

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

DOUGLAS K. UHDE,
Plaintiff,

OPINION AND ORDER

Case No. 03-C-323-C

v.

MARK K. BITSKY, Deputy Sheriff;
GARY A. SILKA, Deputy Sheriff and Detective;
TAMMY L. KROETZ, Deputy Sheriff;
BRIAN EZMAN, Warden Badge Number 211;
MATTHEW SHERD, Police Officer,

Defendants.

This is a civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Plaintiff Douglas Uhde is proceeding on three claims: (1) defendants Mark Bitsky and Matthew Sherd violated his right to be free from unreasonable searches and seizures when they entered his house, searched his automobile and his person without his consent, placed him in handcuffs and arrested him; (2) defendant Tammy Kroetz violated his right to be free from unreasonable searches and seizures when she entered his house without his consent; and (3) defendants Bitsky, Silka and Brian Ezman violated his right to due process when they fabricated evidence against him.

Presently before the court is defendant Ezman's motion for summary judgment. Plaintiff is alleging that, on August 20, 2001 at 10:45 p.m., Ezman was involved in a conspiracy to remove a .12 gauge shotgun from plaintiff's car and place five unexploded cartridges into the gun's chamber in order to increase the number of charges that could be brought against plaintiff. In addition, plaintiff is alleging that Ezman conspired to place "paint and wood fibers" on the muzzle end of the gun to make it appear as if the gun had been used in a burglary. Ezman argues that plaintiff's claim against him must be dismissed because (1) there is no evidence that he was personally involved in violating plaintiff's constitutional rights and (2) he is entitled to qualified immunity. Because the undisputed facts show that Ezman was not personally involved in the acts alleged by plaintiff, I will grant his motion for summary judgment. (Because defendant Ezman is the only defendant moving for summary judgment at this time, I will refer to him as simply "defendant" from this point on.)

Before I set out the undisputed facts, a word is required regarding their source. Although plaintiff submitted a brief in opposition to defendant's motion, he neither responded to defendant's proposed facts nor properly proposed his own factual findings. Instead, plaintiff's brief contains a series of allegations that are not supported by a citation to the record. This court sent plaintiff a copy of the court's summary judgment procedures with the magistrate judge's preliminary pretrial conference report. The procedures provide

that each factual proposition must be followed by a citation to evidence in the record; the court will not consider facts contained only in a brief. See Procedures, I.B.; see also Ziliak v. AstraZeneca, LP, 324 F.3d 518 (7th Cir. 2003) (when a party fails to follow summary judgment procedures, proper response is to disregard party's nonconforming submissions). Further, when a party fails to respond to the other side's proposed findings of fact, the court will view those proposed facts as undisputed. Doe v. Cunningham, 30 F.3d 879, 883 (7th Cir. 1994). Accordingly, I accept defendant's proposed findings of fact as undisputed.

UNDISPUTED FACTS

Plaintiff Douglas K. Uhde is a prisoner at the Stanley Correctional Institution in Stanley, Wisconsin. Defendant Brian Ezman is employed by the Wisconsin Department of Natural Resources as an environmental warden. At all times relevant to this action, defendant held the position of Conservation Warden.

On August 20, 2001, defendant worked at the Department of Natural Resources from 7:30 a.m. until 3:30 p.m. Defendant was not called in to work at any point after his shift ended. He never went to plaintiff's residence, searched plaintiff's vehicle or used his authority as an agent of the State of Wisconsin to make a search of plaintiff's vehicle appear legal. Additionally, defendant did not conspire with members of Adams County law enforcement to fabricate evidence against plaintiff.

After reviewing information provided to him by Adams County law enforcement, defendant found plaintiff to be in violation of Wis. Stat. § 167.31(2)(b) and he issued plaintiff a civil citation. Wis. Stat. § 167.31(2)(b) prohibits placing, possessing, or transporting a firearm in or on a vehicle, unless the firearm is unloaded and encased.

OPINION

The Court of Appeals for the Seventh Circuit has held that summary judgment is appropriate if the court concludes that “if the record at trial were identical to the record compiled in the summary judgment proceedings, the movant would be entitled to a directed verdict because no reasonable jury would bring in a verdict for the opposing party.” Russell v. Acme-Evans Co., 51 F.3d 64, 70 (7th Cir.1995). A party moving for summary judgment will prevail if it demonstrates that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anetsberger v. Metropolitan Life Ins. Co., 14 F.3d 1226, 1230 (7th Cir.1994). When the moving party succeeds in showing the absence of a genuine issue as to any material fact, the opposing party must set forth specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P 56(e); Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Whetstine v. Gates Rubber Co., 895 F.2d 388, 392 (7th Cir.1988). If the nonmovant fails to make a showing sufficient to establish the existence of

an essential element on which that party will bear the burden at trial, summary judgment for the moving party is proper. Celotex, 477 U.S. at 322.

The Fourteenth Amendment prohibits state officials from denying any person life, liberty or property without due process of law. In Smith v. Springer, 859 F.2d 31 (7th Cir.1988), the court of appeals held that police officers may be held liable under 42 U.S.C. § 1983 for fabricating evidence in violation of the due process clause. However, plaintiff has failed to adduce any evidence that would enable a jury to find that defendant was involved in a conspiracy to fabricate evidence against him. The facts show that defendant finished work at 3:30 p.m. and never returned. Defendant was not present at plaintiff's home when the acts alleged by plaintiff occurred. The undisputed facts show also that defendant was not involved in a conspiracy with others to deprive plaintiff of his constitutional rights.

The only evidence plaintiff has submitted to support his allegations against defendant is a civil citation defendant issued to plaintiff. Under Wis. Stat. § 29.924(1), when wardens of the Department of Natural Resources receive notice or information of a violation of § 167.31, they must make a thorough investigation and institute proceedings if the evidence warrants it. In this case, defendant did just that. The citation provides:

On the Above Stated Time and Date, The Defendant *was found by Warden Ezman* and observed by [Adams County Sheriff's Deputy] Mark Bitsky to have an uncased and loaded Mossberg Model 500A 12 [gauge] shotgun (SN#P807029) in the rear passenger area of a 1990 Chrysler LaBaron (sic) (WI Reg. 478 AZM). The vehicle was parked at 229 N. Pine St. Uhde gave

Bitsky consent to search the vehicle.

(Emphasis added). Defendant signed the citation.

Plaintiff did not attach this citation to an affidavit in which he averred that it is a true and correct copy of the citation he received, as required by this court's procedures. See Procedures, I.C.1(f). Even if I were to consider the citation as properly submitted, I would still grant defendant's motion for summary judgment. Presumably, plaintiff believes that the citation supports his position because of the words "was found by Warden Ezman" that are included in the citation. Although plaintiff's interpretation is understandable, a reading of the citation as a whole shows that the words "was found by Warden Ezman" simply indicate defendant's conclusion, as a warden of the Department of Natural Resources, that plaintiff had violated § 167.31. The citation states that defendant "found" the violation but that defendant Bitsky "observed" it. Thus, defendant's conclusion in the citation is based on Bitsky's observations, not on personal knowledge. Under this reading of the citation, plaintiff cannot use it to show that defendant was present at plaintiff's residence on the night of August 20 or that he had any role in fabricating evidence against him.

On a final note, plaintiff should be aware that the other defendants in this case are likely to file motions for summary judgment as well. Therefore, it is imperative that plaintiff understand this court's procedures for responding to motions for summary judgment because his failure to follow them may be fatal to his claims.

To adequately respond to a motion for summary judgment, plaintiff must submit a response to defendants' proposed finding of fact. See Procedures, II. A. 1. The response should answer each numbered fact proposed by the defendant in separate paragraphs, *using the same number*. Id., II.D.1 (emphasis in original). If plaintiff disputes a fact proposed by the defendant, he should state his version of the fact and cite evidence that supports his version. Id., II.D.2. The court will not consider any factual propositions made in response to defendants' proposed facts that are not supported properly and sufficiently by admissible evidence. Id., II.E.2. Evidence may include: depositions, answers to interrogatories, affidavits, documentary evidence and party admissions. Id., I.C.1(a-f). To be admissible, an affidavit must be made by a person who has first hand knowledge and must show that the person making the affidavit is in a position to testify about those facts. Id., I.C.1(e). In addition, the affidavit must contain the signature and seal of a notary public that is provided upon the signing of the document, or the person making the affidavit must make a declaration at the completion of his affidavit that includes the following statement: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date)." See 28 U.S.C. § 1746. Documentary evidence (such as the citation plaintiff relied on in opposing defendant's motion for summary judgement) must be shown to be true and correct either by an affidavit or by stipulation of the parties. Id., I.C.1(f). If plaintiff does not dispute a fact proposed by defendants, the

court will conclude that the fact is undisputed. Id., II.C.

In addition to filing a response to defendants' proposed facts, plaintiff should submit a brief in opposition to the motion for summary judgment and all evidentiary materials used to support his version of the facts. Id., II.A.3. If he wishes, he may file his own proposed findings of fact in addition to (not instead of) his response to defendants' proposed findings. Again, however, each proposed fact must be followed by a (1) citation (2) to admissible evidence (3) that is located in the record.

ORDER

IT IS ORDERED that defendant Brian Ezman's motion for summary judgment is GRANTED and defendant Ezman is DISMISSED from this case.

Entered this 24th day of February, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge