UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:11-CV-627-BR

JOSEPH GILREATH, Plaintiff, v. CUMBERLAND COUNTY BOARD OF EDUCATION, Defendant.	)	ORDER

This matter is before the court on the 13 March 2014 motion for summary judgment filed by defendant Cumberland County Board of Education ("the Board"). (DE # 47.) Also before the court is the Board's 17 April 2014 motion to strike. (DE # 55.) The period to respond and reply to the motions has elapsed, and the matters are now ripe for disposition.

I. BACKGROUND[1]

Plaintiff Joseph Gilreath ("plaintiff") began his employment with the Board in 1993 as a band director and music teacher at Anne Chesnutt Middle School in Fayetteville, North Carolina. (T. Hatch Aff., DE # 47-2, ¶ 2; Pl.'s Aff., DE # 53-21, ¶ 2.) Plaintiff's responsibilities in that position included, but were not limited to, teaching assigned band and music classes, maintaining a safe and orderly environment, maintaining order and discipline in the classroom, planning and implementing instruction, performing various non-instructional duties, reporting grades and other information to the school's principal, reporting student progress and other concerns regularly to parents, planning and executing band concerts, and supervising students at various

[1] Throughout this opinion, the court presents the facts, supported by the record, in the light most favorable to plaintiff, the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

band-related events. (Pl.'s Aff., DE # 53-21, ¶ 3.)

Plaintiff suffers from Attention Deficit Hyperactivity Disorder-Inattentive ("ADHD"). (Pl.'s Mem. Opp'n Mot. Summ. J., Exs. 1-2, DE ## 53-1, 53-2; Pl.'s Aff., DE # 53-21, ¶ 4.) This condition affects his short-term memory, as well as his ability to manage multiple tasks and activities at the same time. (Id.) Plaintiff also suffers from hypertension and was advised by doctors to avoid unnecessary stress. (Pl.'s Mem. Opp'n Mot. Summ. J., Ex. 3, DE # 53-3, at 3; Pl.'s Aff., DE # 53-21, ¶ 4.)[2]

In September 2008, Thomas Hatch ("Hatch"), the principal of Anne Chesnutt Middle School, met with plaintiff. (T. Hatch Aff., DE # 47-2, ¶ 9.) At that meeting, plaintiff told Hatch that he had been dealing with some medical issues, and he provided Hatch with a letter from a psychotherapist dated 17 December 2002 that mentioned that he had been diagnosed with ADHD. (Id. & Ex. 5; see also Pl.'s Aff., DE # 53-21, ¶ 5 ("In the fall of 2008, I requested various accommodations under the Americans with Disabilities Act . . . .").) Hatch told plaintiff that he would need more recent documentation regarding plaintiff's medical issues in order to assist plaintiff. (T. Hatch Aff., DE # 47-2, ¶ 10.) In a memo to plaintiff dated 10 October 2008, Hatch stated that plaintiff was required to submit a doctor's note indicating job limitations that would prevent him from fulfilling non-instructional duties and communicating within the educational environment. (Id. & Ex. 4; see also Pl.'s Mem. Opp'n Mot. Summ. J., Ex. 4, DE # 53-4.) On 30 January 2009, Hatch reiterated to plaintiff that he should provide medical documentation if there were conditions that affected his ability to perform his duties. (T. Hatch Aff., DE # 47-2, ¶¶ 12-14.)

[2] Page citations are to the numbers generated by CM/ECF.

On 3 February 2009, plaintiff provided Hatch with documentation from his physician, Dr. Robert Ferguson, and he also requested various accommodations under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.* (Id. ¶¶ 15-16 & Exs. 7-8; Pl.'s Mem. Opp'n Mot. Summ. J., Ex. 3, DE # 53-3.) For example, plaintiff requested that he be allowed to conduct non-emergency communications with parents and guardians in writing or by email instead of by telephone or personal contact. (Id.) Among other things, he also requested limited evening duties with notice as far in advance as possible whenever such duties were assigned. (Id.) Plaintiff maintains that the requested accommodations were not granted in a timely manner. (Pl.'s Aff., DE # 53-21, ¶ 10.)

On 4 February 2009, plaintiff was placed on a corrective action plan, allegedly in light of concerns about his teaching performance. (T. Hatch Aff., DE # 47-2, ¶ 18 & Ex. 11; Pl.'s Mem. Opp'n Mot. Summ. J., Ex. 9, DE # 53-8.) In March 2010, he was placed on a similar action plan by Assistant Principal Michael Bain ("Bain") after having been given a negative performance evaluation that was dated 26 February 2010. (T. Hatch Aff., DE # 47-2, ¶¶ 20, 24 & Exs. 13-14; Pl.'s Mem. Opp'n Mot. Summ. J., Exs. 10, 17, DE ## 53-9, 53-16.) On 10 June 2010, plaintiff received a performance evaluation and was given two ratings of "Below Standard." (Def.'s Mot. Summ. J., Ex. 7c, DE # 47-10; Pl.'s Mem. Opp'n Mot. Summ. J., Ex. 21, DE # 53-20.) In August 2010, he was asked to start reporting to work early by Bain and the school's new principal, Tonjai Robertson. (Def.'s Mot. Summ. J., Ex. 7a, DE # 47-8; Pl.'s Mem. Opp'n Mot. Summ. J., Ex. 20, DE # 53-19, at 13.) On 9 September 2010, plaintiff received a letter from Bain stating in part that "there [were] still serious deficiencies to be addressed" with regard to plaintiff's performance. (Def.'s Mot. Summ. J., Ex. 7b, DE # 47-9.)

Plaintiff filed separate charges with the Equal Employment Opportunity Commission ("EEOC") on 14 April 2010 and 4 October 2010.[3] (Def.'s Mot. Summ. J., Exs. 8, 10, DE ## 47-11, 47-13; Pl.'s Mem. Opp'n Mot. Summ. J., Ex. 21, DE # 53-20.) Plaintiff commenced this action in North Carolina state court on 30 September 2011. (DE # 1-1.) On 3 November 2011, the Board removed plaintiff's lawsuit to this district. (DE # 1.) Plaintiff subsequently filed an amended complaint on 26 April 2012. (DE # 17.) Plaintiff raises two claims in the amended complaint. He contends that his requested accommodations were not granted in a timely manner in order to allow him to continue in effective employment as an educator, and, as such, his rights under the ADA were violated. (Id.) He also asserts that the Board retaliated against him in violation of the ADA. (Id.)

On 13 March 2014, the Board filed a motion for summary judgment. (DE # 47.) Plaintiff responded to the motion on 3 April 2014 (DE # 51), and the Board filed a reply on 17 April 2014 (DE # 54). Also on 17 April 2014, the Board filed a motion to strike. (DE # 55.) Plaintiff responded to the motion on 8 May 2014 (DE # 59), and the Board submitted a reply on 22 May 2014 (DE # 60).

II. DISCUSSION

A. Motion to Strike

As mentioned above, the Board filed a motion to strike on 17 April 2014. (DE # 55.) In part, the Board has moved to strike "a purported excerpt of an audio recording" (Def.'s Mot. Strike, DE # 55, at 1) that was submitted by plaintiff as Exhibit 5 to his response to the Board's

[3] At this juncture, the court notes that plaintiff alleges that he also suffers from Asperger's Disorder. (Am. Compl., DE # 17, at 3 ¶ 5; Pl.'s Mem. Opp'n Mot. Summ. J., Ex. 1, DE # 53-1.) However, he was not diagnosed with this condition until December 2010, *i.e.*, after he had filed his second charge with the EEOC. (Pl.'s Mem. Opp'n Mot. Summ. J., Ex. 1, DE # 53-1.)

motion for summary judgment. (See DE # 53.) The audio file purportedly contains a recording of a meeting that occurred between plaintiff and Superintendent Franklin L. Till, Jr. on 15 September 2010, wherein plaintiff allegedly made a request for disability accommodations. (See Def.'s Mem. Supp. Mot. Strike, DE # 56, at 3; Pl.'s Aff., DE # 59-1, ¶¶ 2-3.) The Board contends that plaintiff did not disclose the audio recording during discovery even though the Board had requested copies of any recordings related to plaintiff's allegations as a part of its written discovery requests. (See Def.'s Mem. Supp. Mot. Strike, DE # 56, at 5.) As a result, the Board argues that plaintiff may not rely on the recording in opposing the motion for summary judgment and that the recording should be stricken from the record.

Rule 37 of the Federal Rules of Civil Procedure states: "If a party fails to provide information or identify a witness as required . . . , the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). The court has "broad discretion" in determining whether a nondisclosure of evidence is substantially justified or harmless. United States v. $134,750 U.S. Currency, 535 F. App'x 232, 238 (4th Cir. 2013) (unpublished) (citation and internal quotation marks omitted). A trial court determines whether a party's failure to disclose evidence is substantially justified or harmless by considering

> (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party's explanation for its failure to disclose the evidence.

S. States Rack & Fixture, Inc. v. Sherwin-Williams Co., 318 F.3d 592, 597 (4th Cir. 2003). The burden rests on the party facing sanctions to show that his nondisclosure was harmless or substantially justified. Id. at 596.

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