United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

October 19, 2020

Before:

Diane S. Sykes *Chief Judge*
Joel M. Flaum, *Circuit Judge*
Michael B. Brennan, *Circuit Judge*

GREGORY PATMYTHES, Plaintiff-Appellant, No. 20-2223 v. CITY OF MADISON, Defendant-Appellee.	Appeal from the United States District Court for the Western District of Wisconsin. No. 3:16-cv-00738-wmc William M. Conley, Judge.

ORDER

On consideration of the papers filed in this appeal and review of the short record,

IT IS ORDERED that this appeal is LIMITED to a review of the order entered on May 8, 2020, denying appellant's Rule 59(e) and Rule 60 motions.

Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal in a civil case be filed in the district court within 30 days of the entry of the judgment or order appealed. In this case judgment was entered on June 13, 2018, and the notice of appeal

was filed on July 8, 2020, nearly two years late. The district court has not granted an extension of the appeal period, *see* Rule 4(a)(5), and this court is not empowered to do so, *see* Fed. R. App. P. 26(b).

Appellant Gregory Patmythes' Rule 59(b) and Rule 60 motions did not toll the time to appeal the judgment because neither motion was filed within 28 days of entry of the judgment. The papers were filed on July 12, 2020, the 29th day after entry of judgment. The court notes that Fed. R. Civ. P. 6(d) does not extend the time to file any of Fed. R. App. P. 4(a)(4)'s tolling motions. *Blue v. International Brotherhood of Electrical Workers Local Union 159*, 676 Fed. 579, 582 (7th Cir. 2012).

This appeal, however, is timely as to the district court's order of May 8, 2020, denying appellant's Rule 59(b) and Rule 60 motions. The time to appeal the order expired on June 8, 2020. But appellant filed, on May 28, 2020, a timely motion to extend the time to appeal. *See* 28 U.S.C. § 2107(c). The district court granted the motion, extending the time to appeal to July 8, 2020, and appellant filed an appeal on that date. This appeal, therefore, may proceed to review of the May 8, 2020 order.

IT IS FURTHER ORDERED that the briefing in this appeal, as LIMITED by this order, shall proceed as follows:

1. The appellant shall file his brief and required short appendix on or before November 25, 2020.

2. The appellee shall file its brief on or before December 28, 2020.

3. The appellant shall file his reply brief, if any, on or before January 19, 2021.

NOTE: Counsel should note that the digital copy of the brief required by Circuit Rule 31(e) must contain the entire brief from cover to conclusion, the language in the rule that "[T]he disk contain nothing more than the text of the brief . . . " means that the disk must not contain other files, not that tabular matter or other sections of the brief not included in the word count should be omitted. The parties are advised that Federal Rules of Appellate Procedure 26(c), which allows for three additional days after service by mail, does not apply when the due dates for briefs are set by order of court. All briefs are due by dates ordered.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
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Chicago, Illinois 60604

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ORDER

November 20, 2020

Before

DIANE S. SYKES, *Chief Judge*
JOEL M. FLAUM, *Circuit Judge*
MICHAEL B. BRENNAN, *Circuit Judge*

No. 20-2223	GREGORY PATMYTHES, Plaintiff - Appellant v. CITY OF MADISON, Defendant - Appellee

Originating Case Information:

District Court No: 3:16-cv-00738-wmc
Western District of Wisconsin
District Judge William M. Conley

The following are before the court:

1. **NONSTANDARD MOTION FOR APPOINTMENT OF COUNSEL, RECONSIDERATION, TO SEAL THIS DOCUMENT AND SUSPEND BRIEFING,** filed on November 12, 2020, by the pro se appellant.

2. **MOTION FOR COURT ACTION,** filed on November 12, 2020, by the pro se appellant.

3. **LETTER,** filed on November 16, 2020, by the pro se appellant,

IT IS ORDERED that the motion for reconsideration of this court's October 19, 2020, order is **DENIED.**

IT IS FURTHER ORDERED that the request for recruitment of counsel is **DENIED**. See Pruitt v. Mote, 503 F.3d 647 (7th Cir. 2007) (en banc); Farmer v. Haas, 990 F.2d 319, 321 (7th Cir. 1993). It is not necessary to recruit counsel to assist in resolving the issues raised on appeal. Briefing in this appeal will proceed as follows:

1. The brief and required short appendix of the appellant are due by January 20, 2021.

2. The brief of the appellee is due by February 22, 2021.

3. The reply brief of the appellant, if any, is due by March 15, 2021.

Appellant may request further reasonable extensions of time if he is unable to meet current deadlines.

IT IS FINALLY ORDERED that the request to file under seal is **GRANTED** only to the extent that the clerk of this court shall maintain under seal the letter filed by appellant on November 16, 2020.

Important Scheduling Notice !

Hearing notices are mailed shortly before the date of oral argument. Criminal appeals are scheduled shortly after the filing of the appellant's main brief; civil appeals are scheduled after the filing of the appellee's brief. If you foresee that you will be unavailable during a period in which your appeal might be scheduled, please write the clerk advising him of the time period and the reason for your unavailability. The court's calendar is located at **http://www.ca7.uscourts.gov/cal/argcalendar.pdf**. Once an appeal has been scheduled for oral argument, it is very difficult to have the date changed. See Cir. R. 34(e).

form name: **c7_Order_3J**(form ID: **177**)

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

GREGORY PATMYTHES,	OPINION AND ORDER
Plaintiff,	16-cv-738-wmc
v.	(Filed May 8, 2020)
CITY OF MADISON,	
Defendant.	

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 12 7-2 8 (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 noncompetitive 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 non-competitive 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 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

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[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.

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/

WILLIAM M. CONLEY
District Judge

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

GREGORY PATMYTHES,	OPINION AND ORDER
Plaintiff,	16-cv-738-wmc
v.	(Filed Jun. 13, 2018)
CITY OF MADISON,	
Defendant.	

Pro se plaintiff Gregory Patmythes suffers from cystic fibrosis, a life threatening disease requiring extensive medical care. While he remains an employee of defendant, the City of Madison ("the City"), Patmythes brings this action 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, claiming 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.

Pending before the court is the City's motion for summary judgment (dkt. #9), as well as Patmythes' motion for assistance in recruiting counsel (dkt. #7) and motion to exclude certain evidence (dkt. #27). For reasons explained in this opinion, the court will deny

Patmythes' request for assistance in recruiting counsel while granting his motion to exclude in part and denying it in part. Because the evidence of record, even when viewed in Patmythes' favor, does not support a finding that the City violated his rights under the ADA or Rehabilitation Act, the court will also grant the City's motion for summary judgment.

OPINION

I. PATMYTHES' MOTIONS

A. Motion for assistance in recruiting counsel (dkt. #7)

Patmythes requests that the court recruit counsel on his behalf because he has recently been diagnosed with a type of arthritis associated with his cystic fibrosis, and he suffers from infections attributed to his condition, as well as anxiety and depression. Patmythes also represents that he has reached out to multiple law firms, each of whom have declined. Unfortunately, the starting point for any request for appointment of counsel in civil cases is that there is no such right. *Olson v. Morgan*, 750 F.3d 708, 711 (7th Cir. 2014). Rather, courts may grant motions for assistance in *recruiting* counsel where a party meets several requirements. *Santiago v. Walls*, 599 F.3d 749, 760-61 (7th Cir. 2010). Here, Patmythes has established that (1) he is unable to afford counsel and (2) he has made reasonable efforts to find a lawyer on his own but has been unsuccessful.

Still, plaintiff's motion turns on his ability to represent himself. The operative question is not whether a lawyer will do a better job than Patmythes – that is almost always the case. Instead, the question is whether this is a case in which it appears from the record that the legal and factual difficulties exceed the plaintiff's ability to prosecute it on his own. *Pruitt v. Mote*, 503 F.3d 647, 654-55 (7th Cir. 2007). In responding to the motion for summary judgment, Patmythes submitted his own lengthy affidavit, along with numerous documents related to his employment and statements by other City employees. While the admissibility of some of these filings is questionable, he has demonstrated an awareness of the issues relevant to his claims and the ability to gather substantial evidence to support his claims. Furthermore, his briefs are clearly written and, while acknowledging that his arguments at times rely on facts that do not bear directly on his claim in this lawsuit, Patmythes explains that he wanted to provide additional information for context. Substantively, Patmythes cites to relevant authorities and argues his position under the proper standard. More generally, Patmythes has been engaged in this lawsuit: he meets deadlines and apprises the court when he is unavailable. Accordingly, while the court does not underestimate how difficult handling this lawsuit may be for Patmythes, he has done a more than adequate job representing himself through summary judgment, and so his motion will be denied.

