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

GREGORY PATMYTHES,

Plaintiff,

v.

CITY OF MADISON,

Defendant.

OPINION AND ORDER

16-cv-738-wmc

Pro se plaintiff Gregory Patmythes, who suffers from cystic fibrosis, brought claims against the City of Madison under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*, and § 504 of the Rehabilitation Act of 1973 ("the Rehabilitation Act"), as amended, 29 U.S.C. § 794, alleging that the City: (1) discriminated against him on the basis of his disability by "deliberately and intentionally eliminating only his position of employment" and refusing to transfer him to a different position for which he was qualified; (2) failed to provide reasonable accommodations to enable him to manage his cystic fibrosis symptoms better; and (3) subjected him to a hostile work environment because of his disability. On June 13, 2018, the court granted defendant's motion for summary judgment, finding that the evidence of record did not support a reasonable finding that the City of Madison violated his rights under the ADA or Rehabilitation Act. (Dkt. #44.) Plaintiff has since filed motions to alter or amend under Fed. R. Civ. P. 59(e) and 60. (Dkt. ##46, 52.) Since plaintiff has identified no ground for the court to reconsider its conclusions or set aside judgment, however, the court must deny these motions.

OPINION

Federal Rule of Civil Procedure 59(e) allows the court to reconsider its judgment based on (1) manifest error of law or facts or (2) newly discovered evidence that merits reconsideration of the judgment. *See Obriecht v. Raemisch,* 517 F.3d 489, 494 (7th Cir. 2008). Even so, Rule 59(e) "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486 n.5 (2008) (quoting 11 C. Wright & A. Miller, Federal Practice and Procedure § 2810.1, at 127–28 (2d ed. 1995)). Federal Rule of Civil Procedure 60(b) similarly allows for relief from "a final judgment order, or proceeding" on multiple grounds, including mistake, misconduct or, as set forth in Rule 60(b)(6), "any other reason that justifies relief." Again, however, relief from a final judgment under any subsection of Rule 60(b) is "an extraordinary remedy and is granted only in exceptional circumstances." *Bakery Mach. & Fabrication, Inc. v. Trad. Baking, Inc.*, 570 F.3d 845, 848 (7th Cir. 2009).

The narrow relief afforded under either of these rules is simply not available to plaintiff here. In granting defendant's motion for summary judgment, the court concluded that the evidence of record would not support a reasonable finding that defendant violated the ADA, under any of his three theories for relief. *First*, the court concluded that no reasonable jury could conclude that the City failed to accommodate his disability within reasonable limits. Specifically, the evidence of record showed that the City's Occupational Accommodation Specialist, Sherry Severson, made efforts to work with plaintiff to find a reasonable accommodation, but plaintiff failed to provide any documentation from a care

provider opining that: (1) he could not meet the requirements of his position as a Zoning Inspector; or (2) his workplace conditions did not adequately address his disability. (Op. & Order (dkt. #44) at 28-30.) *Second*, the court concluded that the City did not discriminate against plaintiff on the basis of his disability in failing to hire him for three other positions. Indeed, there was no dispute with respect to two of those positions that plaintiff was less-qualified than the people hired, and for the other position, that no one was hired because the individuals responsible for hiring did not believe that *any* applicants were qualified. (*Id.* at 23-26.) *Third*, the court concluded that the evidence of record did not support a reasonable finding that plaintiff was subjected to a hostile work environment based on the statements of two other City employees, Dickens and Leifer; regardless, once the City learned about Dickens' statements, the uncontroverted evidence established that it responded adequately. (*Id.* at 34-36.)

Nevertheless, the court addresses below each of the grounds for relief raised by plaintiff in his motions to alter or amend the judgment.

I. Newly Discovered Evidence

Plaintiff first asserts that the following pieces of "newly discovered" evidence warrant reconsideration: a new affidavit from plaintiff, and four exhibits related to information available before the court resolved defendant's motion for summary judgment. At the outset, plaintiff acknowledges that much of this "new" evidence existed before the he filed his summary judgment opposition materials or at least before the court entered judgment. Nonetheless, plaintiff insists that the court should consider this new evidence for three reasons: (1) he did not learn about the information until after he filed his

opposition; (2) he chose not to come forward with all of his evidence at the summary judgment stage because he wanted to save evidence for trial; or (3) he was confused.

Given the instructions plaintiff received from the court explaining his obligation to respond paragraph by paragraph to defendant's proposed findings of fact (*see* Preliminary Pretrial Conf. Order (dkt. #6) at 15-22), and the extremely lengthy proposed findings of fact and detailed arguments plaintiff *did* file in opposition to defendant's motion for summary judgment, it is doubtful that he omitted any of this evidence strategically or due to confusion, and any failure to discover it falls on plaintiff, absent evidence of misconduct by the City. Although this alone is grounds to deny plaintiff's claims of "new" evidence, the court will briefly explain why none of this "new" evidence calls into question the entry of judgment in defendant's favor in any event.

