Interoffice Memorandum

Date: February 26, 2019

To: John C. Gillespie, Esquire

From: Jenna C. Ferraro, Esquire

Re: El Aemer El Mujaddid v. Brewer, etc. – File No. 11770-140

Subject: Pro Se Plaintiff's Motion for Court-Appointed Counsel in Federal Court

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Question Presented

Under what circumstances can a *pro se* plaintiff have court-appointed counsel in a civil proceeding in federal court?

Brief Answer

Although there is no constitutional or statutory right to the appointment of counsel to an indigent civil litigant, there are certain circumstances where the New Jersey District Court will appoint counsel. However, I think we have very strong arguments as to why counsel should not be appointed in our case, especially when considering the *Tabron* factors listed in the analysis section of this memo. In our opposition, I would recommend walking the court through each of these factors and explaining why they support denying Plaintiff's motion. The case law below makes it clear when courts have been willing to appoint counsel, and when the courts have found that the appointment of counsel was not warranted. The cases could prove useful in making the arguments in our opposition, so I tried to be comprehensive.

Analysis

In summary, based on my reading of the motion, Plaintiff is arguing that he needs court-appointed counsel because of his lack of legal experience, the fact that he lacks money to obtain private counsel, and his inability to "present his case" and the "complex legal issues." Note that Plaintiff's point headings in his brief follow the *Tabron* factors listed below, although he did not have a point heading for every factor; just the first four (although it appears Plaintiff does discuss credibility on page sixteen). I also want to note that Plaintiff cited 28 U.S.C. § 1915(d), but this appears to be the wrong section of the statute, as courts in the cases I read consistently cite to 28 U.S.C. § 1915(e). The *Tabron* case does cite to 28 U.S.C. § 1915(d), but this case is from 1993, so I think the statute was amended since then and that is why other cases cite to a different section, as subsection (d) does not make sense to cite when discussing appointment of counsel to a *pro se*, indigent litigant.

I. The General Rule

Proceedings *in forma pauperis*, 28 U.S.C. § 1915(e)(1), states that "[t]he court may request an attorney to represent any person unable to afford counsel." *See also Montgomery v. Pinchak*, 294 F.3d 492, 498 (3d Cir. 2002) ("Indigent civil litigants possess neither a constitutional nor a statutory right to appointed counsel. Nevertheless, Congress has granted district courts statutory authority to 'request'

appointed counsel for indigent civil litigants."). Subsection (e)(2) states: "Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that the allegation of poverty is untrue, or the action or appeal is frivolous or malicious; fails to state a claim on which relief may be granted; or seeks monetary relief against a defendant who is immune from such relief."

The New Jersey District Court and the Third Circuit have held that "[i]ndigent civil litigants . . . have no constitutional or statutory right to appointment of counsel." *Pressley v. E. Dist. Precinct*, No. 09-3215, 2010 WL 988722, at *n. 3 (D.N.J. Mar. 15, 2010) (citing *Parham v. Johnson*, 126 F.3d at 454, 456-57 (3d Cir. 1997)). However, "district courts . . . have broad discretion in determining whether the appointment of counsel is appropriate." *Id.* (citing 28 U.S.C. § 1915(e)(1); *Tabron v. Grace*, 6 F.3d 147, 153 (3d Cir. 1993), *cert. denied*, 510 U.S. 1196 (1994)). When the court is presented with an application for the appointment of *pro bono* counsel in a civil case, the court needs to determine if the plaintiff's claim has "some merit in fact and law." *Id.* (citing *Parham*, 126 F.3d at 457). If the court does find that plaintiff's claim has some merit in fact and law, the court needs to consider the *Tabron* factors, which are mentioned in plaintiff's motion on page seventeen. *Id.* The factors are: "(1) the ability of the party to present his case; (2) the difficulty of the legal issues; (3) the ability of the party to pursue a factual investigation; (4) the capacity of the party to retain his own counsel; (5) the extent to which a case is likely to turn on credibility determinations; (6) whether the case will require expert witness testimony." *Id.* (citing *Tabron*, 6 F.3d at 155-57).