B. Motion to exclude certain evidence (dkt. #27)

Patmythes moves to exclude certain evidence that the City submitted in support of its motion for summary judgment. In particular, he seeks to exclude: (1) the City's documentary evidence because the citations to the exhibits lack a page and paragraph designation; and (2) several of defendant's proposed findings of fact ("DPFOF") and documents concern events occurring after April 1, 2015. Patmythes' first request will be denied. The City's citations to certain of the exhibits generally did not require a page and paragraph number. In particular, the court has reviewed the City's citations and corresponding evidence, finding the proposed fact support by the materials as cited.[1]

As to his latter request, Patmythes states that the facts and documents related to events after April 1, 2015, should be excluded because that was the date he filed his complaint with the State of Wisconsin Equal Rights Division ("ERD"), and the United States Equal Employment Opportunities Commission ("EEOC"). *See* ERD Case No. 201500823/EEOC Case No. 26G201500669C ("Case '669"). He specifically asks the court to exclude or limit the DPFOF ¶¶ 7, 8, 25-29, 31-34, 36-39, and 64-66. The City agrees that materials

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[1] Nor has Patmythes alleged that he had difficulty identifying the City's cited materials, and his responses suggest the opposite. Patmythes responded specifically to the City's proposed findings of fact in his affidavit, citing to multiple paragraphs of the City's proposed findings of fact. (Patmythes Aff. (dkt. #26) ¶¶ 161-62, 172, 243.)

beyond Case '669 are not properly before the court, but explains that Patmythes' complaint and filings in this case have included information not directly related to Case '669, which is why its proposed findings of fact include a broader range of facts. Therefore, the City agrees to the proposed exclusion of some of its findings, but not others, requiring the court to address them in turn.

First, the City points out that even though his claim in this lawsuit relates to Case '669, paragraphs 57-71 of his complaint contain allegations related to Patmythes' *ongoing* ERC/EEOC complaint. *See* ERD Case No. CR201503529/EEOC Case No. 26G201600445C ("Case '445"). In Case '445, Patmythes alleged that between April 15 and December 16, 2015, his reasonable accommodation requests were repeatedly denied. In particular, Patmythes alleges that: (1) a women's leadership program discriminated against him on the basis of disability and gender; (2) the City did not respond to his July 23, 2015, submission from his cystic fibrosis care team related to reasonable accommodations; and (3) the City had not complied with his request to work up to three hours per day from home. (Def.'s Ex. D (dkt. #12-3) at 5-7.) The ERD issued a "no probable cause" decision regarding Patmythes' disability allegations and a "probable cause" decision with respect to his sole allegation based on gender. While Patmythes appealed the "no probable cause" findings related to the disability allegations, and those findings were certified for a probable cause hearing, Patmythes subsequently requested they be held in abeyance due to ongoing health

issues. Accordingly, the EEOC has not issued a determination with respect to the allegations Patmythes set forth in Case '445, and the court considers them here only as helpful in context.

Second, the City agrees that several of its proposed findings of fact should be excluded, but asks that some to which Patmythes objects be considered nevertheless because they relate to Case '669 and not Case '445. Specifically, the City takes the position that if the court agrees it lacks jurisdiction to address issues beyond the purview of Case '669, DPFOF ¶¶ 25-27 and 29-38 should be excluded because they relate to *other* accommodation requests not encapsulated in Case '669. Even more specifically, the parties seem to agree that: ¶¶ 25-27, 29-31, and ¶¶ 36-38 all relate to Patmythes' leave of absence; and ¶¶ 32-35 relate to his request that he be allowed to work at home. Patmythes agrees, replying that he does not want this court to resolve any issues that the Administrative Law Judge ("ALJ") currently handling his ERD appeal could resolve.

Third, the City nevertheless asks that the court deem DPFOF ¶¶ 7-8 relevant to this lawsuit because those paragraphs merely outline Case '445, which informs what issues are properly before the ALJ. The court agrees and will not exclude those paragraphs from consideration. Additionally, the City explains why DPFOF ¶¶ 28, 39, and 64-66 should be considered, pointing out that Patmythes amended Case '669 on January 20, 2016, to include multiple accommodation allegations. (Def's Ex. B (dkt. #12-2).) Therefore, the

City asserts that this court has jurisdiction over the accommodation-related issues to which DPFOF ¶¶ 28, 39, and 64-66 refer.

Indeed, paragraph 28 describes a June 23, 2015, letter the City received from Patmythes' health care provider related to his health care needs; paragraph 38 outlines the timeframe of Patmythes' use of leave; and paragraphs 64-66 describe how the City handled a job posting.

Each of these facts are relevant, or at least provide context, to Patmythes' claims that are properly before the court. Accordingly, the court agrees that this lawsuit should be limited to the claims Patmythes raised in Case '669, and it will not consider DPFOF ¶¶ 25-27 and 29-38 (as well as corresponding Exhibits Q, R, S, T, U and V) for purposes of summary judgment, and will only reference these facts as needed for context.

II. CITY'S MOTION FOR SUMMARY JUDGMENT (dkt. #9)

UNDISPUTED FACTS

Consistent with Patmythes' position in his motion to exclude, the City also objects to a large number of Patmythes' proposed findings of fact as irrelevant to the claims properly before the court in this lawsuit, because they pertain to issues beyond Case '669. As Patmythes has not opposed the objection, and indeed explicitly stated that he would prefer to have his appeal of the issues in Case '445 handled by the ALJ, the

court summarizes those facts as needed for context only. Regardless, the following facts are deemed undisputed for purposes of the City's motion for summary judgment when viewed in a light most favorable to plaintiff. *Helmen v. Duhaime*, 742 F.3d 760, 761 (7th Cir. 2014).

A. Background

The City's Department of Planning, Community and Economic Development ("Department") includes a Building Inspection Division, which in turn includes the Zoning Administration where Patmythes worked. During the relevant time period, George Hand supervised the Building Inspection Division, and Matthew Tucker supervised the Zoning Administration. At that same time, the City had in place the following Administrative Policy Memorandums ("APM"): APM 3-5 – "Prohibited Harassment and/or Discrimination Policy"; APM 2-22 – "Workplace Accommodations"; and APR 2-45 – "Disability Leave/Layoff". The City also employs an Occupational Accommodations Specialist to assist employees with disabilities.

Patmythes began working for the City in May of 2004 as a Zoning Code Officer I, and he was promoted to a Zoning Code Officer II in 2006 by virtue of the City's practice of "underfilling" positions. That is, Patmythes was hired to fill a position actually budgeted at Code II. Although Patmythes was initially hired at Code I, he rose to this higher level through his subsequent promotion.

Since Patmythes' employment began, the City has been well aware of his cystic fibrosis. While not directly relevant to Case '669, Patmythes took leave for multiple periods of time between April of 2015 and April of 2016, returning to his Zoning Inspector position on April 22, 2016, beginning with a part-time schedule. In June 2016, he began working as a Zoning Inspector on a full time basis, and he continues to work in that capacity.

B. Patmythes' requests for accommodations

City Occupational Accommodations Specialist Sherry Severson worked with Patmythes on his disability and accommodations requests. On September 8, 2014, Patmythes wrote to Severson requesting a HEPA ("High Efficiency Particulate Air") filter to improve air quality in his work area, which he claimed was having an adverse impact on his quality of life.[2] Severson responded that she would contact him the next day to talk specifics.

On September 12, 2014, Patmythes met with Severson in her office, who expressed doubts that a portable HEPA filter would appreciably improve his office's air quality. When Severson asked if he was ready for a HEPA filter, Patmythes replied in the affirmative. As an alternative, Severson asked Patmythes whether he would consider moving to a different room. Either way,

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[2] HEPA filters can be permanent or corded, and portable filters can operate in rooms of approximately six hundred square feet.

Severson explained that Patmythes would need to provide documentation of his medical needs to address his condition. Finally, Severson talked about another individual with respiratory issues who transferred to another department, but according to Severson that individual did not move departments as a result of an accommodation. (Severson 2d Aff. (dkt. #41) ¶ 6.)

On November 12, 2014, Severson emailed Patmythes, attaching three links to air quality control devices and asking him whether a Ultraviolet Germicidal Irradiation ("UVGI") device would be a better alternative. Additionally, Severson again asked Patmythes' opinion about moving to an empty office if one was available. Having not received a response by November 21, 2014, Severson emailed Patmythes once again, asking him if he would agree to an office switch. According to Patmythes, after this email exchange Severson and Patmythes had a conversation in which Severson stated that she had checked on a HEPA filter and learned that there was one in use by two other employees, but it had proven ineffective. According to Patmythes, it was during this exchange that Severson said he "argued too much." (Patmythes Aff. (dkt. #26) ¶ 275.)[3]

On December 5, 2014, Patmythes emailed Severson, stating that she should expect two requests from his doctors: (1) getting him a healthier work environment; and (2) modifying his schedule because he had

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[3] It appears that they also discussed how other employees work remotely, but this issue is relevant to Case 445.

been having a "pulmonary exacerbation." Severson responded on December 8, 2014, acknowledging Patmythes' note and letting him know that they could start the conversation with Matt and George (the supervisors) sooner.

On January 6, 2015, however, Severson emailed Patmythes that she had still not received medical documentation regarding needed accommodations. Patmythes responded the next day, stating that his therapist was against relocating him to a different room, but that he had been certified for a position in the City's Civil Rights Department and wanted to discuss a transfer to that position. Severson responded that to transfer him on the basis of a disability, the City would first need to determine that there were no reasonable accommodations available to him in his current position. On January 8, 2016, Severson emailed Patmythes to acknowledge their many conversations about his conditions and possible accommodations, but further writing that even though she thought he was ready to provide documentation, Patmythes seemed "reluctant to move forward" when they reached the point of approaching his supervisor. (Ex. 1 to Severson 2d Aff. (dkt. #41).)

On January 10, 2015, Severson received a letter from Patmythes' therapist, Nina Pernecke. (Pl.'s Ex. 29 (dkt. #26-26.) In that letter, Pernecke confirmed that Patmythes was under her care for depression and anxiety related to his cystic fibrosis. She recommended "his work space include a window and that the proximity of such space avails him to workplace interaction."

(*Id.*) On January 16, 2015, Patmythes also submitted a formal "Request for Accommodation" to Severson for a transfer to a vacant position. (Def.'s Ex. P (dkt. #13-11).) Patmythes stated that his current assignment was exacerbating his conditions and requested a transfer to the Engineering Department of the Department of Civil Rights. (*Id.*) Patmythes further advised Severson to let him know if she needed any further documentation about his condition.

On January 21, 2015, Severson met with Patmythes in person, and he brought along a copy of Pernecke's letter. By that point, Patmythes had rejected the option of moving to a different room with a window. Severson and Patmythes discussed the fact that the City would be moving his entire department to temporary offices in a different building due to a remodel, and Severson warned that the temporary offices were "terrible." According to Severson, she was referring to the large number of displaced City employees at that space, but Patmythes understood Severson to mean that the temporary office had terrible environmental conditions. According to Patmythes, Severson made additional comments suggesting that she did not want him reassigned because of his disability:

- "I don't want people to not have all the truth about what happens, the honest truth about when we place people in new jobs is, guess what, there's resentment and they have to deal with resentment by other people who either thought they should have gotten the job

or supervisors who think 'well, how come I didn't get to select who I wanted to select.' "

- "So I mean there's resentments and things that people have to deal with, we try really, really hard to work on that, but like I can't go and talk to the other employees who maybe were applying for the job as well or thought they were going to get a job or an opportunity to get a job and say well, but this person has a disability."

According to Patmythes, he left this meeting in tears. (Patmythes Aff. (dkt. #26) ¶ 288.)

Next, Patmythes claims the City's Employee and Labor Relations Manager, Gregory Leifer, made comments on January 28, 2015, about health insurance coverage, which Patmythes interpreted as discriminatory toward individuals with disabilities. The context is unclear – but Patmythes avers that Leifer made the following statements:

- "[F]ifteen percent of covered lives use eight[y] -five percent of your premium dollars that 15%, sorry but that 15% is getting protection from the other 85% that have good genes and don't get sick."
- "I don't want to make this sound as Darwinian as it's going to sound but to follow up . . . on great genes versus bad genes. Doesn't the bad genes person have a responsibility to maintain their health? To avoid the things that are going to make their chronic conditions worse?"

(Patmythes Aff. (dkt. #26) ¶¶ 353-57.) At least for purposes of summary judgment, the City does not dispute these statements were made, but argues that they are not material to this lawsuit.

On February 4, 2015, Patmythes emailed Severson, asking for a status update on his requested reassignment. (Def.'s Ex. Q (dkt. #13-12) at 2.) Severson was out of the office that day and did not respond. On February 23, 2015, Patmythes followed up with a longer email about his request, stating that since Severson and he had met on January 21, he submitted his reassignment request and the City Engineering Department had contacted him for an interview. Patmythes believed that contact was part of the reasonable accommodation reassignment process, but learned during the actual interview that it was not. Patmythes further stated that he met the minimum qualification requirements for a number of job postings, and he requested that "the hiring processes be held in abeyance while we explore the reasonable accommodation of reassigning me to one of those positions." (*Id.*)

Also on February 23, Severson responded to Patmythes' email, apologizing for her delay but explaining that she had difficulty finding time to speak to Brad Wirtz and the City Attorney regarding the modification of the City's policy on using reassignment as a reasonable accommodation. (APM 2-22.) She further attached the City's memorandum responding to his reassignment request, and added:

> I cannot understand why you would have believed that your interview with Engineering was part of an accommodation process. First of all, as I have indicated on numerous occasions, we have not fully explored the potential for accommodations in your current position. Secondly, I had no knowledge of your involvement in that particular hiring process.

(*Id.* at 1.) In the memorandum, dated February 19, Severson also stated that the City was denying his request.

In particular, Severson cited APM 2-22, which had been modified over time but consistently required the City to reassign "an employee who, because of a disability, can no longer perform the essential functions of his/her current position, with or without reasonable accommodation, unless the employer can show that it would be an undue hardship." (*Id.* at 4.) Severson further explained that:

> In your situation, we have not yet attempted to put accommodations in place for your current position although we have discussed possibilities on many occasions. It is at this point when you have retracted from the process. Up until recently[,] you provided no medical documentation that would support the things that we had discussed as possible accommodations, and the note that you provided most recently puts one of your conditions at odds with another in coming up with a possible accommodation.

> I would very much like to continue exploring, and hopefully putting into place, some form of accommodation in your current position that would allow you to work more comfortably. I still believe that some level of telecommuting might be an option worth considering although we have yet to have a dialogue with your supervisors regarding any form of accommodation.

(*Id.* at 5.) Patmythes responded later that day, citing to "*EEOC v. United*," which he believed supported his reassignment request. He also stated that the timing of his interview indicated that it was part of his reassignment request, and that he was very disappointed by her statement that he retracted from the process.[4]

On March 15, 2016, Severson emailed Patmythes (and other employees) asking whether there were any accommodation needs in the temporary offices. It does not appear that Patmythes responded. At some point afterwards, Patmythes was moved to the temporary space located at 126 S. Hamilton Street, the place that Severson had described as "terrible." According to the City, he worked on the first floor area in a large open floor plan that had large windows and thus a good amount of natural light. While he does not provide details about his work environment on Hamilton Street, Patmythes claims that he was still denied a healthy

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[4] Patmythes added that he had communicated his needs using plain English, which he believed was permissible. (Def.'s Ex. Q (dkt. #13-12) at 1.)

work environment, prompting him to hire an attorney on March 20, 2015.

In late July of 2015, the City finally received documentation from a medical provider related to Patmythes request for an accommodation in the form of a letter, dated July 23, 2015, from Brook LaChance, a nurse practitioner with UW Health's Cystic Fibrosis Center in Madison, Wisconsin. (Def.'s Ex. O (dkt. #13-10).) In that letter, LaChance confirmed that Patmythes' cystic fibrosis included the following issues: chronic cough that produces thick mucus, pulmonary lung infections 2-3 times a year, sinus congestion with frequent infections, chest congestion and shortness of breath. LaChance stated that the recommendations for Patmythes were to "manage his ongoing symptoms with aggressive airway clearance including vest and nebulizers, daily exercise, taking oral medications as prescribed." LaChance added that "his health is easily disturbed with poor air quality, temperature extremes and viral illnesses," and she concluded the letter by requesting that the City "continue to work with Greg and his attorney on reasonable accommodations to continue his employment." (*Id.*)[5]

[5] LaChance did not include any specific recommendations with respect to whether Patmythes should be working during his "aggressive airway clearance" regimes, although his health care providers had indicated that he should not be working during those periods of time when Patmythes previously requested FMLA leave.

C. Patmythes' applications to other positions and evidence of underfilling, temporary and interim hirings

In addition to the position discussed above, Patmythes applied for several vacant positions, though again outside the accommodation process. Rather, those positions were filled through the City's Civil Service Process. First, at the end of 2014, a vacancy arose in the Department of Civil Rights ("OCR") for an Equal Opportunities Investigator/Conciliator 1 position. The recruiting period for that position ran between October 9 and October 26, 2014. Patmythes and four other City employees applied and each were interviewed. The interviews were scheduled for January 9, 2015. Three City supervisors sat on the interview panel, which asked each interviewee the same four questions, and gave each the opportunity to provide the panel with information they deemed relevant. After the interview, each panel member independently scored the interviewee's answers. During the application process, Patmythes reports being told that he did not "have the look we want in that position," but he does not identify who made the statement or the specific context in which the comment was made. (Patmythes Aff (dkt. #26) ¶ 372.)[6] Regardless, Patmythes scored the lowest of all five applicants, and the highest scoring applicant was hired. Patmythes was notified on February 2, 2015, that he was not selected. At that time, he was

[6] The City does not dispute this statement for purposes of summary judgment only.

told that the person hired had prior work experience as an administrative support staff person.

Second, in January of 2015, Patmythes applied for a position entitled "Project Manager." That posting was initially listed for architects only, but then the City's Human Resources department broadened the minimum qualifications to include someone with a construction management background. Patmythes was initially screened out, but he successfully appealed for consideration, citing to his industrial education degree and related experience. The City ultimately received ten qualified applicants for the position, and all ten were referred for an interview. Following the interviews, however, the Supervisor concluded that none of the ten applicants met her needs because the job required more architectural experience than any of the candidates possessed. Accordingly, the City re-posted the vacancy in May of 2015 as an "Architect 2/3" position. Patmythes did not apply for that position.

Third, in February of 2015, a Police Records Supervisor position opened up. Nine applicants, including Patmythes, were interviewed, and the applicant who scored significantly higher than all of the other applicants was hired. Patmythes was not.

Patmythes also asserts that other, non-disabled employees received the benefit of the City's practice of "underfilling" positions or hiring "interim" employees, offering examples of instances where individuals were hired on a temporary basis or were "underfilled." First, Roger Goodwin was hired as the "Interim Director of

Human Resources" for three years. Second, Witzel-Behl was hired as a Clerk, even though the position was posted as "Clerk/Treasurer." Third, Ragland was hired to lead the Office of Community Services with no experience in the area. Fourth, Police Chief Koval was promoted to chief directly from sergeant. However, Patmythes does not provide evidence of the circumstances surrounding any of these hires, including the process undertaken to fill the positions.[7]

D. Allegations of hostile work environment

As the administrative clerk for Patmythes' Department in charge of coordinating benefits, Kris Dickens provided information to the City's HR Department to obtain coverage through the City's disability insurance carrier for Patmythes' time off. Part of this process involved entering Patmythes' time off using proper coding, which required Dickens to go back and forth with HR. On June 5, 2014, after Dickens had several exchanges with HR, she became frustrated and said to Patmythes "You know, you and [another employee] are a real pain in the ass with your leave." (Patmythes Aff. (dkt. #26) ¶ 130.) Patmythes claims Dickens complained to another Zoning Inspector that: (1) Patmythes was difficult about losing holiday pay for Memorial Day; (2) "it wasn't fair that Greg didn't have to use up all of his time"; and (3) "employees should

[7] Again, the City does not dispute the alleged facts for purposes of summary judgment, instead taking the position that they are not material.

have to use up all of their own time before being able to use (wage) insurance." (*Id.* at ¶¶ 213-15.)

Patmythes reported this exchange to his supervisors, Tucker and Hank. Tucker suggested that Patmythes speak to Dickens about it if he wanted. According to the City, Hank suggested that Patmythes should put his complaint in writing and Hank would deal with it, while Patmythes claims that Hank responded that he would not get involved and that Dickens should "do her fucking job." (*Id.* at ¶ 455.) Apparently understanding how her comments might be perceived, Dickens drafted an email to herself that described what happened and characterized the exchange as expressing frustration with the repeated back and forth with HR, not with Patmythes' disability.

Afterwards, Patmythes filed a complaint against Dickens under the City's discrimination policy, APM 3-5. After investigating, the City concluded that Dickens' comment was not directed at Patmythes' disability and did not create a hostile work environment.[8] Patmythes states that the incident had an adverse impact on his mental health, and that having to work with Dickens subsequently impeded his therapy.

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[8] Patrnythes alleges one other instance regarding Dickens' behavior. In October or November 2011, Patmythes overheard Dickens tell another employee, "There is no reason for him to be off three weeks." More generally, Patrnythes claims that Dickens is known for being difficult to work with. It does not appear this information was provided to or considered by the City.

E. Patmythes' ERD/EEOC cases

i. Case '669

As previously described, Patmythes filed Case '669 on April 1, 2015. Patmythes amended that complaint on January 20, 2016. His complaint includes the following timeline:

- June 5, 2014: comment by Dickens, and the subsequent handling by Hank and Tucker.
- December 5, 2014: Patmythes submitted a request for reasonable accommodation to Severson.
- January 9, 2015: City filled the Investigator/ Conciliator position without considering Patmythes. During the application process, Patmythes is informed he "doesn't have the look" the City wants, which Patmythes describes as discrimination based on disability, gender and race.
- January 21, 2015: Patmythes submitted a request for reasonable accommodation to Severson, and Severson discouraged him from asking for a transfer because there may be hard feelings from other employees that also want the position.
- January 28, 2015: Leifer told Patmythes that people with "bad genes" have a duty to avoid things that made their chronic conditions worse because it causes health insurance premiums to increase.

- February 20, 2015: Patmythes interviewed for Project Manager position and mentioned his belief that it was part of the reasonable accommodation process.
- February 25, 2015: Patmythes submitted a request for accommodation with Severson.
- March 6, 2015: Project Manager recruitment terminated by the City, to be reclassified at a lower pay grade, contrary to the City's practice of "underfilling" positions.
- March 11, 2015: Patmythes interviewed for positions in Human Resources and he was discriminated against because his accommodation requests had not been met.
- March 27, 2015: The City admitted that the hiring process is in need of reform because of systemic racism at Madison Metro.
- March 31, 2015: Patmythes interviewed for Police Records supervisor, but the panel refused to answer Patmythes' questions during his interview.
- April 1, 2015: Patmythes filed ERD and EEOC complaints.

(Def.'s Exs. A, B (dkt. ##12-1, 12-2).)

On April 13, 2016, the ERD issued a "no probable cause" decision that dismissed Case '669. Patmythes did not appeal the ERD's dismissal. On August 10, 2016, the EEOC issued a "Dismissal and Notice of Rights" form that adopted the ERD's findings and notified Patmythes that he had 90 days to file a federal

lawsuit with respect to the allegations in Case 669. (Def.'s Ex. C (dkt. #12-2).)

ii. Case '445

On January 22, 2016, Patmythes filed a second complaint with the ERD and EEOC. In Case '445, Patmythes alleged that between April 15, and December 16 of 2015, his reasonable accommodation requests were repeatedly denied. (Def.'s Ex. D (dkt. #12-3) at 5-7.) As noted above, this case has not been resolved because Patmythes is in the process of appealing his reasonable accommodation claims. Patmythes filed this lawsuit on November 9, 2016. In paragraphs 14-56, Patmythes outlined the claims that he brought in Case '669. In paragraphs 13 and 57-71 of his complaint, Patmythes outlines the allegations that he brought in Case '445.

SUMMARY JUDGMENT OPINION

The City agrees that Patmythes has a disability and that he is a "qualified individual" for purposes of the ADA and Rehabilitation Act, but seeks summary judgment on Patmythes' claims on four grounds: (1) the court lacks jurisdiction to consider plaintiff's allegations related to Case '445; (2) no reasonable trier of fact could find that the City discriminated against plaintiff based on his disability; (3) no reasonable trier of fact could find that the City failed to provide him with a reasonable accommodation for his condition; and (4) no reasonable trier of fact could find that the

City created a hostile work environment based on plaintiff's July 2014 incident with Dickens. As to the first of these arguments, this court plainly lacks jurisdiction to consider plaintiff's allegations related to his second ERD/EEOC complaint, referred to above as Case '445. Patmythes does not oppose this argument specifically; rather, he seeks to have the ALJ, and not this court, resolve his appeal in that case. Accordingly, the court will not exercise jurisdiction over Patmythes' allegations in paragraphs 57-71 of his complaint, focusing instead on whether a reasonable trier of fact could conclude on the record before the court on summary judgment that the City discriminated against Patmythes on the basis of his disability, failed to provide him with a reasonable accommodation, or subjected him to a hostile work environment.[9]

A. Discrimination

The ADA prohibits employers from discriminating against a qualified individual on the basis of a disability. 42 U.S.C. § 12112(a). Historically, to prevail on a discrimination claim against the City under the ADA, a plaintiff can proceed under the direct or indirect method of proof. *See Taylor-Novotny v. Health All. Med. Plans, Inc.*, 772 F.3d 478, 489 (7th Cir. 2014). More recently, however, the Seventh has moved away from a rigid application of "the many multifactored tests in

[9] In the employment context, the ADA's standard applies to Rehabilitation Act claims as well. *Brumfield v. City of Chi.*, 735 F.3d 619, 630 (7th Cir. 2013).

employment discrimination cases" and, instead, directed district courts to "decide, when considering the evidence as a whole, 'whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge.'" *Monroe v. Ind. Dep't of Transp.*, 871 F.3d 495, 504 (7th Cir. 2017) (quoting *Ortiz v. Werner Enter., Inc.*, 834 F.3d 760, 765 (7th Cir. 2016)). Because the parties have organized their arguments consistent with the two methods, the court will as well, while mindful that the ultimate question is simply whether plaintiff has presented sufficient evidence from which a reasonable fact finder could conclude that defendant discriminated against him because of his disability.

Under the direct method, he must show that (1) he is disabled within the meaning of the ADA, (2) he was qualified to perform the essential functions of the job, with or without accommodation, and (3) he suffered an adverse employment action because of his disability. *Bunn v. Khoury Enters., Inc.*, 753 F.3d 676, 683 (7th Cir. 2014). To establish the third prong, plaintiff must show that his disability was a "but for" cause of the adverse employment action. *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961-62 (7th Cir. 2010). Plaintiff can show causation through direct or circumstantial evidence, with circumstantial evidence encompassing, among other things, suspicious timing and pretext for the adverse employment action. *Bunn*, 753 F.3d at 684.

