IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

AUGUSTINE CARRION, Plaintiff, v. CITY OF WILMINGTON, a political subdivision of the State of Delaware, and MONICA GONZALEZ-GILLESPIE, in her individual and official capacity, Defendants.	)	Civil Action No. 03-613-KAJ

MEMORANDUM OPINION

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January 7, 2005
Wilmington, Delaware

JORDAN, District Judge

I. INTRODUCTION

Before me is a Motion for Summary Judgment (Docket Items ["D.I."] 71; the "Motion") filed by the City of Wilmington (the "City") and Monica Gonzalez-Gillespie, in her individual and official capacities ("Gonzalez-Gillespie") (collectively "Defendants"). Augustine Carrion ("Plaintiff"), a former equipment operator for Wilmington, brought this suit against the Defendants pursuant both to the Americans with Disabilities Act, 42 U.S.C. §§ 12101, *et seq*. (the "ADA"), and to 42 U.S.C. § 1983; he also asserts various state law claims. I have jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367. For the reasons that follow, the Motion is granted.

II. BACKGROUND[1]

Plaintiff was hired as an equipment operator by the City in 1990. (D.I. 1 at ¶ 6.) In 1993, Plaintiff transferred to the City's Department of Public Works. (*Id*. at ¶ 7.) From 1993 through 1996, Plaintiff was, at various times, out of work on disability. (*Id*. at ¶ 8.) During that period, Plaintiff underwent surgery on his neck to repair a cervical disk. (*Id*. at ¶ 9.) On May 14, 1998, Plaintiff injured his neck on the job and, on November 4, 1999, again underwent cervical disc surgery. (*Id*. at ¶ 12.) From at least January of 1999, Plaintiff was unable to return to his former position because of his physical condition. (*See* D.I. 75 at A-43.)

[1]The following rendition of the background information is cast in the light most favorable to the non-moving party and does not constitute findings of fact.

In March 2002, the City informed Plaintiff that he was terminated because, it said, he repeatedly refused to cooperate in providing information on his medical condition. (*Id*.) The Plaintiff then filed a discrimination complaint with the Equal Employment Opportunities Commission through the Delaware Department of Labor, asserting that the City had violated the ADA. (D.I. 1 at ¶ 17-18.) Shortly thereafter, on or about April 15, 2002, the City rescinded its termination letter, citing as its reason the Plaintiff's beginning to cooperate in providing medical information. (*See id*. at ¶ 19; D.I. 75 at A-47.) The City then scheduled an appointment for the Plaintiff to meet with its recruiting coordinator to assist in finding a job that would be suitable for the Plaintiff. (*See* D.I. 75 at A-47.) On April 23, 2002, that meeting took place and the Plaintiff was given a list of jobs to consider, including, among others, electronics technician, sanitation worker, and another equipment operator position. (D.I. 75 at A-139-A-140; A-147e.) Plaintiff never responded to that list of options. (*Id*. at A-140, A-143.) On June 13, 2002, through certified mail, Plaintiff was offered the job of school crossing guard. (*Id*. at A-50.) Plaintiff did not respond to the City's offer and, on August 19, 2002, the City again terminated Plaintiff's employment. (*Id*. at A-53.)

During the time Plaintiff was on disability, the City paid Plaintiff the difference between his worker's compensation pay and his previous salary, as required under Section 40-80(h) and Section 9.8 of the Union Contract governing Plaintiff's employment relationship with the City. (D.I. 1 at ¶ 29.) After his termination, Plaintiff no longer received those supplemental payments. (*See id*. at ¶31.)

III. STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment shall be entered if "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." "[T]he availability of summary judgment turn[s] on whether a proper jury question ... [has been] presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* In making that determination, the Court is required to accept the non-moving parties' evidence and draw all inferences from the evidence in the non-moving parties' favor. *Id.* at 255; *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 456 (1992). Nevertheless, the party bearing the burden of persuasion in the litigation, must, in opposing a summary judgment motion, "identify those facts of record which would contradict the facts identified by the movant." *Port Authority of New York and New Jersey v. Affiliated FM Ins. Co.,* 311 F.3d 226, 233 (3d Cir. 2002) (internal quotes omitted).

IV. DISCUSSION

In Counts I and II of the Complaint, Plaintiff alleges that Defendants terminated his employment in violation of the ADA. In his Answering Brief in Response to Defendants' Motion for Summary Judgment ("Answering Brief"), however, Plaintiff does not respond to any of the arguments made by Defendants in support of their assertion that they did not violate the ADA. (D.I. 80.) Furthermore, in a letter to the court from Plaintiff's counsel, Plaintiff acknowledges that he did not respond with respect to those

claims and that he informed defense counsel that he was amenable to a dismissal of them. (D.I. 88.) Therefore, I will dismiss those claims with prejudice.

In Counts III and IV, respectively, Plaintiff alleges that Defendants Gonzalez-Gillespie and the City violated his constitutional rights and are liable under 42 U.S.C. § 1983. As with Counts I and II, Plaintiff did not respond to any arguments made by Defendants with respect to Count IV. (D.I. 80.) Also as with Counts I and II, Plaintiff has stated that he agrees that Count IV should be dismissed. (D.I. 88.) Consequently, I will dismiss Count IV with prejudice.

The only remaining federal claim is Count III. In Count III, Plaintiff alleges that Gonzalez-Gillespie's "actions in depriving Plaintiff of his employment, and the attendant benefits, amounts to a deprivation of his property rights without due process of law in violation of this United States Constitution subjecting her to liability under 42 U.S.C. § 1983." (D.I. 1 at ¶ 52.)

Plaintiff has not responded to any of the arguments made by Defendants on the lawfulness of the termination of his employment. Therefore, Plaintiff has conceded there is no liability on that basis and judgment in favor of the Defendant is appropriate on that aspect of Count III. *See* FED. R. CIV P. 56 (stating that "when a motion for summary judgment is made and supported [by sworn affidavits], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response ... must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party").

There is a second aspect of Count III, however, which Plaintiff addresses at length, namely the question of whether he had a constitutionally protected property interest in receiving the supplemental payments that made up the difference between his workers compensation benefits and his former salary.[2] In that regard, Defendants argue that "Plaintiff's bargained-for due process rights are exclusively set forth in Article IV of his union's collective bargaining agreement." (D.I. 73 at 30; D.I. 75 at 1-15, 19.) Section 4.16 of that agreement authorizes the union to grieve any employment decisions, an avenue the Plaintiff did not elect to pursue. (D.I. 73 at 30; D.I. 75 at A-4.) Additionally, a copy of the termination letter was sent to the head of Plaintiff's union, who also did not initiate a grievance on Plaintiff's behalf. (*See* D.I. 73 at 30; D.I. 75 at A-53-A-54.) Plaintiff has not responded to the Defendants' argument and evidence, thus failing in his obligation to "set forth specific facts showing that there is a genuine issue for trial." *See* FED. R. CIV P. 56. Because Plaintiff has not rebutted in any way the argument and evidence presented by Defendants to show that his due process rights were not violated, judgment for the Defendants is also warranted on this aspect of Count III.[3]

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[2]For purposes of this decision, I will assume that Plaintiff has a protectable property interest in the supplemental payments; however, I need not and do not decide that such is the case.

[3]In Plaintiff's Answering Brief, he also argues that the City violated the constitutional prohibition against the impairment of contracts. (D.I. 80 at 18-22.) Such a claim was never raised in the Complaint, and any attempt to now amend the Complaint is inappropriate. *See Fatir v. Dowdy*, C.A. No. 95-667-GMS, 2002 U.S. Dist. LEXIS 16480 at *23 (D. Del. Sept. 4, 2002) ("[B]elated attempts at amendment are disfavored with good reason. If parties were allowed to repeatedly amend their complaints, even after summary judgment motions had been filed, not only the opponent, but the courts, would be prejudiced by the never-ending litigation"). The argument is not properly

The last two claims in the Complaint, Counts V and VI (the "State Claims"), are State law claims for wrongful termination and violation of the contractual provision requiring the City to supplement Plaintiff's pay. The only basis for me to consider those claims is the supplemental jurisdiction provided in 28 U.S.C. 1367. Since I have decided that the Plaintiff's federal claims must be dismissed, it is within my discretion whether to retain jurisdiction over the State Claims. *See* 28 U.S.C. 1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction over a claim ... if ... the district court has dismissed all claims over which it has original jurisdiction ... ."); *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 444 (3d Cir. 1997) (decision to exercise supplemental jurisdiction "is committed to the sound discretion of the district court").

To the extent any resources have been invested by the parties in developing the record regarding the State Claims, that investment will not be lost simply because the issues are to be addressed in a state court of competent jurisdiction. It is therefore neither wasteful nor unfair to decline to exercise supplemental jurisdiction in this matter. *Queen City Pizza*, 124 F.3d at 444 (district court's decision to decline the exercise of supplemental jurisdiction was proper since it "would not be unfair to the litigants or result in waste of judicial resources"). Declining jurisdiction allows the Plaintiff's claims under Delaware law to be addressed, as is proper, by the courts of Delaware. Accordingly, the State Claims will be dismissed without prejudice.

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before the court and justifies no further consideration.

V. CONCLUSION

Accordingly, Counts I, II and IV will be dismissed with prejudice; summary judgment for Defendants will be entered on Count III; and Counts V and VI will be dismissed without prejudice. An appropriate order will follow.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

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ORDER

For the reasons set forth in the Court's Memorandum Opinion of today's date in this matter,

IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment (D.I. 71) is GRANTED in part, to the extent that judgment is hereby entered for Defendants and against Plaintiff on Count III of the Complaint (D.I. 1); it is further ORDERED that Counts I, II and IV of the Complaint are dismissed with prejudice, and Counts V and VI are dismissed without prejudice.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

January 7, 2005
Wilmington, Delaware