II. Application of the Rule

a. *The Landmark Cases & a Detailed Discussion of the Rule: Tabron, Parham, & Montgomery*

Tabron seems to be a landmark case in this area of law, and it will be important to cite to in our opposition. Tabron was a prison inmate who brought an action *pro se* against prison officials that may have been involved in events surrounding an assault that took place by another inmate. *Tabron*, 6 F.3d at 151. Tabron moved for the appointment of counsel under 28 U.S.C. § 1915(d) (see my note above), stating he did not have the legal education or experience required to present his case and needed a lawyer to help him with discovery. *Id.* Although defendants did not oppose Tabron's motion, the magistrate judge denied it, stating that "non-compensated counsel can be appointed by the court in civil rights cases only when exceptional circumstances exist. No such circumstances exist in this case." *Id.* Tabron represented himself, but was disadvantaged because of his lack of resources and unfamiliarity with discovery rules. *Id.* Ultimately, summary judgment was granted in favor of the defendants, which was followed by Tabron's appeal *in forma pauperis*. *Id.* at 152-53.

The court noted the district court's authority to appoint counsel to represent an indigent litigant in a civil case derives from 28 U.S.C. § 1915(d), stating that this section gives district courts broad discretion to request an attorney to represent an indigent civil litigant, and that such litigants do not have a statutory right to appointed counsel. *Id.* at 153. In this case, the court noted that there was little guidance at the time in the Third Circuit as to what criteria courts should consider when determining whether to grant a request for the appointment of counsel. *Id.* at 154. The court stated that in one case where the court addressed standards for appointing counsel under § 1915(d), it had stated:

> [T]he appointment of counsel for an indigent plaintiff in a civil case under 28 U.S.C. § 1915(d) is discretionary with the court and is usually only granted upon a showing of special circumstances indicating the likelihood of substantial prejudice to him resulting, for example, from his probable

inability without such assistance to present the facts and legal issues to the court in a complex but meritorious case.

Id. (citing *Smith-Bey v. Petsock*, 741 F.2d 22, 26 (3d Cir. 1984)). The defendants pointed to this language in support for the magistrate judge's statement that appointing counsel is allowed "only when exceptional circumstances exist," but the court noted that the dicta in this case stated appointment is "*discretionary* with the court" and is "*usually only granted* upon a showing of special circumstances." *Id.* at 154-55 (internal citations omitted) (emphasis added). The court did not interpret this to support the magistrate's decision that appointment is allowed *only* in exceptional circumstances and that, when those circumstances are not present, the court does not have discretion to appoint an attorney. *Id.* at 155; *see also Parham*, 126 F.3d at 457 (noting that while some circuits have held counsel can be appointed only in "exceptional circumstances," the Third Circuit has chosen not to read this requirement into the statute). The Third Circuit took this opportunity to elaborate on *Smith-Bey* by giving courts more criteria to ascertain the "special circumstances" under which an attorney can be appointed for an indigent litigant in a civil case. *Tabron*, 6 F.3d at 155.

As previously stated, the district court needs to determine as a threshold issue the merits of Plaintiff's claim, noting "before the court is justified in exercising its discretion in favor of appointment, it must first appear that the claim has some merit in fact and law." *Id.* (citing the Eighth Circuit and stating "[t]he appointment of counsel should be given serious consideration if the [indigent] plaintiff has not alleged a frivolous or malicious claim and the pleadings state a *prima facie* case.") (internal citations omitted); *see also Montgomery*, 294 F.3d at 498-501 ("We therefore conclude that Montgomery's allegations clearly state a non-frivolous, *prima facie* case of deliberate indifference to a serious medical need and that the already established evidence indicates more than an 'extremely slim' chance of success on the merits. Therefore, we find that Montgomery's case demonstrates potential merit in fact and law, and that he has met his threshold burden for appointment of counsel."); *Parham*, 126 F.3d at 457.

If the district court determines Plaintiff's claim has arguable merit in fact and law, the court needs to consider other factors relating to appointing counsel. *Tabron*, 6 F.3d at 155; *see also Montgomery*, 294 F.3d at 499; *Parham*, 126 F.3d at 457 (listing all six factors). The court noted here that the plaintiff's ability to present his case is a significant factor that needs to be taken into consideration, taking into account plaintiff's education, literacy, prior work experience, and prior litigation experience. *Tabron*, 6 F.3d at 156 (internal citations omitted). The court stated that an indigent plaintiff's ability to present his case could depend on factors like plaintiff's ability to understand English and whether plaintiff is a prisoner and the restraints placed on plaintiff due to confinement (like using a typewriter, copy machine, phone, or computer). *Id.* (internal citations omitted); *see also Parham*, 126 F.3d at 459. "If it appears that an indigent plaintiff with a claim of arguable merit is incapable of presenting his or her case, serious consideration should be given to appointing counsel . . . and if such a plaintiff's claim is truly substantial, counsel should ordinarily be appointed." *Tabron*, 6 F.3d at 156. The court should also consider the difficulty of the legal issues, and "should be more inclined to appoint counsel if the legal issues are complex." *Id.* (internal citations omitted). "[W]here the law is not clear, it will often best serve the ends of justice to have both sides of a difficult legal issue presented by those in trained legal analysis." *Id.* (internal citations omitted); *see also Parham*, 126 F.3d at 459 (stating that while the ultimate issue appeared simple in this case, "comprehension alone does not equal ability to translate that understanding into presentation. While the ultimate issue may be comprehensible, courts must still look to the proof going towards the ultimate issue and the discovery issues involved.")

Other factors are the degree to which factual investigation will be necessary and the ability of Plaintiff to pursue the investigation. *Id.* (internal citations omitted). The court can consider "the extent to which prisoners and others suffering confinement may face problems in pursuing their claims. Additionally, where the claims are likely to require extensive discovery and compliance with complex discovery rules, appointment of counsel may be warranted." *Tabron*, 6 F.3d at 156 (internal citations omitted). Furthermore, "when a case is likely to turn on credibility determinations, appointment of counsel may be justified." *Id.* (internal citations omitted). The court stated "when witness credibility is a key issue, 'it is more likely that the truth will be exposed where both sides are represented by those trained in the presentation of evidence and in cross examination.'" *Id.* (internal citations omitted); *see also Parham*, 126 F.3d at 460 ("[W]hen considering this factor, courts should determine whether the case was solely a swearing contest."). Appointment of counsel could also be warranted when the case requires expert testimony. *Tabron*, 6 F.3d at 156 (internal citations omitted). The last factor to be considered is whether the plaintiff can attain and afford counsel on his own behalf. *Parham*, 126 F.3d at 457 (citing *Tabron*, 6 F.3d at 155-56, 157 n. 5) ("If counsel is easily attainable and affordable by the litigant, but the plaintiff simply has made no effort to retain an attorney, then counsel should not be appointed by the court."). This list of factors is not exhaustive; the determination of whether to appoint counsel needs to be made on a case-by-case basis. *Tabron*, 6 F.3d at 157-58 (internal citations omitted). Finally, the court stated that volunteer lawyer time is very valuable, and district courts should not request counsel under § 1915(d) indiscriminately. *Id* at 157. Quoting the Second Circuit, the court said:

> 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.

Id. (internal citations omitted).

b. *Williams v. Hayman*

This case involved an instance where the court, *sua sponte*, appointed counsel to Plaintiff. *Williams v. Hayman*, 488 F.Supp.2d 446, 447 (D.N.J. 2007). Although not directly on point, since a motion was made in our case, it was cited in other cases I read, so I decided to include it for the sake of completeness. I think it also shows an instance where the court will grant *pro bono* counsel to a plaintiff in a civil case in federal court. The court stated where an unrepresented Plaintiff in a civil suit is indigent, and where good cause exists for the appointment of *pro bono* counsel under 28 U.S.C. § 1915(e)(1), the District Court has discretion to appoint *pro bono* counsel even when there is no motion to do so. *Id.* (citing *Tabron*, 6 F.3d at 156).

Plaintiff was *pro se* and deaf, and alleged that the prison he was incarcerated in denied him reasonable accommodations in violation of the Americans with Disabilities Act. *Id.* He also alleged that this failure deprived him of medical care, which could violate the Eighth Amendment. *Id.* In his original motion for *pro bono* counsel, Plaintiff stated the language barrier made it hard for him to communicate with the court, that he had limited English reading and writing skills, thus impairing his ability to comprehend opinions, orders, and correspondence from the court, as well as his ability to adequately represent himself. *Id.* The court noted that pursuant to 28 U.S.C. § 1915(e)(1), it can request an attorney to represent an indigent plaintiff in a civil action, stating "[t]he court may request an attorney to represent any person unable to afford counsel." *Id.* (internal citations omitted). The court had already found Plaintiff to be indigent when it granted his request for *in forma pauperis* status, and the court also screened the complaint and determined *sua sponte* dismissal was unwarranted because it did not seem that "the case was frivolous, malicious, sought damages from an immune party or failed to state a

claim." *Id.* When Plaintiff first applied for *pro bono* counsel, it was denied as premature, and he failed to reapply after Defendants filed a motion to dismiss. *Id.* 447-48.

Although Plaintiff did not appeal the denial or submit a new application for *pro bono* counsel, the court decided *sua sponte* that the consideration was no longer premature and that "the interests of justice require the appointment of counsel to assist [Plaintiff] in the prosecution of this case." *Id.* at 448 (internal citations omitted). The court stated that 28 U.S.C. § 1915(e) "gives district courts broad discretion to request an attorney to represent an indigent civil litigant," and that "[i]f it appears that an indigent plaintiff with a claim of arguable merit is incapable of presenting his . . . case, serious consideration should be given to appointing counsel . . . and if such plaintiff's claim is truly substantial, counsel should ordinarily be appointed." *Id.* at 449 (citing *Tabron*, 6 F.3d at 153, 156). Here, the court found Plaintiff was indigent and incapable of representing himself, and taking the allegations as true, Plaintiff might have meritorious claims. *Id.* Applying the *Tabron* factors, the Court stated (1) Plaintiff had limited ability to present the case by himself, (2) the legal issues are complex, (3) Plaintiff's ability to pursue investigation is impaired by his incarceration and limited resources, (4) Plaintiff cannot afford counsel, (5) it is not known whether the case will turn on credibility determinations. *Id.* (citing *Tabron*, 6 F.3d at 156-57). The court found the factors supported appointment of counsel. *Id.* The court also noted it had already screened the case and determined it might have merit. *Id.* at 449-50. For these reasons, the court appointed *pro bono* counsel to represent Plaintiff. *Id.* at 450.

c. *An Unpublished Decision (Most of the decisions I came across are unpublished)*

In *Pressley*, the court assumed, but did not decide, that Plaintiff's claim had some merit in fact and law, but found that Plaintiff's application failed to satisfy the *Tabron* factors for appointment of *pro bono* counsel. *Pressley*, 2010 WL 988722 at *n. 3. The court stated Plaintiff did not have difficulty presenting his case. *Id.* When determining a plaintiff's ability to present his case, courts will take into consideration a plaintiff's "education, literacy, prior work experience, and prior litigation experience." *Id.* (quoting *Tabron*, 6 F.3d at 156). In this case, Plaintiff showed he had an "understanding of the actions he should take in furtherance of his claim" because while incarcerated, he filed a complaint and an application to proceed *in forma pauperis* and an application asking for *pro bono* counsel. *Id.* (Plaintiff's application to proceed *in forma pauperis* was granted). The court also found that Plaintiff's complaint and applications were written clearly and demonstrated that Plaintiff could "effectively communicate the facts upon which his claims are based." *Id.* Therefore, this factor weighed against the court appointing counsel. *Id. But see Parham*, 126 F.3d at 459 (stating Plaintiff's ability to file and respond to motions indicated that Plaintiff had some legal knowledge and was literate, but that fact alone did not conclusively demonstrate Plaintiff could present his own case).

For the **second factor**, the court noted that Plaintiff's cause of action was based on civil rights laws. *Pressley*, 2010 WL 98722, at n. 3. Plaintiff alleged that police officers of the East District Police Precinct assaulted Plaintiff and used excessive force by beating Plaintiff while he was handcuffed. *Id.* at n. 1. Plaintiff further alleged that there was police brutality and that the police committed misconduct. *Id.* The court noted that "the law surrounding this claim is well-developed, and the facts of his case are fairly straightforward." *Id.* at n. 3 (internal citations omitted). The court also stated that at this phase of the case, "the factual and legal issues 'have not been tested or developed by the general course of litigation' in a way that shows any level of complexity." *Id.* (internal citations omitted). Therefore, the court found this factor also weighed against the court appointing counsel.

For the **third factor**, the court determined Plaintiff would be able to conduct a factual investigation without a lawyer. *Id.* The court stated that "[a]lthough Plaintiff is incarcerated, he does not

currently appear to be hindered in his factual investigation. He has presented no facts to show that his factual investigation will be limited." *Id.* (internal citations omitted). The court further noted that Plaintiff has access to discovery tools in the Federal Rules of Civil Procedure to help investigate his causes of action. *Id.* (internal citations omitted). Thus, this factor also did not support appointing *pro bono* counsel. In terms of the **fourth factor**, the court noted that "Plaintiff's indigence is not by itself a sufficient basis to appoint counsel," and that Plaintiff did not show he made any efforts to obtain a lawyer. *Id.* (internal citations omitted). The court, therefore, found this factor also did not support the appointment of counsel.

