IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RAYMOND J. BROKENBROUGH, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 13-692-CJB
	)	
CAPITOL CLEANERS & LAUNDERERS INC.,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

Before the Court in this employment action are two documents filed by Plaintiff Raymond J. Brokenbrough ("Plaintiff"): (1) a letter motion titled "Motion to Re-open Case or Permission to Open a New Case" ("First Motion"), (D.I. 67); and (2) "Plaintiff's Motion to Reopen Case and Amend Complaint" ("Second Motion"), (D.I. 69). The Court DENIES both motions, for the reasons that follow:

I. BACKGROUND AND PROCEDURAL HISTORY

1. On May 19, 2015, the Court issued a Memorandum Opinion (the "Memorandum Opinion") granting Defendant Capitol Cleaners & Launderers, Inc.'s ("Defendant") Motion for Summary Judgment, which was filed pursuant to Federal Rule of Civil Procedure 56. *See Brokenbrough v. Capitol Cleaners & Launderers, Inc.*, Civil Action No. 13-692-CJB, 2015 WL 2394633 (D. Del. May 19, 2015). In an accompanying Order, the Court ordered that judgment be entered for Defendant and against Plaintiff, and that the case be closed. (D.I. 66)

2. On June 8, 2015, Plaintiff filed the First Motion. (D.I. 67) On October 6, 2015, Plaintiff filed the Second Motion. (D.I. 69) Neither motion is accompanied by a certificate of service certifying that proper service has been made on Defendant; this, in turn, may explain why

Defendant did not file a response to either motion.[1]

II. DISCUSSION

A. First Motion

3. With the First Motion, Plaintiff seeks to "reopen this case" or "permission to open a new case." (D.I. 67 at 1) In this motion, there are two strains of argument.

4. One portion of the First Motion consists of Plaintiff explaining that his ex-girlfriend (with whom Plaintiff used to reside) obtained a Protection from Abuse Order against him in September 2014. (*Id.* at 1, 3) This, Plaintiff explains, limited his ability to obtain certain "paper work" and mail that was located at his ex-girlfriend's Felton, Delaware address, including documents relating to this case. (*Id.* at 1)[2] Plaintiff does not explain with any specificity, however, how this circumstance impacted the result in this case, why it warrants re-opening the case, and/or why it amounts to grounds for relief from a final judgment, order or proceeding pursuant to Federal Rule of Civil Procedure 60(b). *See* Fed. R. Civ. P. 60(b); *cf. Braun v. Gonzales*, Civ. No. 11-186-RGA, 2013 WL 1405946, at *1 (D. Del. Apr. 8, 2013). As a result, to the extent that the First Motion seeks relief under Rule 60(b) regarding this address issue, the motion is denied.

5. The remainder of the First Motion consists of the Plaintiff listing a few facts of

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[1] Thus, the filings violated Federal Rule of Civil Procedure 5(d) and this Court's Local Rule 5.2(b)(2). Fed. R. Civ. P. 5(d); D. Del. LR 5.2(b)(2); *see also DeVary v. Desrosiers*, Civ. Action No. 12-150-GMS, 2013 WL 4758005, at *3 (D. Del. Sept. 3, 2013). Despite this, the Court will resolve these motions here, as it can see no prejudice to Defendant in doing so. *Cf. Karpov v. Karpov*, Civ. No. 12-1411-GMS, 2013 WL 653965, at *5 (D. Del. Feb. 20, 2013).

[2] This Felton, Delaware address was Plaintiff's address of record on the docket only for a portion of this case: from February 2014 to April 2014 and from June 2014 to January 2015. (D.I. 2; D.I. 18; D.I. 32; D.I. 45; D.I. 61)

record drawn from Section I.A ("Factual Background") of the Court's Memorandum Opinion regarding summary judgment, followed by Plaintiff's articulation as to why these facts are not accurate. (D.I. 67 at 2) The Court will construe this as a motion for reconsideration of the Memorandum Opinion, pursuant to Federal Rule of Civil Procedure 59(e).

6. The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence. *Folks v. Danberg*, Civ. Action No. 09-103-GMS, 2012 WL 37228, at *1 (D. Del. Jan. 6, 2012) (citing *Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999)). Accordingly, a judgment may be altered or amended if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; and/or (3) the need to correct a clear error of law or fact or to prevent manifest injustice. *Max's Seafood Café*, 176 F.3d at 677; *Folks*, 2012 WL 37228, at *1. A motion to reconsider judgment may not be used to argue that a court rethink a decision already made, nor may it be used to argue new facts or issues that were inexcusably not presented to the court in the matter previously decided. *Dupree v. Corr. Med. Servs.*, Civ. No. 10-351-LPS, 2015 WL 7194438, at *2 (D. Del. Nov. 16, 2015); *Folks*, 2012 WL 37228, at *1 (citing cases). Reargument, however, may be appropriate where the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the court by the parties, or has made an error not of reasoning but of apprehension. *Dupree*, 2015 WL 7194438, at *2; *Folks*, 2012 WL 37228, at *1 (citing cases).

7. Plaintiff's motion for reconsideration is denied. Here, Plaintiff is challenging the accuracy of the above-referenced facts, which relate to instances of negative behavior Plaintiff

allegedly exhibited while working for Defendant. These instances included the following: (1) in June 2009, Plaintiff sexually harassed a female co-worker by making sexually suggestive comments to her; (2) in October 2009, Plaintiff stole commission slips from a different employee, and confessed when he was caught; (3) in December 2009, Plaintiff crashed his company delivery truck while on an unauthorized trip, for which he was issued a written reprimand, and was thereafter demoted to a lesser-paying position; and (4) on various occasions, Plaintiff arrived late or did not show up at all for work. (D.I. 67 at 2) At the time of the Court's decision on Defendant's summary judgment motion, there was nothing in the record to contradict Defendant's evidence, which indicated that these events had occurred and that they had been contemporaneously documented by Defendant's employees. *See Brokenbrough*, 2015 WL 2394633, at *1. And so, the Court took those facts into account in explaining why Defendant had put forward reasonable non-discriminatory reasons for its decision to demote and later fire Plaintiff, and why Plaintiff could not point to sufficient evidence to demonstrate that these reasons were a pretext for racial discrimination. *Id.* at *7-8.

8. Plaintiff now either contests that these various events occurred, or suggests that if they did occur, then they were not as serious as Defendant made them out to be. (D.I. 67 at 2 (Plaintiff asserting, *inter alia*, that he "never stole" commission slips from another employee and that Defendant's drivers "never received commission slips at all[,]" or that his accident with the delivery truck "was not at all serious, nor [did it] cause a lot of damage")) However, in doing so, Plaintiff in almost every instance fails to point for support to any identifiable portion of the

record that was before the Court at the time of summary judgment.[3] Instead, here he is largely suggesting that evidence that he had not (but could have) made a part of the record earlier in the case would demonstrate that the facts regarding these incidents are different than what Defendant has asserted. This type of argument—one citing to newly presented "facts" that were available at the time of the original order, but were not then made of record by Plaintiff—cannot support the grant of a motion for reconsideration. *See, e.g.*, *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d

