

NOV 01 2010

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>CLIFFORD DILBERT,</p> <p style="text-align: center;">Plaintiff - Appellant,</p> <p style="text-align: center;">v.</p> <p>JOHN E. POTTER,</p> <p style="text-align: center;">Defendant - Appellee.</p>
--

No. 09-16405

D.C. No. 3:05-cv-00087-MEJ

MEMORANDUM\*

Appeal from the United States District Court  
for the Northern District of California  
Maria-Elena James, Magistrate Judge, Presiding\*\*

Submitted October 19, 2010\*\*\*

Before: O'SCANNLAIN, LEAVY, and TALLMAN, Circuit Judges.

Clifford Dilbert appeals pro se from the district court's summary judgment in his employment action alleging disability and age discrimination and

---

\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

\*\* The parties consented to the jurisdiction of the magistrate judge. *See* 28 U.S.C. § 636(c).

\*\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

retaliation. We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse of discretion the denial of a motion for appointment of counsel. *Johnson v. U.S. Treasury Dep't*, 27 F.3d 415, 416 (9th Cir. 1994) (per curiam). We affirm.

The district court did not abuse its discretion by denying Dilbert's motion for appointment of counsel given the unlikelihood of success on the merits. *See Johnson*, 27 F.3d at 417 (appointment of counsel in employment action); *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991) (28 U.S.C. § 1915 requires exceptional circumstances to warrant appointment of counsel).

The district court did not abuse its discretion by denying Dilbert's motion to compel and requests for a continuance of the summary judgment motion to obtain further discovery. *See Preminger v. Peake*, 552 F.3d 757, 768 n.10 (9th Cir. 2008) (setting forth standard of review).

On appeal, Dilbert does not challenge the merits of the grant of summary judgment. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) (“[A]rguments not raised by a party in its opening brief are deemed waived.”).

Dilbert's remaining contentions are unpersuasive.

**AFFIRMED.**