In considering the **fifth factor**, the court noted that it was "not clear the exten[t] to which the case will turn on credibility determinations. In fact, for this factor to be determinative, 'courts should consider whether the case will be solely a swearing contest.'" *Id.* (citing *Montgomery*, 294 F.3d at 505, quoting *Parham*, 126 F.3d at 460). The court stated that evidence like medical records could be used to support Plaintiff's claim, and that could show credibility by itself might not be the sole deciding factor. *Id.* The court thus concluded it was not apparent that the case would be "*solely* a swearing contest," and therefore this factor did not support the appointment of counsel. *Id.* (citing *Montgomery*, 294 F.3d at 505) (emphasis added). Lastly, in considering the **sixth factor**, the court stated that it was uncertain whether expert testimony would be required at trial. *Id.* Although one of Plaintiff's alleged injuries included damage to one of his eyes, it was not apparent that an expert would necessary to determine the extent or seriousness of Plaintiff's injuries. *Id.* (citing *Montgomery*, 294 F.3d at 504). The court concluded this factor also weighed against appointing counsel. *Id.* In conclusion, the court stated that the *Tabron* factors demonstrated appointment of counsel was not warranted, and Plaintiff's application for the appointment of *pro bono* counsel was denied. *Id.*

d. *Proceeding In Forma Pauperis*

A lot of the cases I came across involved plaintiffs who had filed an application to proceed *in forma pauperis*, so I was curious as to what analysis the court applied if a plaintiff did not file such an application. In one case I came across, Plaintiff filed a complaint alleging Defendant discriminated against him because of his national origin. *Bondarenko v. Hackensack Univ. Med. Ctr.*, No. 07-3753, 2009 WL 2905373, at *1 (D.N.J. Sept. 4, 2009). Plaintiff filed an application for the appointment of *pro bono* counsel which was denied, so he renewed the application at a later time. *Id.* The court stated many of the same rules already listed above. *See id.* (stating there is no constitutional or statutory right to appointed counsel for a civil litigant, but district courts retain statutory authority to appoint *pro bono* counsel for indigent civil litigants pursuant to 28 U.S.C. § 1915(e)(1)). The court proceeded to state that when exercising discretion under 28 U.S.C. § 1915, the court needs to follow the framework set forth in the Third Circuit decisions mentioned above, beginning with determining the merit of claimant's case, and that after finding "some arguable merit in fact and law," the court must weigh the *Tabron* factors. *Id.* The court noted that when weighing these factors, district courts need to be mindful of other considerations: the list is not exhaustive, "where a plaintiff's case appears to have merit and most of the aforementioned factors have been met, courts should make every attempt to obtain counsel," and district courts "should exercise care in appointing counsel because volunteer lawyer time is a precious commodity and should not be wasted on frivolous cases." *Id.* at *2 (internal citations omitted).

When examining the factor regarding whether the plaintiff can attain and afford counsel on his own behalf, the court noted if counsel is easily attainable and affordable by claimant, but he has made no effort to retain an attorney, counsel should not be appointed. *Id.* at *4. The court noted that Plaintiff did not apply to proceed *in forma pauperis*, but his motion to appoint counsel stated he cannot afford an attorney. *Id.* In his previous application, Plaintiff stated he was unsuccessful in trying to obtain counsel

through contacting the Bergen County Bar Association who referred two attorneys that were not interested in taking the case, contacting the EEOC for an "affordable legal advisor," and contacting attorneys on his own who did not want to represent him. *Id.* The court therefore found Plaintiff made efforts to retain counsel on his own behalf and that this factor weighed in favor of appointment of counsel. *Id.* I included this to show that even where a party is not proceeding *in forma pauperis* by filing an application with the court, the same analysis seems to apply. Furthermore, even if a plaintiff does not file an application to proceed *in forma pauperis*, a court could still find this factor satisfied based on the rule previously stated.

Conclusion

I think there are strong arguments we can make as to why Plaintiff's motion should be denied based on the case law above. In our opposition, it will be important to explain why Plaintiff's claim has no merit in fact and law and to walk the court through the *Tabron* factors. I think a court would likely find in our favor and deny Plaintiff's motion. Again, I tried to be as comprehensive as possible in this memo so that it would be useful in drafting the opposition. If you need me to conduct any further research on this issue, please let me know.