First, plaintiff's new affidavit raises issues related to his discriminatory hiring claim. Plaintiff now claims that a "non-competitive reassignment" was granted to another City employee, Ms. D. Collingwood, and he learned about this promotion only after responding to the City's motion for summary judgment in March of 2018. According to plaintiff, Collingwood was promoted from a position of .75 FTE Graphics Tech in the Office of the Director of Planning and Community and Economic Development to a 1.0 FTE Program Assistant in the Department of Civil Rights. Plaintiff claims he, too, requested non-competitive reassignment, but his request was denied, inferring that he was discriminated against on the basis of to his disability. While the court's opinion did hone in on plaintiff's failure to come forward with a comparator for purposes of his discrimination claim, that failure was not dispositive. Rather, the court's analysis of his discrimination claim focused

equally on the City's evidence that its hiring decisions were objectively reasonable because the hired applicants were more qualified than plaintiff or the City determined that none of the applicants were sufficiently qualified. (Op. & Order (dkt. #44) at 25-26.) For that reason, even assuming that the court would accept Collingwood as an adequate comparator *and* good cause existed for his failing to call it to the court's attention sooner, plaintiff still has not pointed to any manifest error in the court's finding that the City's failure to promote him did not amount to discrimination on the basis of his disability.

Second, on March 26, 2018, plaintiff claims to have learned that Byron Bishop, the head of the City's Equal Opportunities Division, accused its Human Resources Department of bias against people of color and women. Again, even if this email exists and underlying facts could not have been proffered sooner, the email is not relevant to the City's decisions in 2014 and 2015 to hire someone with more qualifications than plaintiff.

Third, plaintiff cites to one of the City's filings with the State of Wisconsin's Equal Rights Division ("ERD"), in which it represented that: there were no windows in plaintiff's unit; plaintiff worked a significant amount of time outside his office; and the City was not aware that any co-employee had "questionable interactions" with plaintiff. (Pl. Br. (dkt. #47) at 13.) While plaintiff claims that he worked in his office much more than the City represented, the evidence of record in this case showed that his health care provider's report to the City did not request a specific accommodation related to a room with a window. As for the "questionable interactions" comment, the City's knowledge about comments made to plaintiff is irrelevant given that the court assumed that certain unkind statements were made to plaintiff for purposes of summary judgment, but concluded that these statements

did not amount to a hostile work environment as a matter of law. Regardless, it was undisputed that the City responded in a reasonable manner once made aware of these statements, absolving it from liability. (Op. & Order (dkt. #44) at 34-36.) Finally, all of this information was patently available to plaintiff at summary judgment because he had to exhaust the ERD proceedings before bringing suit in federal court.

Fourth, related to the reasonable accommodation claim, plaintiff: describes the relocation of the City offices to another building (Pl. Br. (dkt. #47) at 17); references sampling of air quality (*id.* at 18); and submits the City's alleged proposal that he sit in a windowless office in the Madison Municipal Building (*id.* at 37). However, none of this evidence would be material to the court's conclusions related to his need for a reasonable accommodation. The court's conclusion with respect to this theory for relief relied heavily on plaintiff's failure to respond reasonably to Severson's requests for documentation from his health care providers, and none of this "new" evidence suggests that Patmythes actually engaged with Severson in an attempt to arrive at an appropriate accommodation to help him manage his symptoms.

Fifth, plaintiff cites to additional conversations he allegedly had with Severson regarding placing him in a vacant position, and the possibility of him working remotely, which apparently relates to his claim that the City failed to accommodate his disability reasonably. (Pl. Br. (dkt. #47) at 12, 19.) However, it is undisputed that Severson *also* had explained that to place plaintiff in a vacant position as an accommodation, there would need to be a record establishing that Patmythes could not perform the functions of his *current* position. Again, plaintiff does not claim he ever provided the City such an opinion

from a medical professional supporting his working from home or placement in a different position. To the contrary, the only opinion evidence before the court was a nurse practitioner, who wrote the City a letter, but did not even bring up the possibility of moving plaintiff to another position or allowing him to work from home. (*See* Op. & Order (dkt. #44) at 14-15.)

Sixth, plaintiff attempts to clarify a vague statement he introduced at summary judgment, having previously alleged that when he was applying for the Project Manager position, an unidentified City employee told him he was "not right for the position," and the court commented that the statement was not material because plaintiff failed to identify the person speaking or suggest that the person was a decision-maker. (Op. & Order (dkt. #44) at 27.) Now Patmythes claims that the person was Tariq Saqqaf, a member of the mayor's staff. Even if timely, this identification is also immaterial, since there is no suggestion that Saqqaf was involved in the hiring process for that position in any way.

II. Mistake, Inadvertence, Surprise or Excusable Neglect

Plaintiff further claims that the court erred in numerous ways in granting defendant's motion. While the court will briefly address assertion each in turn, again none are a basis for reconsideration.

To start, plaintiff claims the court failed to afford him more latitude as a *pro se* litigant and erred in denying his request for assistance in recruiting counsel. (Pl. Br. (dkt. #47) at 4-7.) In fact, the court construed his claims and evidence of record generously.

