

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
ESTHER SALAS
UNITED STATES MAGISTRATE JUDGE

MARTIN LUTHER KING COURTHOUSE
50 WALNUT ST.
ROOM 2060
NEWARK, NJ 07101
973-297-4887

June 16, 2009

LETTER ORDER

VIA CM/ECF and RR/Certified Mail

Jeff Boss
7002 Blvd East
Apt. 26G
Guttenberg, NJ 07093

Re: Jeff Boss v. National Security Agency, et al.
Civil Action No. 09-1162 (PGS)

Dear Litigants:

Before the Court is Plaintiff Jeff Boss's Application for Appointment of Pro Bono Counsel. For the reasons set forth below, the application is *denied*.

Plaintiff filed this *Bivens* action against the National Security Agency ("NSA") on March 16, 2009. He alleges, among other things, that his car and his home have been bugged by the NSA. Plaintiff alleges a massive conspiracy against him and those close to him because, as he alleges, one of his family members planned the attacks on September 11, 2001. He further alleges that the government has substantially disrupted his current gubernatorial campaign.

The case law of the Third Circuit makes it abundantly clear that "[i]ndigent civil litigants possess neither a constitutional nor statutory right to appointed counsel." *Montgomery v. Pinchak*, 294 F.3d 492, 498 (3d Cir. 2002) (citing *Parham v. Johnson*, 126 F.3d 454, 456–57 (3d Cir. 1997)). While Congress has empowered district courts to "request" counsel for civil litigants, they cannot "require" an unwilling attorney to serve as counsel. *Id.* (citing 28 U.S.C. § 1915 (e) (1)); see also *Christy v. Robinson*, 216 F. Supp. 2d 398, 406 n.16 (D.N.J. 2002) (citing *Mallard v. United States Dist. Court for Southern Dist. of Iowa*, 490 U.S. 296, 301–02 (1989)). Although the Third Circuit "has interpreted [28 U.S.C.] § 1915 as affording district courts 'broad discretion' to determine whether appointment of counsel in a civil case would be appropriate," the Court has also repeatedly "cautioned that 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 498–500 (citing *Tabron v. Grace*, 6 F.3d 147, 153–155 (3d Cir. 1993)).

The Third Circuit has articulated an analytical framework that district courts must use in exercising their discretion. *See Tabron v. Grace*, 6 F.3d 147 (3d Cir. 1993); *Parham v. Johnson*, 126 F.3d 454 (3d Cir. 1997); *Montgomery v. Pinchak*, 294 F.3d 492 (3d Cir. 2002). This framework begins with a threshold assessment of the merit of the claimant’s case. *Montgomery*, 294 F.3d at 498–99 (citing *Tabron*, 6 F.3d at 155; *Parham*, 126 F.3d at 457). If the district court first finds “some arguable merit in fact and law,” then it must go on to weigh a series of considerations known as the *Tabron* post-threshold factors. *Id.* at 499. These factors include:

- (1) the plaintiff’s ability to present his case;
- (2) the difficulty of the particular legal issues;
- (3) the degree to which factual investigation will be necessary and the ability of the plaintiff to pursue an investigation;
- (4) the extent to which the case is likely to turn on credibility determinations;
- (5) whether the case will require testimony from expert witnesses; and,
- (6) the plaintiff’s capacity to retain counsel on his own behalf.

Id. (citing *Tabron*, 6 F.3d at 155–57); *see also Parham*, 126 F.3d at 461.

Of these factors, the first has been identified as “perhaps the most significant.” *Id.* at 501. In analyzing the plaintiff’s ability to present his case, the Court considers “the plaintiff’s education, literacy, prior work experience, and prior litigation experience, along with a plaintiff’s ability to understand English and the restraints placed upon a prisoner plaintiff by confinement.” *Id.* at 501 (internal citations omitted) (citing *Tabron*, 6 F.3d at 156). As additional guidance, the Third Circuit has noted that the Court should consider the plaintiff’s ability to present his case “[i]n conjunction with . . . the difficulty of the particular legal issues.” *Tabron*, 6 F.3d at 156; *see also Montgomery*, 294 F.3d at 502.

Accordingly, the Court assumes – solely for the purpose of this motion – that the Complaint has “some arguable merit in fact and law.” *Montgomery*, 294 F.3d at 499. The Court need not undertake detailed analysis of this point, however, because application the *Tabron* post-threshold factors weigh strongly against appointment of *pro bono* counsel.

The first *Tabron* factor does not weigh in favor of appointment. Plaintiff’s complaint indicates that he is clearly literate, able to speak English, conduct basic legal research, and competently draft basic pleadings.

Nor does application of the second *Tabron* factor weigh in favor of appointment. The legal issues are not particularly difficult. Plaintiff alleges a conspiracy to violate his constitutional rights. Plaintiff has done a competent job of drafting his complaint and citing caselaw thereto. Clearly, he grasps the issues at play.

The third, fourth, and fifth *Tabron* factors also weigh against appointment. At this juncture, it does not appear that extensive factual investigation will be necessary, that the case will turn on credibility determinations, or that testimony of expert witnesses will be required.

Finally, the court acknowledges that there is no evidence that Mr. Boss has the financial means to obtain counsel. Therefore, the sixth *Tabron* factor weighs in his favor. However, this

fact alone is not enough to justify an order of appointment. Indigency alone does not warrant the appointment of counsel absent satisfaction of other *Tabron* post-threshold factors. *See Christy v. Robinson*, 216 F. Supp. 2d 398, 410–111 (D.N.J. 2002) (denying application for *pro bono* counsel where indigency was the “only one of the six factors . . . weigh[ing] in favor of appointment of counsel”)

The Court is, as always, sympathetic to any disadvantages of the parties that come before it. However, the law and its application to the facts of this case are clear. The Court is also mindful that, as the case moves forward, it may exercise its discretion to appoint counsel *sua sponte* should any of the above discussed considerations change. *Tabron*, 6 F.3d at 156; *Christy*, 216 F. Supp. 2d at 406. Accordingly, the Court denies the motion.

SO ORDERED.

s/Esther Salas
HON. ESTHER SALAS
United States Magistrate Judge