        day of March, 2003, upon consideration of Plaintiff's Motion for Appointment of Counsel (Document No. 14, filed March 12, 2003), it is hereby **ORDERED** that Plaintiff's Motion is **DENIED**.

There is no constitutional or statutory right to appointed counsel for civil litigants, Parham v. Johnson, 126 F.3d 454, 456-57 (3d Cir. 1997); Tabron v. Grace, 6 F.3d 147, 153 (3d Cir. 1993), however, 28 U.S.C. § 1915(d) provides for discretionary appointments:

[t]he court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

The nature of this broad judicial discretion has been refined by the Third Circuit, in an effort to enhance the viability of the statute and establish meaningful guideposts for the courts. See generally Tabron, 6 F.3d 147. In Tabron, the Third Circuit enumerated a series of indeterminable, non-exhaustive factors for the district judge (or magistrate judge) to consider in a motion for appointment of counsel. However, as a threshold issue, it must appear that the plaintiff's claim has some arguable merit in fact and law. Id. at 155. If the district court opines that the plaintiff's claims are arguably meritorious in law and fact, then the court will undertake the six-factor Tabron test: (i) the plaintiff's ability to present his or her own case; (ii) the

complexity of the legal issues; (iii) the degree to which factual investigation will be necessary and the ability to pursue such investigation; (iv) the amount a case is likely to turn on credibility determinations; (v) whether the case will require the testimony of expert witnesses; and (vi) whether the plaintiff can attain and afford counsel on his or her own behalf. Id. at 155-56, 157 n. 5; Parham, 126 F.3d at 457.

Therefore, the district court is instructed to perform a two-prong analysis in motions for appointment of counsel: (i) whether plaintiff has presented an arguably meritorious claims; and (ii) whether the balance of the six-factor Tabron test weighs in favor of appointing counsel. As an overlay to the two-prong analysis, this Court acknowledges the scarcity of volunteer lawyering for indigent litigants, and the corresponding duty on the district courts to properly funnel these limited resources to those clients that would receive the greatest benefit from such services, and to that end, this Court will not “request counsel under § 1915(d) indiscriminately.” Tabron, 6 F.3d at 157; see also Cooper v. Sargenti Co., 877 F.2d 170, 172 (2d Cir. 1989)(“Volunteer lawyer time is a precious commodity . . . Because this resource is available in only limited quantity, every assignment of a volunteer lawyer to an undeserving client deprives society of a volunteer lawyer available for a deserving cause. We cannot afford that waste.”).

This is Plaintiff’s second federal lawsuit against Steamfitters Local Union 420. Previously, Plaintiff alleged that, “the union had discriminated against her by referring white males for work over her, reducing her hours, refusing to promote her, refusing to provide her with free legal services for a personal matter while providing those services for white males, and failing to address her complaints of a hostile work environment.” Olivia Drake v. Steamfitters Local Union 420, No. 98-1849 (3d Cir. 2000). The Defendant moved for summary judgment and

the district court granted the motion; the Third Circuit affirmed. Id. Presently, the Plaintiff's Complaint (Document No. 3, filed January 25, 2002) alleges claims that, on the surface, appear to be substantially similar to the central issues addressed in Plaintiff's previous federal suit against Local 420. See Olivia Drake v. Steamfitters Local Union No. 420, 1998 WL 564486 (E.D. Pa.). However, this Court does not, and need not, make a final legal adjudication on the merits of Plaintiff's case, but rather, after a cursory review, this Court is of the opinion that Plaintiff's case is arguably meritorious, or at least not frivolous.

#### Application of the six-factor Tabron test

In evaluating plaintiff's ability to represent herself, courts should consider "the plaintiff's education, literacy, prior work experience, and prior litigation experience." Tabron, 6 F.3d at 156. Reiterating, this is Plaintiff's second federal lawsuit against Local 420. In Plaintiff's first suit, plaintiff proceeded *pro se*, and her pleadings and overall ability to represent herself was above the average *pro se* litigant. Plaintiff is relatively well educated, and her writing ability is commendable. Furthermore, Plaintiff is not incarcerated and has access to vital resources such as a photocopier, telephone, computer, and fax machine. See Rayes v. Johnson, 969 F.2d 700, 702-03 (8th Cir. 1992). This factor weighs against appointing counsel.

Second, "where the legal issues are complex, it will probably serve everyone involved if counsel is appointed." Parham, 126 F.3d at 459. On its face, Plaintiff is bringing a discrimination claim against Local 420, and although the issues might be deemed straightforward and comprehensible for a seasoned employment discrimination lawyer, there is no doubt that sifting through the overwhelming volume of legal authority in this particular area of the law would be a daunting task for most any *pro se* litigant. This element of the six-part analysis tips

the scales in favor of appointing counsel.

Third, it does not appear that the degree of factual investigation and the ability of the plaintiff to pursue such investigation is overly burdensome in this discrimination action. Fourth, this case is not likely to turn on credibility determinations or to be “solely a swearing contest.” Parham, 126 F.3d at 461. Fifth, the plaintiff most likely would not be required to produce expert witnesses in this action. Therefore, elements, three, four, and five, weigh against appointing counsel. Lastly, there is no evidence to suggest that plaintiff can attain and afford her on counsel; this factor plainly points in favor of appointment of counsel.

The totality of the circumstances weighs in favor of not appointing counsel for this particular case. Hodge v. Police Officers, 802 F.2d 58, 60 (2d Cir. 1986)(“the determination must be made on case-by-case basis.”). Plaintiff is reminded that she remains free to independently engage counsel, however it is suggested that she do so in an expeditious manner. At the Rule 16 conference on December 2, 2002, Plaintiff was urged to promptly file a formal motion requesting appointment of counsel, and the Clerk of Court did not receive Plaintiff’s motion until March 12, 2003--more than three months after Plaintiff was initially directed to file her motion. Based on the foregoing reasons, it is hereby **ORDERED** that Plaintiff’s Motion for Appointment of Counsel is **DENIED**.

BY THE COURT:

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Legrome D. Davis, U.S.D.J.