The court also explained in detail why it was denying plaintiff's request for assistance in recruiting counsel: his submissions illustrated that he understood how to litigate his claims, could adeptly gather and present evidence, and could argue his positions using relevant legal standards. (Op. & Order (dkt. #44) at 2-3.) The court was not obliged to do more for him then or now; indeed, his pending motions continue to confirm that he is well-aware of the nuances of his claims and has been litigating his claims adequately without the help of an attorney. That he did not prevail is due largely to the lack of evidence supporting his claims, which his current motions only serve to confirm.

Next, plaintiff argues that the court did not adequately take into account the City's practice of noncompetitive reassignment or transfer, underfilling, and interim hiring. (Pl. Br. (dkt. #47) at 1, 2, 19-20, 23, 27.) Again, in fact, the court expressly addressed plaintiff's allegation that the City had such a practice, but concluded that he had failed to submit evidence that would support a finding that the City did not hire him for vacant positions *because* of his disability. (Op. & Order (dkt. #44) at 17, 25, 26.)

Plaintiff also insists that there are multiple disputed facts that warrant reconsideration, but he points to nothing showing that the court's findings were disputed.[1] First, plaintiff claims that his 2006 promotion from Zoning Code Officer 1 to Zoning Code Officer 2 resulted from his settlement of a grievance, not because the City had underfilled

[1] Plaintiff further claims that he inadvertently failed to respond to numerous of defendant's proposed findings of fact, and would now submit his responses. (*See* dkt. #53-2.) The court has reviewed those responses. For the most part, plaintiff disputes only facts that the court omitted from its analysis because the court agreed that any events before April 1, 2015, were irrelevant to his claims in this lawsuit. As for the remaining "facts," Patmythes disputes are based on his opinion, not factual averments, so the court will not address them further for purposes of his pending motions.

the Zoning Code Officer 2 position when Patmythes was initially hired in 2004, as set forth in the court's opinion. (*See* Op. & Order (dkt. #44) at 8.) However, plaintiff's previous advancement was not material to the court's ultimate conclusion regarding the City's hiring decisions made *in 2014 and 2015*.

Second, while the evidence of record at summary judgment was that plaintiff suggested to the City's Occupational Accommodations Specialist, Sherry Severson, that he receive a HEPA filter, and Severson expressed concerns as to whether such a filter would improve his office's air quality (*id.* at 8), plaintiff now claims that *he* was the one who had doubts about the efficacy of a HEPA filter (Pl. Br. (dkt. #47) at 10, 34). Yet, at summary judgment, the court accepted that plaintiff had objected to the HEPA filter, but failed to come forward with any evidence related to: how he objected, how Severson responded to his alleged objection, and, most importantly, whether a health care provider agreed that a HEPA filter was inappropriate. (Op. & Order (dkt. #44) 29, 31.)

Third, plaintiff disputes the court's finding that he rejected a move to a different office with a window (*see* Op. & Order (dkt. #44) 11), contending instead that he never rejected an offer to move into an office with a window (Pl. Br. (dkt. #47) 13, 35-37). Even accepting that plaintiff never rejected an offer to move to an office with a window, however, the record still does not contain evidence that any medical professional actually *recommended* that move, and, regardless, he was eventually placed in open office area with a window. (Op. & Order (dkt. #44) 14-15, 30-31.) Finally, plaintiff argues that the City was inconsistent in how it filled a Facilities and Sustainability Manager position in 2007, as compared to the Project Manager position he had applied to in 2015 -- now suggesting

that the person hired in 2007 was not qualified for that position, just as he was not technically qualified for the Project Manager position. (Pl. Br. (dkt. #47) 22-23.) Besides the fact that plaintiff still has not provided sufficient details about the two applicants and the two positions to find that this example constituted an adequate comparator, plaintiff still has also failed to acknowledge the fact that the City came forward with evidence that *no one* was hired for that Project Manager position because the City determined the position needed to be restructured to include architectural qualifications. (Op. & Order (dkt. #44) 24-26.)

Finally, plaintiff attempts to reargue a number of points: he should have been reassigned to a vacant position rather than having to compete for one (Pl. Br. (dkt. #47) 12, 16, 17, 20, 27-33, 43-45); he was subjected to a hostile work environment based on the statements made by Leifer and Dickens (Pl. Br. (dkt. #47) 15, 21, 24, 32, 45-49); and he was not allowed to ask questions when he interviewed for the Police Records Supervisor position. However, plaintiff has failed to identify any manifest error of law or fact. Instead, these arguments amount to general disagreement with the court's factual findings and legal conclusions, which is not a proper basis for the court to disturb its judgment. Seeing neither new facts warranting reconsideration nor a manifest error of law in its original judgment, therefore, the court must deny plaintiff's motions.

ORDER

IT IS ORDERED that plaintiff Gregory Patmythes' motions pursuant to Federal Rules of Civil Procedure 59(e) and 60 (dkt. ##46, 52) are DENIED.

Entered this 8th day of May, 2020.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge