IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ELIZABETH A. ERICKSON,

Plaintiff,

v.

DEPARTMENT OF WORKFORCE DEVELOPMENT, DIVISION OF VOCATIONAL REHABILITATION OF THE STATE OF WISCONSIN, MICHAEL GRECO, JOHN HAUGH, and PATRICIA NOLAND,

Defendants.

OPINION AND ORDER

15-cv-320-wmc

After a trial to the bench and subsequent order, this court entered judgment in defendants' favor on plaintiff Elizabeth Erickson's claim for disability discrimination and failure to accommodate under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, *et seq.*, and the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA" or "ADA"), 42 U.S.C. § 12101, *et seq*. Specifically, the court found that plaintiff had failed to establish a required element of her claims under both Acts -- that she was otherwise qualified to perform the essential functions of a counselor-in-training position with or without accommodations. Still pending before the court, however, are two motions to alter or amend the judgment by plaintiff, who is now proceeding *pro se*.[1] (Dkt. ##129, 137.) For the reasons that follow, the court will deny both motions.

[1] Technically, plaintiff's second motion is actually titled a "Motion to Amend the Docket #129: Including New Exhibits to Add re False Testimony Claims." (Dkt. #137.) Since this motion was filed three months after judgment was entered, it may be untimely under Federal Rule of Civil Procedure 59. *See* Fed. R. Civ. P. 59(b), 59(e) (requiring filing no later than 28 days after the entry of judgment); 12 James Wm. Moore, *Moore's Fed. Practice* § § 59.16[2] (describing split in the circuits, with the Seventh Circuit not having weighed in, as to whether a timely Rule 59 motion may be amended). However, because the grounds raised in the second motion are largely

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As explained in the court's prior order, both plaintiff's discrimination and failure to accommodate claims require a showing that Erickson is a qualified individual with a disability. *See Felix v. Wis. Dep't of Transp.*, 828 F.3d 560, 568 (7th Cir. 2016) (describing elements for a discrimination termination claim under the Rehabilitation Act); *Cloe v. City of Indianapolis*, 712 F.3d 1171, 1176 (7th Cir. 2013) (setting forth elements for a failure to accommodate claim under the ADA). At trial, the court found that Erickson failed to demonstrate that she was qualified to perform essential functions of the counselor-in-training position at issue, with or without reasonable accommodation, and directed entry of final judgment.

Plaintiff now seeks relief from the judgment under various provisions of Rule 59. That Rule provides for a new trial "after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court." Fed. R. Civ. P. 59(a)(1)(B). The Rule also allows for reopening the judgment to "take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment." Fed. R. Civ. P. 59(a)(2). Finally, plaintiff seeks to alter or amend the judgment under subsection (e).

Regardless of the relief sought, Rule 59 requires the movant to present either (1) newly discovered evidence or (2) a manifest error of law or fact. *See Miller v. Safeco Ins. Co. of Am.*, 683 F.3d 805, 813 (7th Cir. 2012) (describing standard under 59(e)); *Ball v.*

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duplicative of those raised in the first -- namely, that the court erred in crediting Richard Clark's trial testimony -- the court will address both motions in this opinion.

Interoceanica Corp., 71 F.3d 73, 76 (2d Cir. 1995) ("A motion for a new trial in a nonjury case . . . should be based upon manifest error of law or mistake of fact, and a judgment should not be set aside except for substantial reasons." (internal citation and quotation marks omitted)). Moreover, Rule 59 precludes a movant from presenting theories, arguments or evidence that could have been presented before judgment was entered. *See Uphoff v. Elegant Bath, Ltd.*, 176 F.3d 399, 410 (7th Cir. 1999) ("Rule 59(e) may not be used to raise novel legal theories that a party had the ability to address in the first instance."); *Ball v. Interoceanica Corp.*, 71 F.3d 73, 76 (2d Cir. 1995) (Rule 59(a) motion for new trial should not be granted "merely because the losing party can probably present a better case on another trial.").

In reviewing the trial record, the court determined that defendants demonstrated legitimate concerns with Erickson's performance with regards to three, core functions: (1) failure to assess and determine eligibility timely; (2) difficulty with developing effective IPEs based on an accurate assessment of a consumer's strengths and weaknesses; and (3) most importantly, an inability to move consumers to a successful placement (*i.e.*, successfully "close cases"). In lengthy, detailed submissions in support of her post-judgment motions, the plaintiff attempts to challenge each of those findings, directing the court to evidence in the record that she contends warrants either a new trial or judgment as a matter of law in her favor.