Under the indirect method, plaintiff must establish a *prima facie* case of discrimination by showing

that (1) he is disabled under the ADA, (2) he was meeting his employer's legitimate employment expectations, (3) he suffered an adverse employment action, and (4) similarly-situated employees without a disability were treated more favorably. *Id* at 685. If plaintiff establishes a *prima facie* case, the burden shifts to the City to present evidence showing a legitimate, nondiscriminatory reason for the employment action. *Id.* If the City meets its burden, then Patmythes must submit evidence that the City's stated reason is pretextual. *Id.* Patmythes does not explicitly pursue either method of proof, but on this record, he cannot avoid judgment under either.

As an initial matter, Patmythes has offered *no* evidence that he was qualified for any of the three positions, nor that he was even arguably the most qualified. Instead, he suggests that the qualifications are irrelevant because of the City's policy of underfilling positions. Even assuming that plaintiff were qualified for one of the positions, Patmythes has no evidence that he was turned down for that position *because of* his disability. Instead, he appears to rely on circumstantial evidence in the form of statements made by Severson, Leifer and Dickens related to his disability. As set forth above, the court will assume for purposes of summary judgment that: in January of 2015, Severson told him that other employees would resent him if he were reassigned because of a disability; around the same time, Leifer arguably implied that Patmythes and other who require insurance benefits had "bad genes," and thus had an obligation to keep himself healthy; and in June of 2014, Dickens told him that

handling his leave benefits coordination was a "pain in the ass."

However, none of this evidence would support a finding of discriminatory animus in the City's hiring decisions. Indeed, Leifer's and Dickens' statements are non-starters because *neither* were involved in the decision not to hire Patmythes for any of the positions to which he applied. *See Fleischman v. Cont'l Cas. Co.*, 698 F.3d 598, 605 (7th Cir. 2012) ("[A] nondecisionmaker's animus is not evidence that the employer's actions were on account of plaintiff's age."). As to Severson's statement, she arguably *could* have placed Patmythes in one of the three positions sought, and her statements about other employees or supervisors resenting him, made contemporaneous to her decision not to reassign him, could fairly be interpreted to be *some* circumstantial evidence that her decision was tainted. Nonetheless, Patmythes himself broke any causal connection between Severson's apparent reluctance to place him in a vacant position because of his disability and the decision not to reassign him. While Severson *repeatedly* told Patmythes that he would need to provide documentation to support his request for reassignment, he never actually followed up, even after Severson asked for the information on multiple occasions. Accordingly, Patmythes' discrimination claim fails.

Nor can Patmythes avoid judgment under the indirect method. Patmythes can easily meet the first three elements: he is disabled, the record supports a finding that he was meeting expectations, and a

cognizable adverse employment action under the ADA is a significant change in employment status, which includes hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *See Chaudhry v. Nucor-Steel-Ind.*, 546 F.3d 832, 836 (7th Cir. 2008) (citing *Bell v. E.P.A.*, 232 F.3d 546, 555 (7th Cir. 2000)).

The fourth prong is an insurmountable hurdle for Patmythes because he has not submitted evidence that there were other, non-disabled employees who were treated more favorably. To satisfy this element, plaintiff would need to "identify a satisfactory comparator to the court." *Bunn*, 753 F.3d at 685 (7th Cir. 2014). "The inquiry is fact intensive, requiring consideration of the circumstances as a whole." *Raymond v. Ameritech Corp.*, 442 F.3d 600, 610-11 (7th Cir. 2006) (citing *Spath v. Hayes Wheels Int'l-Ind., Inc.*, 211 F.3d 392, 397 (7th Cir. 2000)). Here, Patmythes claims that the City discriminated against him on the basis of his disability in failing to hire him for the Investigator/Conciliator, Project Manager, and Police Records Supervisor positions. (*Id.* at ¶¶ 36-39, 45-49, 54.)[10] To

[10] The City also asserts a statute of limitations defense with respect to Patmythes' challenge to his Investigator/Conciliator position hiring process. To challenge that decision, plaintiff had to bring a claim with an administrative agency within 300 days of the event giving rise to the discriminatory act. 42 U.S.C. § 12117; 42 U.S.C. § 2000e-5(e)(1). The City points out that Patmythes received notice that he was not going to be hired for this position on February 2, 2015, and failed to include this claim in his initial April 1, 2015, ERD/EEOC complaint. Instead, he added it to his January 20, 2016, amended complaint. However,

support his theory that other, non-disabled employees were treated more favorably, however, Patmythes describes instances in which other non-disabled City employees were hired on an "interim" or temporary basis, or through the City's process of "underfilling." In particular, he points to the interim hiring of Goodwin, the underfilling hiring of Witzel-Behl and Ragland, and the promotion of Koval to chief of police, to suggest that the City failed to apply its typical hiring practices to him because of his disability. Yet these examples are not proper comparators because plaintiff provides no context for those hiring decisions. Not only are the positions facially distinct, but plaintiff offers no evidence as to how the City carried out the hiring and interview process to fill these other positions, much less evidence that these other individuals were more or less qualified than other candidates. Therefore, it would be unreasonable to conclude that Patmythes was "similarly situated" to these other individuals. Considering all of this evidence, the court concludes that a reasonable fact finder could not conclude that defendant was

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a plaintiff may amend an EEOC charge "to clarify and amplify allegations made therein," not to allege an entirely new theory that does not relate back to a timely filed original charge. *Fairchild v. Forma Sci., Inc.*, 147 F.3d 567, 575 (7th Cir. 1998) (citing 29 C.F.R. § 1601.12(b)). In Patmythes' original ERC/EEOC charge, he complained about "promotions" that he did not receive. Accordingly, when he amended his complaint in January of 2016, he was arguably only providing greater detail with respect to each of his failed attempts to apply for a new position, including the Investigator/Conciliator position, meaning that amendment relates back to the April 2015 original filing date.

denied another position within the City because of his disability.

Even assuming that plaintiff's examples somehow got him over the *prima facie* threshold, the City has provided undisputed evidence that it had a legitimate reason for each hiring decision: the hiring processes involved a panel of interviewers who asked each interviewee the same set of questions; the panel members scored each interviewee independently; and the individual that was hired was the highest scoring interviewee. More specifically, as to the Investigator/ Conciliator position, the person hired had previous work experience in that City agency, and Patmythes received the lowest score among all of the applicants. Similarly, the City decided to change the requirements of the Project Manager position to include broader architectural qualifications, and so it had to restart the hiring process with new criteria as to *all* applicants, not just Patmythes. As a result, *Patmythes* chose not to apply for the revised posting. Finally, the City submitted undisputed evidence that Patmythes was not chosen for the Police Records Supervisor position because there was another applicant who scored significantly higher than all of the other applicants *and* had previously supervisory experience in that area. Neither was true of Patmythes. Accordingly, even assuming that Patmythes could show that he was treated differently than similarly situated, non-disabled employees, a reasonable trier of fact would have to find that the City had legitimate reasons for making the hiring decisions in each instance.

At least with respect to the Project Manager position, Patmythes also contends that the justifications are pretextual. However, "to show pretext, a plaintiff must show that (1) the employer's non-discriminatory reason was dishonest and (2) the employer's true reason was based on discriminatory intent." *Stockwell v. City of Harvey*, 597 F.3d 895, 901 (7th Cir. 2010) (quoting *Fischer v. Avanade, Inc.*, 519 F.3d 393, 403 (7th Cir. 2008)). Here, Patmythes claims that during the application process, "someone" from the Mayor's office told him that he does not have the right "look" for the position. However, he does not provide any additional detail about who said it or the context in which this comment was made, including whether the comment actually referred to his disability in some way. Otherwise, his conclusion as to the import of this observation is based on speculation alone, which is insufficient to create a factual dispute as to why the highest scoring candidate was hired. *See Hooper v. Proctor Health Care, Inc.*, 804 F.3d 846, 854 (7th Cir. 2015) ("With only Hooper's speculation, we cannot find sufficient evidence to create a question of fact as to whether Proctor's proffered reason for Hooper's termination was pretextual.") (citing *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1181 (7th Cir. 2002)); *see also Widmar v. Sun Chem. Corp.*, 772 F.3d 457, 465 (7th Cir. 2014) (holding that employee failed to show pretext where he only offered speculation instead of identifying inconsistencies in employer's reasons for termination). Even more important for purposes of summary judgment, Patmythes offers no evidence that the person who said this to him had *any* involvement in the hiring process for the

position. Accordingly, no reasonable fact finder could conclude that the City's reasons for denying him these positions were pretext for discrimination because of his disability.

B. Reasonable Accommodation

Under the ADA and Rehabilitation Act, a "reasonable accommodation" may include "job restructuring, part-time or modified work schedules, reassignment to a vacant position, . . . and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9)(B); 29 C.F.R. pt. 1630, App. § 1630.2(o); *see also EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 805 (7th Cir. 2005). To prevail on a failure to accommodate claim, plaintiff must show that he was a qualified individual with a disability, and that defendant was aware of his disability but failed to reasonably accommodate it. *Bunn*, 753 F.3d at 682. Once a covered employer becomes aware of an employee's disability, it must engage in "an 'interactive process' to determine the appropriate accommodation under the circumstances." *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 693 (7th Cir. 1998). Even if a plaintiff can show that his disability has not been reasonably accommodated, the employer "will be liable only if it bears responsibility for the breakdown of the interactive process." *Sears*, 417 F.3d at 805. In such circumstances, "courts should attempt to isolate the cause of the breakdown and then assign responsibility." *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996).

Here, Patmythes challenges as unreasonable the City's failure to provide him with a healthy work environment by (1) providing him a HEPA filter, (2) moving him to a workspace with a window and a chance for workplace interaction, *or* (3) transferring him to another position. The City insists that this claim fails because it reasonably accommodated plaintiff's disability and, even if it did not, plaintiff was indisputably responsible for the breakdown of the interactive process.

i. HEPA filter or different workspace with better air quality

The City cannot be held liable for Severson's failure to provide Patmythes with a HEPA filter. For one, an employer is not required to provide the particular accommodation that an employee requests or prefers, but rather to provide a *reasonable* accommodation. *Hoppe v. Lewis Univ.*, 692 F.3d 833, 840 (7th Cir. 2012). Patmythes does not dispute that Severson discussed his requests for a HEPA filter with him between September 2014 and January 2015, nor that Severson suggested that Patmythes could consider moving to another office space. Severson did not rule out the option of a HEPA filter, and instead she asked him for medical documentation to confirm his needs. While Patmythes assured her that he would be providing it, he never did.

In the meantime, the undisputed records shows that Severson explained her reservations as to whether a

HEPA filter would be effective and offered Patmythes other options, including using UVGI cleaners or moving to a different office. Yet Patmythes rejected both options without explaining (to Severson or the court) why either would have been inadequate. Eventually, in January of 2015, Severson expressed frustration that Patmythes had not provided the medical documentation requested, and she repeated her requests. When she finally received a letter from Patmythes' mental health care provider, there was *no* recommendation about the HEPA filter, and the record shows Severson attempted to follow the actual recommendation to provide Patmythes with workplace interaction and natural light. While Patmythes would make much of Severson's statement in January that the temporary workspace was "terrible," he does not dispute that when actually moved to the temporary workspace, he was allowed to sit in an open area with plenty of natural light. Given the undisputed evidence that Severson was never provided with medical guidance on the claimed need for a HEPA filter *and* that Severson was communicating with Patmythes in an effort to gather the necessary information to accommodate his requests for a workspace with better air quality, while providing what she could, a reasonable trier of fact would have to find that Patmythes' own failure to provide requested information precluded Severson from pinpointing the exact nature of his needs, much less how best to accommodate them. *See Tadder v. Bd. of Regents of Univ. of Wis. Sys.*, 15 F. Supp. 3d 868, 888 (W.D. Wis. 2014) (finding that employer did not fail to provide reasonable accommodation where employee

failed to provide information from medical providers related to his requested accommodation).

Similarly, to the extent Patmythes is complaining about the delay between his first request for accommodation in September of 2014 and January of 2015 when he first requested reassignment, that argument is also unavailing. An employer may be held liable for unnecessary delays in complying with reasonable accommodation requests, but courts reach that conclusion only where the record supports a finding that the employer has not been acting in good faith. *See Jay v. Intermet Wagner Inc.*, 233 F.3d 1014, 1017 (7th Cir. 2000) (concluding that despite 20-month delay in reassigning employee, employer was acting in good faith because it reconsidered reassignment on a weekly basis, kept employee on medical leave and offered the position as soon as it became available); *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1134 (7th Cir. 1996) ("A party that obstructs or delays the interactive process is not acting in good faith."). The record does not support a finding that Severson was acting in bad faith here because Severson was waiting for medical information. *See Clayborne v. Potter*, 448 F. Supp. 2d 185, 192 (D.D.C. 2006) (holding that 12-month delay reasonable in light of defendant's efforts, including seeking additional medical information).

Here, Patmythes again takes issue with Severson not immediately providing him with the HEPA filter, but the evidence shows that *Patmythes* himself was the bottleneck to progress. He repeatedly ensured Severson that his care providers would forward the

medical information needed to address his concerns about air quality, and when finally provided, the information did not even address his supposed need for a HEPA filter. Instead, Severson received a simple note from Patmythes' nurse practitioner that he be allowed to work near a window and engage with other co-workers. Even the June 2015 letter from Patmythes' cystic fibrosis care team provided no specific recommendations as to the need for air filters. Instead, that team simply requested that the City continuing working with Patmythes. In other words, despite Severson's repeated efforts to obtain it, Patmythes failed to provide information necessary to craft a more reasonable accommodation to improve his working environment.

ii. Vacant position

While the Court of Appeals for the Seventh Circuit recognizes reassignment as a reasonable accommodation, it is appropriate *only* after the employer has determined that the employee cannot be accommodated in his or her current position. *King v. City of Madison*, 550 F.3d 598, 600 (7th Cir. 2008) ("King is correct to note that the ADA recognizes reassignment to a vacant position as a potentially reasonable accommodation if a disabled employee is unable to perform the essential functions of a job. 42 U.S.C. § 12111(9)(B)."); *Dalton v. Subaru-Isuzu Auto.*, 141 F.3d 667, 678 (7th Cir. 1998) ("The option of reassignment is particularly important when the employee is unable to perform the essential functions of his or her current job, either with or without accommodation or when accommodation would

post an undue hardship for the employer."). Here, the City's reassignment policy, APM2-22, contains this same principle, providing for reassignment upon a determination that "the employee cannot be reasonably accommodated in their current position."

While Patmythes claims that he should have been reassigned to one of three vacancies, the City was never able to conclude that he could not be reasonably accommodated in his Zoning Inspector position. Patmythes does not deny that Severson was attempting to collect his medical provider's recommendations regarding how best to accommodate his particular needs. Certainly, the City was aware that Patmythes was having difficulties with the air quality in his workspace at the end of 2014 and early 2015, and Severson was attempting to work with Patmythes to determine specific steps the City could realistically take to alleviate those issues. At least as of the date that Patmythes submitted Case '669, however, the City could not make that determination because Patmythes had not provided specific information from his doctors. Therefore, judgment in the City's favor is appropriate because the record does not support a finding that it failed to accommodate plaintiff's request, even construing all the facts in Patmythes' favor.

C. Hostile Work Environment

Finally, the City seeks judgment on Patmythes' claim that he was subjected to a hostile work environment. While the Court of Appeals for the Seventh

Circuit has not decided whether a hostile work environment claim is actionable under the ADA or Rehabilitation Act, its analysis of such claims suggests it may be. *See Lloyd v. Swifty Transp., Inc.*, 552 F.3d 594, 603 (7th Cir. 2009) (the incidents described failed to meet the standard of a hostile work environment claim). Regardless, if the cause of action exists, it appears analogous to Title VII hostile work environment claims, and so the court will analyze this claim under that framework. *See Silk v. City of Chi.*, 194 F.3d 788, 804 (7th Cir. 1999) (analyzing ADA hostile work environment claim, without deciding whether such a claim exists, under the Title VII framework).

To succeed on a hostile work environment claim, plaintiff must show that: (1) his work environment was both objectively and subjectively offensive; (2) the harassment was based on his disability; and (3) the conduct was sufficiently severe or pervasive so as to alter the conditions of his employment. *See Boss v. Castro*, 816 F.3d 910, 920 (7th Cir. 2016); *Ekstrand v. Sch. Dist. of Somerset*, 583 F.3d 972, 978 (7th Cir. 2009). "An objectively hostile environment is one that a reasonable person would find hostile or abusive." *Adusumilli v. City of Chi.*, 164 F.3d 353, 361 (7th Cir. 1998) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). Courts must consider the totality of circumstancing in evaluating whether a workplace is hostile, including: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it

unreasonably interferes with an employee's work performance. *Harris*, 510 U.S. at 23.

At least for purposes of summary judgment, the City does not dispute that Patmythes felt subjectively offended by Dickens' and Leifer's comments, and the court will accept Patmythes' representation that Dickens' comments negatively impacted his improvement in therapy. While the comments Patmythes dealt with may have been inappropriate, however, the circumstances simply do not describe the type of environment that qualifies as objectively offensive under the factors set forth by the Supreme Court in *Harris*. *See Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1013 (7th Cir. 1997) ("Not every unpleasant workplace is a hostile environment.").

As an initial matter, Patmythes does *not* claim a pattern of inappropriate conduct. Instead, there are two, separate narratives he points to as creating a hostile work environment: (1) Dickens' statements from June 2014 that his leave requests were a "pain in the ass," as well as Dickens' contemporaneous complaints to his coworker; and (2) Leifer's January 2015 comments implying that Patmythes and others who may be ill have "bad genes." In response, Patmythes correctly points out that a single incident *can* give rise to an actionable hostile work environment claim if "sufficiently severe." *Nichols v. Mich. City Plant Planning Dep't*, 755 F.3d 594, 600-01 (7th Cir. 2014). However, none of the statements, whether standing alone or considered together, is sufficiently offensive to support a finding that he endured a hostile work environment.

Specifically, Dickens' June 2014 statement is not sufficiently severe to support a finding that he dealt with a hostile environment. *See Ellis v. CCA of Tennessee, LLC*, 650 F.3d 640, 648 (7th Cir. 2011) (finding stray comments that included the word "monkey," and two incidents of an employee wearing clothing marked with a confederate flag were insufficient to maintain a race-based hostile work environment claim); *but see Cerros v. Steel Tech., Inc.*, 288 F.3d 1040, 1047 (7th Cir. 2002) (recognizing that an "unambiguously racial epithet falls on the 'more severe' end of the spectrum"). Certainly, Dickens' June 2014 comment was rude, but there is no evidence that she made it in a threatening way towards Patmythes, or even that she raised her voice or was physically threatening. Moreover, calling Patmythes' leave requests a pain in the ass – even assuming it is because of his disability – is far from severe. Likewise, even though Patmythes may have overheard other comments that Dickens made about one of his medical leaves shortly after that incident, the Seventh Circuit's treatment of harassment claims strongly suggests verbal harassment was limited to a handful of overheard statements, rather than any intentionally inflicted, which simply does not rise to the severe or pervasive standard. *See Patt v. Family Health Sys.*, 280 F.3d 749, 754 (7th Cir. 2002) (eight gender-based comments over a three-year period too isolated and sporadic to constitute a hostile work environment); *Ngeunjuntr v. Metro Lift Ins. Co.*, 146 F.3d 464, 467 (7th Cir. 1998) (isolated incidents outside of employee's presence did not create a hostile work environment).

The same is true as to Leifer's claimed comment. While the context of the statement is unclear, it can be fairly characterized as unseemly and insensitive. However, Leifer's apparent opinion about how Patmythes should handle his health care is not so objectively offensive to create a hostile environment. Indeed, the facts here are readily distinguishable from other isolated acts held to be severe enough to constitute actionable harassment. *See EEOC v. Mgmt. Hosp. of Racine, Inc.*, 666 F.3d 422 433 (7th Cir. 2012) (supervisor severely harassed an employee when he stated he wanted to "fuck her," she was "kinky" and liked "rough sex," and physically groped her buttocks); *Smith v. Sheahan*, 189 F.3d 529, 534 (7th Cir. 1999) (single incident of injuring employee's wrist due to her gender constituted severe harassment); *Lapka v. Chertoff*, 517 F.3d 974, 983 (7th Cir. 2008) (allegation of rape sufficiently severe to create a hostile environment).

The same conclusion is necessary when viewing Patmythes experiences with Dickens and Leifer as a whole. The comments – made over the course of six months by two different people – were not severe and did not pervade his work experience. While Patmythes claims that Dickens is known for being difficult to work with, there is no evidence that Patmythes dealt with either Dickens or Leifer on a regular basis, much less that they made any other comments arguably implicating his cystic fibrosis. Additionally, the evidence of record does not suggest that Patmythes' work performance was adversely affected. While his progress in therapy may have been hampered by Dickens' lack of

sensitivity, there is no evidence or suggestion that Patmythes was unable to work as a result of those comments.

More importantly, the City cannot be held liable for this incident because it took prompt steps to correct Dickens after her comment and Patmythes never even reported Leifer's comments, despite knowing he should. Employers are "strictly liable" for harassment inflicted by supervisors, but when the harasser is a co-worker, the employer can assert an affirmative defense by showing that it: (1) "exercised reasonable care to prevent and correct promptly any sexually harassing behavior"; and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities that the employer provides. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (employer may escape liability if it took reasonable care to prevent and promptly correct the offending behavior); *Silk*, 194 F.3d at 805 (same). Here, the record shows that Patmythes reported the incident with Dickens to his supervisor Hank, and then he submitted an internal complaint about it pursuant to the City's policy, APM 3-5. As to Leifer, Patmythes' failure to take advantage of the policy by reporting Leifer – when he clearly knew about the policy – absolves the City from liability. Accordingly, as a reasonable trier of fact could not find that Patmythes was subjected to a hostile work environment on the evidence of record, summary judgment will be granted in the City's favor.

ORDER

IT IS ORDERED that:

1) Plaintiff Gregory Patmythes' motion for assistance in recruiting counsel (dkt. #7) and motion to exclude certain evidence (dkt. #27) are DENIED.

2) Defendants' motion for summary judgment (dkt. #9) is GRANTED as follows: (a) the claims outlined in Patmythes' allegations in paragraphs 5771 of his complaint are DISMISSED WITHOUT PREJUDICE for lack of subject matter jurisdiction; and (b) the remaining claims are DISMISSED WITH PREJUDICE.

3) The clerk of court is directed to enter judgment in defendant's favor and close this case.

Entered this 13th day of June, 2018.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

ELECTRONIC FILING PROCEDURES

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

* * *

ELECTRONIC FILING PROCEDURES IN CIVIL AND CRIMINAL CASES

* * *

III. GENERAL GUIDANCE

* * *

G. Technical Failures

A Filing User whose filing is made untimely as the result of a technical failure of the ECF website may seek appropriate relief from the court by filing a declaration that the Filing User was unable to file in a timely manner because of technical difficulties. The Filing User should print, if possible, a copy of the error message received and submit it with the declaration. Known ECF outages will be posted on the court's website and announced via e-mail to Filing Users.

Technical problems with the Filing User's facilities, such as phone line problems, problems with the Filing User's Internet Service Provider (ISP), hardware or software problems, do not constitute a technical failure under these procedures or excuse an untimely filing.

A document that could not be timely filed due to a technical failure of the ECF website must be filed on the first day the court is

open for business following the original filing deadline.

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28 U.S. Code § 452 - Courts always open; powers unrestricted by expiration of sessions

All courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders.

The continued existence or expiration of a session of a court in no way affects the power of the court to do any act or take any proceeding.

(June 25, 1948, ch. 646, 62 Stat. 907; Pub. L. 88–139, § 2, Oct. 16, 1963, 77 Stat. 248.)

Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 13 and 302 (Mar. 3, 1911, ch. 231, §§ 9, 189, 36 Stat. 1088, 1143; Mar. 2, 1929, ch. 488, § 1, 45 Stat. 1475).

Sections 13 and 302 of title 28, U.S.C., 1940 ed., related only to district courts and the Court of Customs and Patent Appeals, and this section has been written to cover all other courts of the United States.

Other provisions of said section 302 of title 28, U.S.C., 1940 ed., are incorporated in sections 214, 456, and 604 of this title.

The phrase "always open" means "never closed" and signifies the time when a court can exercise its functions. With respect to matters enumerated by statute or rule as to which the court is "always open," there is no time when the court is without power to act. (Ex parte Branch, 63 Ala. 383, 387.)

Section 13 of title 28, U.S.C., 1940 ed., provided that "The district courts, as courts of admiralty and as courts of equity, shall be deemed always open * * *" for enumerated purposes, and that the judge "at chambers or in the clerk's office, and in vacation as well as in term," may make orders and issue process. The revised section omits all reference to the nature of the action or proceeding and enumeration of the acts which may be performed by the court. This is in accord with Rules 45(c) and 56 of the new Federal Rules of Criminal Procedure which contain similar provisions with respect to criminal procedure both in the courts of appeals and in the district courts.

Rules 6(c) and 77(a) of the Federal Rules of Civil Procedure contain provisions similar to the second and first paragraphs, respectively, of this section with respect to civil actions in district courts.

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28 U.S. Code § 2071 – Rule-making power generally

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

(b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order.

(c)(1) A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit.

(2) Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.

(d) Copies of rules prescribed under subsection (a) by a district court shall be furnished to the judicial council, and copies of all rules prescribed by a court other than the Supreme Court under subsection (a) shall be furnished to the Director of the Administrative Office of the United States Courts and made available to the public.

(e) If the prescribing court determines that there is an immediate need for a rule, such court may

proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment.

(f) No rule may be prescribed by a district court other than under this section.

(June 25, 1948, ch. 646, 62 Stat. 961; May 24, 1949, ch. 139, § 102, 63 Stat. 104; Pub. L. 100-702, title IV, § 403(a)(1), Nov. 19, 1988, 102 Stat. 4650.)

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28 U.S. Code § 2072 – Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

(Added Pub. L. 100-702, title IV, § 401(a), Nov. 19, 1988, 102 Stat. 4648; amended Pub. L. 101-650, title III, §§ 315, 321, Dec. 1, 1990, 104 Stat. 5115, 5117.)

Federal Rules of Civil Procedure (FRCP) Rule 6. Computing and Extending Time; Time for Motion Papers

* * *

(3) Inaccessibility of the Clerk's Office. Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) "Last Day" Defined. Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) "Next Day" Defined. The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

* * *

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served and service is made

under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

* * *

Notes of Advisory Committee on Rules—1985 Amendment

Rule 6(a) is amended to acknowledge that weather conditions or other events may render the clerk's office inaccessible one or more days. Parties who are obliged to file something with the court during that period should not be penalized if they cannot do so. The amendment conforms to changes made in Federal Rule of Criminal Procedure 45 (a), effective August 1, 1982.

* * *

Committee Notes on Rules—2001 Amendment

The additional three days provided by Rule 6(e) is extended to the means of service authorized by the new paragraph (D) added to Rule 5(b), including – with the consent of the person served – service by electronic or other means. The three-day addition is provided as well for service on a person with no known address by leaving a copy with the clerk of the court.

Changes Made After Publication and Comments. Proposed Rule 6(e) is the same as the "alternative proposal" that was published in August 1999.

* * *

Committee Notes on Rules—2005 Amendment

Rule 6(e) is amended to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the party served. Three days are added after the prescribed period otherwise expires under Rule 6(a).

* * *

Changes Made After Publication and Comment. Changes were made to clarify further the method of counting the three days added after service under Rule 5(b)(2)(B), (C), or (D).

* * *

Committee Notes on Rules—2009 Amendment

* * *

28 U.S.C. §452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Some courts have held that these provisions

permit an after-hours filing by handing the papers to an appropriate official. *See, e.g., Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

* * *

Committee Notes on Rules—2016 Amendment

Rule 6(d) is amended to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow 3 added days to act after being served.

Rule 5(b)(2) was amended in 2001 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3

added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14 -, 21 -, and 28- day periods that allow "day – of the -week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3 added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means" of delivery under subparagraph (F).

What is now Rule 6(d) was amended in 2005 "to remove any doubt as to the method for calculating the time to respond after service by mail, leaving with the clerk of court, electronic means, or by other means consented to by the party served." A potential ambiguity was created by substituting "after service" for the earlier references to acting

after service "upon the party" if a paper or notice "is served upon the party" by the specified means. "[A]fter service" could be read to refer not only to a party that has been served but also to a party that has made service. That reading would mean that a party who is allowed a specified time to act after making service can extend the time by choosing one of the means of service specified in the rule, something that was never intended by the original rule or the amendment. Rules setting a time to act after making service include Rules 14(a)(1), 15(a)(1)(A), and 38(b)(1). "[A]fter being served" is substituted for "after service" to dispel any possible misreading.

Federal Rules of Civil Procedure FRCP Rule 77. Conducting Business; Clerk's Authority; Notice of an Order or Judgment

(a) When Court Is Open. Every district court is considered always open for filing any paper, issuing and returning process, making a motion, or entering an order.

* * *

(d) Serving Notice of an Order or Judgment.

(1) Service. Immediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear. The clerk must record the service on the docket. A party also may serve notice of the entry as provided in Rule 5(b).

(2) Time to Appeal Not Affected by Lack of Notice. Lack of notice of the entry does not affect the time for appeal or relieve – or authorize the court to relieve – a party for failing to appeal within the time allowed, except as allowed by Federal Rule of Appellate Procedure (4)(a).

Federal Rules of Civil Procedure FRCP Rule 83. Rules by District Courts; Judge's Directives

(a) Local Rules.

(1) In General. After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice. A local rule must be consistent with – but not duplicate – federal statutes and rules adopted under 28 U.S.C. §§2072 and 2075, and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit. Copies of rules and amendments must, on their adoption, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.

(2) Requirement of Form. A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.

(b) Procedure When There Is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§2072 and 2075, and the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

Federal Rules of Appellate Procedure: Rule 3. Appeal as of Right – How Taken

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(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment, order, or part thereof being appealed; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

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(4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

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U.S. District Court
Western District of Wisconsin (Madison)
CIVIL DOCKET FOR CASE #: 3:16-cv-00738-wmc

Patmythes, Gregory v. The City of Madison
Assigned to: District Judge William M. Conley
Referred to: Magistrate Judge Stephen L. Crocker
Case in other court: Seventh Circuit Court of Appeals, 20-02223
Cause: 42:1983 Civil Rights Act

Date Filed: 11/09/2016
Date Terminated: 06/13/2018
Jury Demand: Plaintiff
Nature of Suit: 442 Civil Rights: Jobs
Jurisdiction: Federal Question

Plaintiff

Gregory Patmythes

represented by **Gregory Patmythes**
3614 Stonebridge Dr.
Madison, WI 53719
Email: gjpatmythes@hotmail com
PRO SE

V.

Defendant

The City of Madison

represented by **Steven C. Zach**
Boardman & Clark LLP
1 South Pinckney Street, 4th Floor
P.O. Box 927
Madison, WI 53701-0927
608-257-9521x736
Fax: 608-327-1436
Email: szach@boardmanlawfirm.com

LEAD ATTORNEY
ATTORNEY TO BE
NOTICED

Date Filed	#	Docket Text
		* * *
06/13/2018	44	ORDER denying plaintiffs 27 Motion to remove and exclude unripe items and documentary evidence from this proceeding. Defendants' motion for summary judgment (dkt. # 9) is GRANTED as follows: (a) the claims outlined in Patmythes' allegations in paragraphs 57-71 of his complaint are DISMISSED WITHOUT PREJUDICE for lack of subject matter jurisdiction; and (b) the remaining claims are DISMISSED WITH PREJUDICE.The clerk of court is directed to enter judgment in defendant's favor and close this case. Signed by District Judge William M Conley on 6/13/2018. (jef),(ps) (Entered: 06/13/2018)
06/13/2018	45	JUDGMENT entered in favor of defendant dismissing the case. Signed by Peter A. Oppeneer, Clerk of Court on 6/13/2018. (jef),(ps) (Entered: 06/13/2018)

07/12/2018	46	Plaintiff's Motion: Rules 59 and 60, by Plaintiff Gregory Patmythes. (nln),(ps) (Main Document 46 replaced on 7/13/2018: Affidavit inadvertently uploaded instead of motion. Uploaded correct motion document received from plaintiff via email.) (nln). Modified on 7/13/2018 (nln). (Entered: 07/12/2018)
07/12/2018	47	Brief in Support of Plaintiff's 46 Motion: Rules 59 and 60, by Plaintiff Gregory Patmythes. (nln),(ps) (Entered: 07/12/2018)
07/12/2018	48	Affidavit of Gregory Patmythes in Suport of 46 Rules 59 and 60 Motion. (Attachments: # 1 Exhibit A - 20171102 Byron Bishop Bias Accusation E Mail Felicia Jones appeal email, # 2 Exhibit B - 2004 Inspection Unit PSD Operating Budget 28, # 3 Exhibit C - 20161101 Air Quality Test, # 4 Exhibit D - 20160324 Boardman ERD) (nln),(ps) (Entered: 07/12/2018)
07/12/2018	49	Declaration of Technical Failure (Attachments: # 1 Exhibit) (Patmythes, Gregory),(ps) (Entered: 07/12/2018)

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Federal Rules of Civil Procedure (FRCP) Rule 5. Serving and Filing Pleadings and Other Papers

(a) SERVICE: WHEN REQUIRED.

(1) *In General.* Unless these rules provide otherwise, each of the following papers must be served on every party:

* * *

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

(b) SERVICE: HOW MADE.

* * *

(2) *Service in General.* A paper is served under this rule by:

* * *

(C) mailing it to the person's last known address—in which event service is complete upon mailing;

(d) FILING.

* * *

(4) *Acceptance by the Clerk.* The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

Notes of Advisory Committee on Rules—1996 Amendment

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The role of the Judicial Conference standards is clarified by specifying that the standards are to govern technical matters. Technical standards can provide nationwide uniformity, enabling ready use of electronic filing without pausing to adjust for the otherwise inevitable variations among local rules. Judicial Conference adoption of technical standards should prove superior to specification in these rules.

Electronic technology has advanced with great speed. The process of adopting Judicial Conference standards should prove speedier and more flexible in determining the time for the first uniform standards, in adjusting standards at appropriate intervals, and in sparing the Supreme Court and Congress the need to consider technological details. Until Judicial Conference standards are adopted, however, uniformity will occur only to the extent that local rules deliberately seek to copy other local rules.

It is anticipated that Judicial Conference standards will govern such technical specifications as data formatting, speed of transmission, means to transmit copies of supporting documents, and security of communication. Perhaps more important, standards must be established to assure proper maintenance and integrity of the record and to provide appropriate access and retrieval mechanisms. Local rules must address

these issues until Judicial Conference standards are adopted.

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The separate reference to filing by facsimile transmission is deleted. Facsimile transmission continues to be included as an electronic means.

Committee Notes on Rules—2001 Amendment

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Rule 6(e) is amended to allow additional time to respond when service is made under Rule 5(b)(2)(D). The additional time does not relieve a party who consents to service under Rule 5(b)(2)(D) of the responsibilities to monitor the facility designated for receiving service and to provide prompt notice of any address change.
