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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Gerald Harris,
10 Plaintiff,
11 v.
12 ASARCO LLC,
13 Defendant.

No. CV-15-00449-TUC-JAS

ORDER

14
15 Pending before the Court are Plaintiff's Motion for Conditional Referral to the
16 Department of Labor (Writ of Assistance), with a Stay of Proceedings (Doc. 44), and
17 Plaintiff's Motion for Oral Argument and Revisit the Motion for Appointment of Counsel
18 (Doc. 47). Defendant filed responses in opposition to the motions. (Docs. 45, 48.)
19 Plaintiff has not filed replies to the responses, and the time to do so has lapsed. This
20 matter is ripe for review.

21 **I. FACTUAL HISTORY**

22 In April of 2013, Plaintiff notified Defendant's Human Resources that he was
23 being treated differently from other employees due to his disability. (Doc. 1 at ¶ 14.)
24 Plaintiff suffers from Asperger's Syndrome/Autism Spectrum Disorder. *Id.* at ¶ 11.
25 Plaintiff alleges that after he requested accommodations he was needlessly disciplined
26 and discriminated against due to his disability. *Id.* at ¶¶ 19-23. On May 15, 2014,
27 Defendant terminated Plaintiff. *Id.* at ¶ 50.
28

1 **A. EEOC Charge**

2 In June of 2013, Plaintiff filed a charge with the Equal Employment Opportunity
3 Commission (“EEOC”), which was amended for the last time in May of 2014. *Id.* at
4 ¶¶ 53, 55; Def.’s Resp. (Doc. 45), U.S. EEOC Charge No. 540-2013-02425 (Ex. “1”);
5 Def.’s Resp. (Doc. 45), U.S. EEOC Amended Charge No. 540-2013-02425 (Ex. “4”).

6 On June 24, 2015, the EEOC dismissed Plaintiff’s charge and notified Plaintiff of
7 his right to sue. (Def.’s Resp. (Doc. 45), U.S. EEOC Dismissal and Notice of Rights (Ex.
8 “5”).) Additionally, the EEOC notified Plaintiff “If you need to inspect or obtain a copy
9 of information in EEOC’s file on the charge, please request it promptly in writing and
10 provide your charge number (as shown on your Notice). While EEOC destroys charge
11 files after a certain time, all charge files are kept for at least 6 months after our last action
12 on the case. Therefore, if you file suit and want to review the charge file, please **make**
13 **your review request within 6 months of this Notice.** (Before filing suit, any request
14 should be made within the next 90 days.)” *Id.* (emphasis in original).

15 **B. MSHA Complaint**

16 In March of 2014, Plaintiff filed a complaint with the Mine Safety and Health
17 Administration (“MSHA”). (Doc. 44 at ¶ 3.) MSHA sent Plaintiff a letter stating that
18 MSHA did “not believe that there is sufficient evidence to establish, by a preponderance
19 of the evidence that a violation of Section 105(c) occurred. For that reason, the Secretary
20 of Labor will not file a discrimination case with the Federal Mine Safety and Review
21 Commission (“Commission”) in this matter. However, you continue to have the right to
22 file a discrimination case on your own behalf with the Commission. If you decide to file
23 your own case, you must do so within 30 days of this letter” (Def.’s Resp. (Doc. 45),
24 Letter from U.S. Dep’t of Labor, MSHA (Ex. “6”).)

25 **C. Lawsuit**

26 Plaintiff did not provide new information to the EEOC or MSHA or file an appeal.
27 (See Doc. 45.) Instead, Plaintiff filed a complaint in federal court. (Doc. 1.) There is no
28 indication that Plaintiff requested his EEOC charge filed until now. (See Doc. 44.)

1 **II. REQUEST FOR A STAY**

2 “When deciding whether to stay a pending proceeding, a court must weigh
3 competing interests including: (1) the possible damage which may result from the
4 granting of a stay; (2) the hardship or inequity which a party may suffer in being required
5 to go forward; and (3) the orderly course of justice measured in terms of the simplifying
6 or complicating of issues, proof, and questions of law which could be expected to result
7 from a stay. The moving party bears the burden of making out a clear case of hardship on
8 inequity in being required to go forward.” *Prescott v. Rady Children’s Hosp.-San Diego*,
9 265 F. Supp. 3d 1090, 1098 (S.D. Cal. 2017) (citing *Landis v. N. Am. Co.*, 299 U.S. 248,
10 255, 57 S.Ct. 163, 81 L.Ed. 153 (1936); *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir.
11 1962)).

12 Plaintiff requests to refer this matter to the Department of Labor. (Doc. 44.)
13 Plaintiff is requesting that the Department of Labor obtain additional records and review
14 their existing records from the EEOC charge and the MSHA complaint and determine if
15 Defendant acted in bad faith when terminating Plaintiff. *Id.* This is essentially a request
16 that the Department of Labor conduct further investigation and reconsider Plaintiff’s
17 EEOC charge and MSHA complaint outside the non-jurisdictional deadlines. Plaintiff
18 asserts that he should still be permitted to make this request because the deadlines are
19 non-jurisdictional. (Doc. 47 at ¶ 10.) This is incorrect. Failure to satisfy non-jurisdictional
20 requirements may result in dismissal. Fed. R. Civ. P. 12(6); *EEOC v. Blinded Veterans*
21 *Ass’n*, 128 F. Supp. 3d 33, 37 (D.D.C. 2015). Otherwise the deadlines put in place by
22 Congress and the agency would be meaningless. Plaintiff has not provided any
23 information as to why the deadlines should be tolled. (Docs. 44, 47.) Further there is no
24 indication that the EEOC still possesses Plaintiff’s charge file as more than six months as
25 passed since the EEOC’s last action on Plaintiff’s charge. Therefore, requiring the EEOC
26 to re-evaluate their conclusions would require the EEOC to re-conduct their investigation.
27 Therefore, staying the matter is not likely to simplify any matter, despite Plaintiff’s
28 assertions. Finally, Plaintiff’s inquiry is more appropriately resolved through discovery

1 requests. Plaintiff may seek assistance in completing a discovery request or demand
2 through Step Up to Justice.¹ Plaintiff would not be burdened by this matter continuing
3 forward.