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[3] There is one instance in which Plaintiff, in support of these assertions, can be said to be referring to a document of record that was before the Court at the summary judgment stage. Yet even there, the reference is ultimately not helpful to Plaintiff. This instance relates to Plaintiff's above-referenced latenesses and absences. By way of background, Defendant had put forward evidence at the summary judgment stage indicating that "on various occasions, [Plaintiff] arrived late or did not show up at all (i.e., he was a 'no call, no show') for work." *Brokenbrough*, 2015 WL 2394633, at *1 (citing D.I. 55, ex. A & ex. 1). This evidence included: (1) an affidavit of record from Defendant's owner stating that these latenesses/absences had occurred, that a number were unexcused, and that Plaintiff had been warned about them, (D.I. 55, ex. A at ¶ 9); and (2) written Employee Warning Reports (some signed by Plaintiff) and Attendance Reports documenting these latenesses/absences, (*id.* at ex. 1). *See also Brokenbrough*, 2015 WL 2394633, at *1-2 (describing where this evidence could be found in the record). In the First Motion, Plaintiff now asserts that these latenesses or absences "never happened" and, in support, states that "this was also proved wrong by [a Delaware] Department of Labor ["DDOL"] Appeals hearing Referee." (D.I. 67 at 2) This latter statement appears to be a reference to a 2010 decision by a DDOL appeals referee, which Plaintiff did attach to his Complaint in this case. (D.I. 2 at 6-9); *see also Brokenbrough*, 2015 WL 2394633, at *3. But in that 2010 decision, which had the effect of permitting Plaintiff to obtain unemployment insurance benefits after his firing, the appeals referee did not conclude that the above-referenced latenesses or absences "never happened." (D.I. 2 at 8) Instead, the referee simply concluded that, as to Plaintiff's final unexcused absence from work on February 22, 2010 (the absence that ultimately triggered Plaintiff's termination), Plaintiff could have made the "reasonable assumption" that the absence would be excused by Defendant. (*Id.*) Thus, the referee found only that Plaintiff's failure to attend work on that date did not amount to "willful or wanton misconduct" and that he thus should not be precluded from receiving unemployment benefits. (*Id.*) Despite this finding, the undisputed record in this case is that: (1) Plaintiff did have a number of unexcused latenesses or absences from work during his employment; (2) he received a warning in December 2009 that any further unexcused absence would result in termination; and (3) his February 22, 2010 unexcused absence was the reason Defendant gave for his firing. *See Brokenbrough*, 2015 WL 2394633, at *2.

Cir. 1985) (finding that the district court appropriately did not consider an affidavit containing evidence available prior to summary judgment); *Kloth v. S. Christian Univ. Bd. of Dirs.*, Civ. No. 06-244-SLR, 2007 WL 3036893, at *2 (D. Del. Oct. 17, 2007); *cf. Walker v. Carroll*, No. Civ.A 02-325-GMS, 2003 WL 1700379, at *3-4 (D. Del. Mar. 24, 2003) (denying a *pro se* plaintiff's motion for reconsideration because the proffered "new" evidence existed at the time of dismissal, but ultimately granting the motion on a different basis).

B. Second Motion

9. In the Second Motion, Plaintiff makes reference to a portion of the Court's Memorandum Opinion regarding summary judgment, in which the Court concluded that: (1) Plaintiff's Complaint could not be fairly read to have asserted a claim under the Americans with Disabilities Act of 1990 ("ADA"); and thus (2) Plaintiff's claims of racial discrimination were the only claims at issue in the case. (D.I. 69 at 2); *see also Brokenbrough*, 2015 WL 2394633, at *9. Although the text of the Second Motion and an accompanying letter filed by Plaintiff are not entirely clear, it appears that in them, Plaintiff is now requesting the ability to: (1) re-open this case, and amend his Complaint to include a claim against Defendant under the ADA and/or the Rehabilitation Act of 1973; and (2) add one of Defendant's employees, Roger Hearn, as an individual Defendant. (D.I. 69 at 1-3; D.I. 69, ex. 2)

10. "A district court may deny leave to amend . . . if . . . delay in seeking amendment is undue, motivated by bad faith, or prejudicial to the opposing party." *Dominos Pizza LLC v. Deak*, 534 F. App'x 171, 174 (3d Cir. 2013) (internal quotation marks and citation omitted). "Although delay alone does not justify denial, at some point, the delay will become 'undue,' placing an unwarranted burden on the court, or will become 'prejudicial,' placing an unfair

burden on the opposing party." *Id.* (internal quotation marks and citation omitted). Here, under any conception of the term, Plaintiff has engaged in "undue delay" in moving to amend. Discovery in the instant case ended in September 2014 and case dispositive motions were due in October 2014. (D.I. 40; D.I. 47) Indeed, the case has been closed since May 2015, when the Court granted Defendant's motion for summary judgment. (D.I. 66) Although Plaintiff had every ability to move to amend his Complaint earlier in the case, he failed to do so—perhaps in significant part due to his failure to participate meaningfully in the discovery process. *See Brokenbrough*, 2015 WL 2394633, at *4, *6. Thus, the motion to amend is untimely. *See Dominos Pizza*, 534 F. App'x at 175 (finding that a plaintiff unduly delayed in his request to amend, as he "did not [so] move . . . until after the case was closed"); *Diaz v. Carroll*, 570 F. Supp. 2d 571, 580-81 (D. Del. 2008) (denying leave to amend where a plaintiff sought amendment after the discovery deadline had closed and the dispositive motions deadline had long passed). Furthermore, Defendant would be prejudiced were Plaintiff permitted to assert a new claim and re-open the case at this late date; here, the "interests of judicial economy and finality of judgment militate against allowing a post-judgment amendment of pleadings[.]" *Dominos Pizza*, 534 F. App'x at 175. The Second Motion is therefore denied on both of these grounds.[4]

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[4] In his letter accompanying the Second Motion, Plaintiff makes a brief reference to the concept of "[e]quitable [t]olling." (D.I. 69-2) The legal doctrine applies, *inter alia*, when a plaintiff "in some extraordinary way" was prevented from asserting his rights. *Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir. 2001) (internal quotation marks and citation omitted); *see also Seitzinger v. Reading Hosp. & Med. Ctr.*, 165 F.3d 236, 240 (3d Cir. 1999). Although Plaintiff's letter is less than clear, Plaintiff appears to assert that equitable tolling applies and should permit him to re-open this case or otherwise "re-file" a complaint to include either an ADA or Rehabilitation Act claim; he claims this is justified because "the form [Complaint that Plaintiff filed in the instant case] did not have ADA listed as a [c]hoice [he] could make," thereby preventing him from asserting a disability rights claim. (D.I. 69, ex. 2) Plaintiff provides no further argument on this point, and nothing he has said convinces the Court that the doctrine of equitable tolling

III. CONCLUSION

11. For the foregoing reasons, the Court ORDERS that Plaintiff's Motions are DENIED.

Dated: January 8, 2016

Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE

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should provide him some sort of relief here. The Court notes that Plaintiff was not prevented "in some extraordinary way" from asserting an ADA or Rehabilitation Act claim. The Supreme Court of the United States and the United States Court of Appeals for the Third Circuit have made clear that "extraordinary" circumstances amount to more than mere mistakes or excusable neglect. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (finding attorney error resulting in a late filing to be "at best a garden variety claim of excusable neglect"); *Podobnik v. U.S. Postal Serv.*, 409 F.3d 584, 592 (3d Cir. 2005) (finding that "any errant advice Appellant may have received from an EEOC employee did not rise to the level of an 'extraordinary' circumstance justifying tolling of the limitations period"); *Fahy*, 240 F.3d at 244 ("In non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling.") (citation omitted). Although consequential, Plaintiff's decision not to bring a disability rights claim (because there was no "ADA" option on the form Complaint that he used in bringing his racial discrimination claim) is akin to those instances that courts have found insufficient to trigger equitable tolling. Furthermore, Plaintiff's assertion that equitable tolling applies is also deficient because there is no indication that Plaintiff was diligent in pursuing a disability rights claim after failing to assert it in the Complaint. *See Irwin*, 498 U.S. at 96 ("We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."); *Podobnik*, 409 F.3d at 592 (stating that "running throughout the equitable estoppel cases is the obligation of the plaintiff to exercise due diligence to preserve his or her claim") (internal quotation marks and citation omitted). For these reasons, the doctrine of equitable tolling is not implicated here.