IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GREGORY PATMYTHES,

Plaintiff,

v.

THE CITY OF JANESVILLE,

Defendant.

ORDER

04-C-367-C

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Plaintiff Gregory Patmythes has moved for reconsideration of the order of June 15, 2005, in which I granted defendant The City of Janesville's motion for summary judgment on plaintiff's claim that defendant had terminated his employment because of his cystic fibrosis in violation of the Americans with Disabilities Act and the Rehabilitation Act. The motion will be denied. None of plaintiff's arguments persuade me that I erred in granting defendant's motion.

Plaintiff's first argument, that the court displayed favoritism to defendant, merits no response. Plaintiff's second argument is that he failed to propose certain facts because he was not provided the ten extra days to respond to defendant's summary judgment motion that the court ordinarily provides pro se litigants. According to plaintiff, he was given a

response date by the clerk's office that was not consistent with Magistrate Judge Crocker's preliminary pretrial conference order, which stated that plaintiff would have thirty days to file his response because of his pro se status. Plaintiff indicates that he called the clerk's office to verify the date but he does not state that he informed whomever he spoke to of Judge Crocker's order. Although he filed a motion for an extension of time in which to respond, he waited to do so until one day before he filed his response. Thus, the court was not able to rule on this motion until his deadline had passed and by which time plaintiff had filed his opposing papers.

In any event, I have already explained to plaintiff in the June 15 order that he was not prejudiced by the absence of additional proposed findings of fact. Plaintiff had argued that an "ambiguously ominous" comment made by Tom Rogers, defendant's assistant city manager, on September 7, 2001 and a statement by defendant's city manager, Steve Sheiffer, that he would have made the same cuts in city spending even if state aid were not reduced as anticipated were two examples of circumstantial evidence of discrimination. After noting that there were no properly proposed findings of fact related to either comment, I explained that Roger's comment had no real probative value because it was made twenty months before plaintiff's position was eliminated and that Sheiffer's statement was similarly of little probative weight because the city had financial problems aside from the impending state budget cuts. Because plaintiff made no apparent attempt to reconcile the conflicting

information he received regarding the due date for his response materials and more importantly, suffered no prejudice, there is no basis for altering the outcome of this case.

Plaintiff's third argument is that the court underestimated a jury's ability to probe inconsistent statements, namely Sheiffer's comment about making the same cuts even if state aid were not reduced. In the June 15 order, I described this comment as having "fairly little probative value." On further consideration, I am convinced that this was giving it too much credit. Sheiffer did not know that plaintiff suffered from cystic fibrosis until this suit was filed. Any comment he made prior to that time could not possibly evince discriminatory sentiment. Thus, Sheiffer's statement has *no* probative value.

The fourth argument plaintiff raises is that the court held him to a higher standard than defendant. Specifically, he charges that the court accepted defendant's assertion that its reference to "his union" instead of "the union" was a typographical error without extending the same courtesy to plaintiff. Plaintiff did not inform the court that he had made any typographical errors in any of his submissions. Although plaintiff now identifies his failure to put into dispute defendant's proposed fact that Sheiffer was not aware of plaintiff's cystic fibrosis, I am not convinced that this error is fairly classified as typographical in nature. In any event, plaintiff does not identify any specific evidence he has that would put that fact into dispute. Thus, I see no reason to reopen this case.

Fifth, plaintiff argues that the court did not view the facts in the light most favorable

to the non-moving party. As an example, he notes that I relied on defendant's evidence that among several of its employees who incurred health care costs in excess of those plaintiff incurred was an individual with pancreatic cancer. Plaintiff contends that defendant never informed the court that this individual passed away before his position was eliminated. Plaintiff is correct that I did not consider evidence that was not on the record before me. The standard that court's are to view facts in the light most favorable to the non-moving party does not mean that courts should or even can invent information for which there is absolutely no evidentiary suggestion on behalf of any party.

Even if plaintiff had raised this point earlier, it would not have changed the outcome. I relied on the evidence regarding the individual with cancer for the proposition that defendant had never before terminated any of its employees because of the health care costs associated with their serious diseases. This is true regardless whether the individual with pancreatic cancer passed away before or after plaintiff's position was eliminated.

Plaintiff's final argument is that the court relied on defendant's assertion that one of its employees was on an extended family medical leave without asking whether she had exceeded the duration of leave protected under the Family Medical Leave Act. Defendant had proposed as fact that this employee was on a family medical leave. Dft.'s Reply PFOF, dkt.. #42, at 21, ¶ 57. Plaintiff responded only that defendant had not mentioned this fact to the EEOC; he did not suggest or provide any evidence indicating that the employee had

exceeded the duration of protected leave. Id. Plaintiff's argument suggests that he is under the erroneous impression that courts are investigative bodies. Courts resolve disputes on the facts before them. To the extent plaintiff believes that the record before the court was not sufficiently complete, it was his responsibility to make it so.

ORDER

IT IS ORDERED that plaintiff Gregory Patmythes motion to alter or amend the judgment is DENIED.

Entered this 1st day of July, 2005.

BY THE COURT:

Barbara B. Crabb

BARBARA B. CRABB
District Judge