4 The Court finds that a stay is not appropriate, as this matter shall not be referred to
5 the Department of Labor.

6 **III. REQUEST FOR REFERRAL TO DEPARTMENT OF LABOR**

7 It is the Court's understanding that Plaintiff requests that this matter be referred to
8 the Department of Labor, with an order that the Department of Labor conduct additional
9 investigation into this matter and issue a factual ruling. (Doc. 44.) The request would be
10 to limit discovery necessary in this matter as the Department of Labor will conduct
11 discovery and make a factual determination as to one of Plaintiff's claims. This request
12 will be denied. It is neither the Court's nor the Department of Labor's responsibility to
13 conduct discovery in this matter. As explained above, it is likely that the Department of
14 Labor is unable to comply with this request as all applicable deadlines have long passed,
15 and the EEOC has likely destroyed the relevant charge filed. (*See* Def.'s Resp. (Doc. 45),
16 U.S. EEOC Dismissal and Notice of Rights (Ex. "5"); Def.'s Resp. (Doc. 45), Letter from
17 U.S. Dep't of Labor, MSHA (Ex. "6").) Plaintiff may contact Step Up for Justice
18 regarding advice on conducting discovery.

19 **IV. REQUEST FOR COUNSEL AND ORAL ARGUMENT**

20 The Court finds that Plaintiff has not shown at this time that there are exceptional
21 circumstances in this case that warrant appointment of counsel in this civil case. *See, e.g.,*
22 *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009). That motion, therefore, will be
23 DENIED.

24 Plaintiff's request for oral argument is denied, as oral argument would not be
25 helpful to the Court.

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27 ¹ Step Up to Justice (<http://www.stepuptojustice.org/>) offers a free, advice-only clinic for
28 self-represented civil litigants on Thursdays from 1:30 p.m. to 3:30 p.m. If a pro se
litigant wishes to schedule a clinic appointment, she should contact the courthouse
librarian, Mary Ann O'Neil, at MaryAnn_O'Neil@LB9.uscourts.gov.

1 **V. REQUEST FOR DECLARATORY JUDGMENT AND MINUTE ENTRY**

2 In Plaintiff’s Motion for Oral Arguments and Revisit the Motion for Appointment
3 of Counsel, Plaintiff requests a “declaratory judgment and court-minute concluding that
4 just-stated unsolicited legal advice [that the ex parte contact with the Court is prohibited]
5 is improper-in-fact, and demonstrates malpractice.” (Doc. 47 at ¶ 9.) Defendant does not
6 address this issue in their response. (See Doc. 48.) Regarding ex-parte communication,
7 both parties have been notified that “[t]he parties shall not contact the Court’s staff (i.e.,
8 Law Clerks or the Judicial Assistant) telephonically or by e-mail to ask questions or
9 express concerns regarding cases pending before the Court, and the Court has directed its
10 staff not to entertain any such informal communication.” (Doc. 3 at 1.) Therefore, except
11 for the exceptions listed in the Court’s September 23, 2015 Order, the parties shall not
12 contact the Court. The request is denied to the extent any confusion has not been
13 clarified.

14 **VI. ADMONISHMENT AND SETTLEMENT CONFERENCE**

15 The Court shall not issue an admonishment at this time.

16 The Court believes that a settlement conference mediated by a Magistrate Judge
17 would be helpful to the parties at this point. Therefore the Court will order the parties to
18 participate in a settlement conference. The Court will also issue a stay of the current
19 deadlines in recognition of the settlement conference.

20 **VII. CONCLUSION**

21 Accordingly,

22 IT IS ORDERED that Plaintiff’s motions for referral to the Department of Labor
23 with a stay (Doc. 44) and for oral arguments and appointed counsel (Doc. 47) are denied.

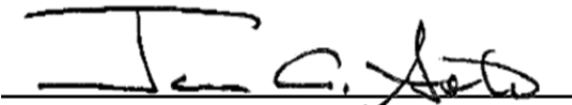
24 IT IS FURTHER ORDERED that Magistrate Judge Bruce G. Macdonald shall
25 conduct a settlement conference at a date and time that is convenient for him, and that the
26 parties shall comply with any requirements imposed by Magistrate Judge Macdonald in
27 relation to the settlement conference. By no later than Friday, June 01, 2018, the parties
28 shall contact Magistrate Judge Macdonald’s chambers at (520) 205-4520 to schedule the

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settlement conference. Within seven days of the conclusion of the settlement conference, the parties shall file a document with the Court stating whether or not the case settled.

IT IS FURTHER ORDERED that due to the parties' participation in settlement conference that deadlines shall be stayed until the settlement conference is resolved.

Dated this 3rd day of May, 2018.



Honorable James A. Soto
United States District Judge