In particular, plaintiff argues that the court committed a manifest error of fact in failing to appreciate patterns in the evidence presented at trial, pointing to evidence that: (1) she closed more cases than testified to by witnesses at trial; and (2) she was successful

the vast majority of the time in determining eligibility within the 60-day job requirement. Erickson also contends that her supervisor Richard Clark's testimony was wrong and contradicted by trial evidence, directing the court to various documents, some of which were admitted at trial.[2]

Plaintiff also attempts to submit new evidence -- specifically, an affidavit from one of her consumers, challenging defendants' assessment of his application and of plaintiff's treatment of that application. (O'Neill Aff. (dkt. #130).) Even accepting her reason for not being able to obtain the affidavit earlier, there is *no* reason why plaintiff could not have submitted it before entry of judgment.[3] Regardless, the affidavit does not demonstrate that plaintiff was qualified to perform the job; it underscores a specific disagreement between the parties about plaintiff's performance that was already manifest. *See generally* 12 James Wm. Moore, *Moore's Federal Practice* § 59.13[2][d][iv] (3d ed. 2017) (To warrant relief under Rule 59, "the evidence must be of such substantial probative value that a different result would have been attained if it had been introduced at the original trial.").

In addition to faulting the court, plaintiff contends that her counsel failed to understand her claims, directing the court to headnotes concerning "ineffective assistance of counsel, grounds for new trial motion." (Pl.'s Mot. (dkt. #129) 9.) Because there is no Sixth Amendment right to counsel in a civil setting, there is no post-judgment, ineffective

[2] As plaintiff correctly points out, the court mistakenly referred to Erickson's former supervisor as *John* Clark in its prior opinion and apologizes for that error.

[3] While plaintiff attempts to offer an explanation for her failure to secure this declaration before judgment, the explanation rings hollow given that the affidavit is dated November 28, 2016, and judgment was not entered until December 14, 2016.

assistance of counsel claim available to plaintiff here. In other words, Rule 59 is not a vehicle for a now *pro se*, civil plaintiff to challenge strategic decisions of her former counsel. *See Burton v. Bd. of Regents of the Univ. of Wisconsin Sys.*, No. 14-CV-274-JDP, 2016 WL 3512287, at *3 (W.D. Wis. June 22, 2016) ("Burton hired the attorneys who represented her in this case; they were not forced upon her. Those attorneys presented Burton's case on her behalf, and she cannot pursue relief under Rule 59(e) just because she disagrees with their strategic decisions. It is too late for that.").

The court would also be remiss if it did not emphasize the exceptional quality of her trial counsel. This case was not lost because of any ineffectiveness by plaintiff's counsel, but rather by plaintiff's unfortunate defensiveness to constructive criticism, lack of personal insight about her own blind spots, and a determination to forge ahead despite better ways to apply her obvious abilities to constructive use. Plaintiff's post-judgment motions are a case in point. Erickson attaches a number of documents to her motions, some of which appear to be trial exhibits, while others appear not to have been made a part of the record at all. Regardless, none of the documents, viewed independently or collectively, undermine the court's finding that she was not otherwise qualified to perform the essential functions of a counselor-in-training position, with or without accommodations.

For example, plaintiff attaches an email chain purporting to demonstrate that Clark knew of her disability, but the emails are dated November 25 and 26, 2012, well *after* the undisputed date Clark and Noland were aware of her hearing disability and need for accommodation. (Mot. to Amend, Ex. C (dkt. #137-3).) Plaintiff also attaches a

Wisconsin Department of Safety and Professional Service form that Clark completed in October 2012, on which he checked that Erickson meets the "minimum competency" for "demonstrating effective case management and record keeping methods." (Mot. to Amend, Ex. B (dkt. #137-2) 5.) The answer on the form, however, responds to the category "Applicant uses established methods to maintain appropriate clinic records and client data, and understands the circumstances under which various records can be released." (*Id.*) On its face then, the form seeks an assessment as to whether Erickson is capable of managing sensitive information, rather than managing cases from the DVR perspective.

Erickson similarly attaches an email from September 2011, in which she references her prior work in the Janesville DVR office. (Mot. to Amend, Ex. A (dkt. #137-2).) In contrast, Clark testified that he was not aware that she previously worked in the Janesville office, but this is easily explained by a memory lapse, rather than lying. Moreover, plaintiff's counsel could have attempted to impeach Clark about this mistake at trial, but opted not to, likely because any awareness of Erickson's earlier experience at the Janesville office would have further justified Clark's concerns about Erickson's lack of improvement in her on-the-job performance over time.

Erickson further devotes much of her motions taking issue with any finding that she was not completing her initial consumer assessments within the 60-day required time period. (*See also* Mot. to Amend, Ex. D (dkt. #137-4).) However, Clark did not testify that Erickson failed to meet this requirement. Instead, his testimony was that Erickson failed to assess eligibility as soon as possible. In particular, he testified that for easy cases,

where the eligibility was clear, Erickson should have made those determinations much sooner. Clark also pointed out credible examples where Erickson seemed unable to perceive (or an unwillingness to accept) limitations in a consumer's background or experience that counseled for a different approach or field to pursue employment or training.

In addition, Erickson generally challenges the standards of review on which she was evaluated, either arguing that defendants deviated from those set forth in the specific review forms or that the performance requirements were not attainable. There is no evidence, however, that Erickson was held to different standards than other employees, nor that the goals were purely aspirational. To the contrary, Clark testified, again credibly, that he used the same GAR form for everyone and that the caseload management standards -- the ones setting forth certain timelines -- were essential to the job. Moreover, Erickson's complaints about having to complete work in another office, or take on cases transferred from departing counselors, were all part of the job, not unique requirements for Erickson.

As described in its earlier opinion, the court credited Richard Clark's testimony. In her post-judgment motions, Erickson labels Clark as "biased," but it is not obvious what she means by this term except that he testified that she was not qualified. That is not "bias" in any legally significant meaning of the word. If by biased she means that Clark had concerns about her performance -- and indeed, recommended both that Erickson not be hired and not be retained -- that is true, but that does not render his testimony unreliable or otherwise undermine his credibility. What Erickson would have needed to show is that Clark had animus *because of her disability*, and plaintiff offered no such evidence. Instead, Clark testified credibly that he did not know of her disability at her 9-month GAR, when

he recommended that she not pass the probation period. While the court was critical of Clark for this failure, particularly given his profession as a trained guidance counselor, this might even amount to negligence, but it is not evidence of discriminatory intent, nor even much of a reason to question his credibility, especially since Erickson's disability was not obvious and she was so adept at compensating for her limitations without others knowing.

At bottom, Clark's testimony was frank, clear and included detailed examples to describe his concerns about Erickson's performance. In particular, Clark testified about: (1) Erickson's fundamental disconnects in assessing a consumer's disability and job interests and providing guidance (11/9/16 Trial Tr. (dkt. #135) 19-20); (2) Erickson's failure to assess eligibility well within 60 days for straight-forward cases (for example, with consumers who have profound limitations) (*id.* at 25); (3) Erickson's failure to document critical details in notes (*id.* at 31-32); (4) Erickson's failure to develop IPEs within 90 days (*id.* at 34); and (5) Erickson's failure to develop IPEs that address the consumer's disability (*id.* at 36). While Erickson disputed much of this and offered her own, discrete examples when she met performance expectations, the record as a whole supports the court's finding that she was not otherwise qualified to perform essential functions of a counselor-in-training position, with or without accommodations.

While Erickson felt blind-sided by Clark's 9-month GAR and recommendation not to advance her from the probation period, the question for the court is not whether defendants adequately prepared or even informed Erickson of these performance concerns; instead, the court's focus is on whether she was qualified to complete the job.[4] While the

[4] Erickson's reaction to the 9-month GAR is understandable. In part, Clark explained his initial

court is sympathetic to Erickson's criticism of how defendants communicated her performance concerns -- and, even more so, as explained in its original opinion, managed her request for an accommodation -- the court finds no basis for altering its prior determination that she failed to demonstrate an essential element of her claims. For all of Erickson's abilities, not least her own intelligence and determination to overcome any hurdle, and perhaps because of them, she was less able to assess the physical, mental or emotional limitations of others, or at least to coach them through those limitations to their own definition of success -- much like star quarterbacks or virtuoso musicians are sometimes unable to transition to coaching those less gifted. Regardless, Erickson's performance problems as a counselor-in-training appeared to the court as the trier in fact to have proven intractable and ultimately unrelated to her disability, meaning that she failed to demonstrate her ability to perform the essential functions of the position, with or without reasonable accommodation. For all these reasons, the court will deny her Rule 59 motions.

Finally, defendants' bill of costs is before the court. (Dkt. #127.) Plaintiff requested that the court stay any decision on the bill of costs pending review of her Rule 59 motions. (Pl.'s Mot. (dkt. #129) 2.) Having denied those motions and finding defendants' costs appropriate and well-documented, the court will award defendants costs in the requested amount of $7,020.01.

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positive reviews were consistent with his philosophy of coaching people to become successful, up until the point when he had to make a decision about whether the job was a long-term fit. (11/9/16 Trial Tr. (dkt. #135) 16-17.) Clark also credibly testified that the earlier, largely positive GARs were, in part, a reflection that Erickson did not have enough of a caseload for certain of his concerns to crystalize. (*Id.* at 30-31.)

ORDER

IT IS ORDERED that:

1) Plaintiff Elizabeth Erickson's motions to alter or amend the judgment and motion for new trial (dkt. ##129, 137) are DENIED.

2) Defendants' bill of costs (dkt. #127) is ACCEPTED. Defendants are awarded costs in the requested amount of $7,020.01.

Entered this 5th day of January, 2018.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge