IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40496
(Summary Calendar)

LANEY J. HARRIS,

Plaintiff-Appellant,

versus

GORDON R. SULLIVAN,
General Acting Secretary
Department of the Army,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(5:93-MC-14)

(March 8, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Laney J. Harris appeals the district court's denial of motions to proceed in forma pauperis and for

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

appointment of counsel in connection with his suit under 42 U.S.C. § 2000e-5. Finding no abuse of discretion in the rulings of the district court, we affirm.

I

FACTS AND PROCEEDINGS

Harris filed a civil rights complaint pursuant to Title VII of the Civil Rights Act of 1964, alleging that he had been subjected to racial threats at work, that he was denied a "highly successful performance rating," that he had been harassed and denied the same rights and privileges that were enjoyed "by whites," and that he was denied promotion on the basis of his race. He also filed a motion to proceed in forma pauperis (IFP) and for the appointment of counsel.

The magistrate judge found that Harris possessed sufficient resources to pay the required fees and therefore failed to meet the requirements to proceed IFP. The magistrate judge also found that, given Harris's ability to afford an attorney and his failure to establish that he had a meritorious claim, the appointment of counsel would be unduly burdensome in his case and recommended that Harris's motions be denied. After conducting a de novo review of the record, the district court adopted the findings and conclusions of the magistrate judge and denied Harris's motion to proceed IFP and for the appointment of counsel. Harris timely filed a notice of appeal.

II

ANALYSIS

Harris contends on appeal that the district court erred by denying his motion for the appointment of counsel. The unconditional denial of counsel is an appealable interlocutory order. See Robbins v. Maggio, 750 F.2d 405, 413 (5th Cir. 1905). The denial of Harris's motion is thus properly before this court.

Appointment of counsel in a Title VII case is not a matter of right. Gonzalez v. Carlin, 907 F.2d 573, 579 (5th Cir. 1990). Title VII merely authorizes district courts to appoint counsel to represent Title VII plaintiffs upon application and "in such circumstances as the court may deem just." 42 U.S.C. § 2000e-5(f)(1). A federal district court has "considerable discretion" in determining whether to appoint counsel, so we review such determinations by the district court under an abuse of discretion standard. Salmon v. Corpus Christi Indep. Sch. Dist., 911 F.2d 1165, 1166 (5th Cir. 1990). Factors that the trial court should consider in determining whether to appoint counsel include the probable success of the Title VII claim, the efforts taken by the plaintiff to retain counsel, and the plaintiff's financial ability to retain counsel. Id.

Harris has not shown that he is financially unable to retain counsel. In his affidavit in support of his motion to proceed IFP, Harris stated that he was unemployed, was receiving food stamps, and had only $5 in his savings account and less than $5 in his checking account. He also stated however, that in the previous

twelve months he had received $4,620 from the Texas Employment Commission, $16,076.83 from the Office of Personnel Management, and $3,590.75 from the Red River Army Depot, his former employer. He further stated that he owns three automobiles with a total estimated value of $3,000, and a house and property valued at $34,000. And, although Harris does not indicate in his brief that he made an effort to retain counsel, the district court found that Harris had been "reasonably diligent" in seeking counsel.

Harris has demonstrated no basis for us to find that the district court erred reversibly in determining that Harris's ability to establish a Title VII claim on failure to hire, harassment, or reprisal is doubtful. See Salmon, 911 F.2d at 1166. The district court relied in part on the determination of the Equal Employment Opportunity Commission (EEOC) that Harris's claim had no merit. A determination of the EEOC is "highly probative" in determining whether to appoint counsel. Gonzalez, 907 F.2d at 580 (internal quotation and citation omitted).

Although Harris has alleged that he was subjected to a hostile work environment, he has not shown likelihood of success for his Title VII claim.

> "A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality."

Portis v. First Nat'l Bank of New Albany, 34 F.3d 325, 331 (5th Cir. 1994) (quoting Harris v. Forklift Systems, Inc., 114 S. Ct. 367, 370-71 (1993)). "Evidence of a hostile work environment claim may include `the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" Id. at 333 (quoting Harris, 114 S. Ct. at 371).

Harris alleges that a Caucasian co-worker made a racist remark to him in 1985 and again on another unspecified date, and that two co-workers made racist remarks to him in 1991. Without more, these allegations are not nearly sufficient to support a successful "hostile work environment" claim under Title VII, as they fail to meet Harris's "severe or pervasive" test. See Harris, 114 S. Ct. 370-71. Although Harris alleged that there were numerous other incidents of harassment, he did not make specific arguments regarding these other incidents. Thus he has not demonstrated the probable success of his Title VII claim. We conclude that the district court did not abuse its discretion by denying Harris's motion for the appointment of counsel.

Harris also argues that the district court erred by denying his motion to proceed IFP. Like an order denying appointment of counsel, an order denying an application to proceed IFP is immediately appealable, Flowers v. Turbine Support Division, 507 F.2d 1242, 1244 (5th Cir. 1975), and thus is properly before this court. The denial of IFP status is reviewed for an abuse of

discretion. Id. at 1243-44.

Whether a party may proceed IFP in the district court is based solely on economic criteria. Watson v. Ault, 525 F.2d 886, 891 (5th Cir. 1976). Poverty sufficient to qualify does not require absolute destitution. Adkins v. E.I. Du Pont de Nemours & Co., 335 U.S. 331, 339 (1948). The central question is whether the movant can afford the costs without undue hardship or deprivation of the necessities of life. Id. at 339-40. As discussed above, Harris has not demonstrated that he is a pauper. Further, Harris paid the $100 appellate filing fee, suggesting that he has the ability to afford the district court fees. The district court thus did not abuse its discretion by denying Harris's motion to proceed IFP. The remainder of Harris's appellate brief addresses the merits of his civil rights claims, which have not yet been ruled on by the district court and thus are not before us.

AFFIRMED.