IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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AUSTIN C. SZYMANKIEWICZ,

Plaintiff,

v.

DAVID PICARD, CONRAD REEDY, HAYLEY HERMANN, DAVID TARR, MIKE DITTMAN and DENICE DOYING,

Defendants.

ORDER

04-C-186-C

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On March 16, 2005, I granted defendants' motion for summary judgment on plaintiff's state law claims and on his federal law claims of retaliation and conspiracy against defendants Picard, Reedy, Hermann, Tarr and Dittman. In addition, I granted defendant Doying's motion for summary judgment with respect to plaintiff's claim that Doying retaliated against him when she ordered him to mow lawns and when she searched his cell on September 4, 2003. On May 2, 2005, the case proceeded to trial on plaintiff's one remaining claim that defendant Doying violated his First Amendment rights when she confiscated items from his cell on July 18, 2003, in retaliation for his complaining about

being forced to mow lawns. The jury found in favor of the defendant. On the day of trial, plaintiff filed a "Motion to Reconsider or Revise" the March 16 order. That motion is presently before the court. It raises the question whether and to what extent a litigant can rely on allegations in a complaint that the plaintiff has signed under penalty of perjury. The answer is that a litigant can rely on such allegations to the extent they would be reliable if made in an affidavit, that is, if they show affirmatively that the plaintiff is competent to testify to the matters therein. Although plaintiff swore to his complaint under penalty of perjury, his doing so did not make all of the allegations admissible as evidence.

In his motion to reconsider, plaintiff contends that this court erred in refusing to accept his complaint as "evidence" in support of certain of his factual propositions. He argues that because his complaint was verified, it should have been treated as an affidavit and all of the documents attached to the complaint should have been considered admissible evidence. It was error not to recognize that plaintiff's complaint was verified, but the error did not harm plaintiff because the majority of allegations were not admissible because they were not the product of plaintiff's personal knowledge or because they did not support the proposed fact for which plaintiff cited them.

Fed. R. Civ. P. 56 provides in relevant part,

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated

> therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Plaintiff points out that in Ford v. Wilson, 90 F.3d 245 (7th Cir. 1996), the Court of Appeals for the Seventh Circuit held that "by declaring under penalty of perjury that the complaint was true, and by signing it," the plaintiff in that case had converted his complaint into an affidavit that could be considered in opposition to a defendant's motion for summary judgment. However, plaintiff ignores the court of appeals' holding that the conversion of the complaint into an affidavit was appropriate only with respect to the factual assertions in the complaint that complied with the requirements for affidavits specified in Fed. R. Civ. P. 56, that is, the factual assertions that were made on personal knowledge and showed affirmatively that the affiant was competent to testify to the matters stated therein. Id. at 247. The majority of the factual assertions made in plaintiff's verified complaint were not based on his personal knowledge. Plaintiff repeatedly asserted that the defendants knowingly and intentionally took certain actions in retaliation for his exercise of a First Amendment right, but he never explained how he obtained personal knowledge of defendants' knowledge and intent. In addition, plaintiff referred to documentary exhibits attached to his complaint, but such exhibits do not become admissible simply because they are attached to a verified complaint. The averments in the affidavit or complaint must establish that the relevant exhibit is a true and correct copy of what it purports to be. So,

for example, where plaintiff asserted in his complaint that on such and such a date, he was issued conduct report number so and so, and he promptly thereafter identified the conduct report by its exhibit number, the court could accept the exhibit as properly authenticated. Plaintiff is a competent witness to identify the conduct report he received. However, when plaintiff attached to his complaint photocopies of a document that appears to be an "Offender Performance Evaluation" form completed on June 23, 2003, by someone whose name is illegible (Plaintiff's Exhibit E) and a document titled "Due Process Witness Questions for C/O Mr. J. Russell" (Plaintiff's Exhibit F), and never explained that he has personal knowledge that these documents are unaltered copies of the originals, the documents were not admissible. With respect to Exhibit F, he does not even explain what the document is, that is, when it was created, who created it and for what purpose it was created.

I note that in many instances where plaintiff supported a proposed factual statement with reference to his complaint, he simultaneously cited certain paragraphs in his own December 25, 2004, affidavit that he submitted in opposition to defendants' motion for summary judgment. Therefore, in many instances where I disregarded plaintiff's version of the fact proposed, it was not simply because he relied on statements in his complaint, but because the averments in his affidavit did not support the fact he was proposing.

In his motion for reconsideration, plaintiff does not identify any fact he proposed in

opposition to defendants' motion for summary judgment that was supported solely by reference to a statement in his verified complaint that was made on personal knowledge and that was material to the issues being decided. Nevertheless, I have reviewed plaintiff's complaint and his proposed findings of fact to make certain that he was not prejudiced by the court's failure to recognize that the allegations in his complaint had been sworn to under penalty of perjury. I can see nothing in the complaint that would have led to a different outcome on defendants' motion for summary judgment.

ORDER

IT IS ORDERED that plaintiff's Motion to Reconsider or Revise" this court's order of March 16, 2005, is DENIED.

The clerk of court is directed to enter judgment for defendants David Picard, Conrad Reedy, Hayley Hermann, David Tarr, Mike Dittman and Denice Doying and close this case.

Entered this 13th day of May, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge