

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 92-5035  
Summary Calendar

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JESSE J. PENNINGTON,

Plaintiff-Appellant,

VERSUS

TEXAS HIGHWAY DEPARTMENT  
and GLENN C. CATHEY,

Defendants-Appellees.

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Appeal from the United States District Court  
For the Eastern District of Texas

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(March 31, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

**BACKGROUND**

Pennington filed a motion for leave to proceed in forma pauperis and a motion for appointment of counsel in the U.S. District Court for the Eastern District of Texas at Lufkin (USDC)

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

in connection with a claim that Pennington asserts he has against the Texas Highway Department for discrimination on the grounds of age and race in his employment. The district court referred the motions to the magistrate judge for appropriate action. The magistrate judge conducted a hearing, after which he recommended that Pennington's motion to proceed in forma pauperis be denied, and that his motion for appointment of counsel be granted subject to the qualification that appointed counsel be permitted to withdraw after thoroughly investigating Pennington's claims, if it was determined that Pennington's claims were not sufficient to go forward. The district judge accepted the magistrate judge's recommendation regarding proceeding in forma pauperis but rejected his recommendation regarding appointment of counsel and entered an order denying both of Pennington's motions. Pennington then filed a "brief for appellant" in this Court, acting pro se and filed a motion in this Court for appointment of counsel, which was denied by a member of this panel. Because Pennington is acting pro se, we have treated this matter as an interlocutory appeal, even though it is technically deficient in various respects as an interlocutory appeal.

We AFFIRM the findings of the magistrate judge relating to the right to proceed in forma pauperis and AFFIRM the order of the district judge denying such motion.

As to the subject of appointment of counsel, the law is clear that a prospective plaintiff seeking relief under Title VII of the Civil Rights of Act of 1964, as amended, 42 U.S.C. §2000(e) et seq.

or under the Age Discrimination and Employment Act of 1967, 29 U.S.C. § 621-34 has no absolute right to be represented by appointed counsel; and the decision of whether to provide counsel lies solely within the discretion of the district court. See, Caston v. Sears, Roebuck and Co., 556 F.2d 1305 (5th Cir. 1977); Neal v. IAM Local Lodge 2836, 722 F.2d 247 (5th Cir. 1984); and Gonzalez v. Carlin, 907 F.2d 573 (5th Cir. 1990). While we recognize that the magistrate judge in this case came to the conclusion that the facts in this case were appropriate for the appointment of counsel, the district judge obviously came to an opposite conclusion on the same set of facts; and we are not persuaded that the district judge abused his discretion in that regard. We AFFIRM therefore the decision of the district judge to deny the motion for appointment of counsel.

Since service of process has never been accomplished on either of the named defendants, and no final order has been entered by the district court in connection with this matter, we REMAND this case to the trial court for the entry of an appropriate order fixing a time frame within which Pennington shall prepare and file his original complaint against the prospective defendants and secure service of process on such defendants. Failing compliance with such order, the trial judge may enter an order of dismissal for want of prosecution in this cause.