

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

DOUGLAS K. UHDE,
Plaintiff,

ORDER

03-C-323-C

v.

MARK K. BITSKY, Deputy Sheriff;
GARY A. SILKA, Deputy Sheriff and Detective;
TAMMY L. KROETZ, Deputy Sheriff;
MATTHEW SHERD, Police Officer,

Defendants.

In this case, plaintiff Douglas Uhde claims that defendants subjected him to an unreasonable search and seizure and denied him procedural due process. On March 15, 2004, plaintiff filed a "Request for Emergency Injunction Order," in which he alleged that papers relating to this lawsuit had been removed from his cell, preventing him from prosecuting the lawsuit. In an order entered on March 19, 2004, Magistrate Judge Crocker advised the parties that Judge Crabb was out of the country, which prevented the court from taking immediate action on plaintiff's motion. However, Judge Crocker directed defendants' counsel to advise the court, in writing, no later than March 25, 2004, whether plaintiff's legal papers had been returned to him and, if not, to explain where the documents are and

when plaintiff may expect to receive them.

On March 24, 2004, counsel for the Adams County defendants advised the court that plaintiff's files were removed from plaintiff's cell on March 9, 2004, and were returned to him on March 12, 2004. Plaintiff does not dispute that he is presently in possession of his files. Accordingly, plaintiff's motion for an emergency injunction order will be denied.

The reason plaintiff's legal papers were taken from his cell has been revealed in other motions that defendants Bitsky, Silka and Kroetz have filed. On March 19, 2004, these defendants moved for Rule 11 sanctions against plaintiff, and for an order extending plaintiff's release date pursuant to Wis. Stat. § 807.15. In support of these motions, defendants have averred that on or about February 10, 2004, plaintiff submitted to the court for inclusion in the record a document titled "Non-Consent Form," a purported letter from the Adams County Sheriff's Department to plaintiff dated May 6, 2003, and a copy of an envelope postmarked May 6, 2003 from the Adams County Sheriff's Office. According to defendants, the form and letter are fabricated. The Rule 11 motion is accompanied by 1) evidentiary materials that include authenticated copies of the original documents from which plaintiff's alleged fabricated documents were created; 2) the sworn statement of plaintiff's former cell mate indicating that he witnessed plaintiff's efforts at cutting and pasting and typing to create the fabricated documents; and 3) authenticated copies of seven pages of documents retrieved from the garbage in plaintiff's cell revealing cut out sections used to

create the fabricated documents.

Fed. R. Civ. P. 11(b) states,

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --

* * *

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. . . .

When a litigant suspects that the opposing party has violated Rule 11, the litigant is required to give the opposing party formal notice of the conduct alleged to violate Rule 11 and offer the party an opportunity to withdraw or correct its actions to avoid imposition of sanctions. Fed. R. Civ. P. 11(c)(1)(A); Divane v. Krull Electric Co., Inc., 200 F.3d 1020, 1026 (7th Cir. 1999)

Counsel for defendants represents to the court that on February 26, 2004, he served plaintiff with defendants' motion describing the conduct at issue, together with a letter advising plaintiff to withdraw the fabricated documents and warning him that if he failed to withdraw the documents, counsel would file the Rule 11 motion with this court. This notice satisfies the notice requirement described in Fed. R. Civ. P. 11(c)(1)(A).

I conclude that an evidentiary hearing must be held on defendants' Rule 11 motion.

The assertions of misconduct are serious and cannot be decided conclusively without assessing plaintiff's credibility.

As for defendants' motion to extend plaintiff's prison release date pursuant to Wis. Stat. § 807.15 as a sanction for plaintiff's alleged conduct, defendants have provided no legal authority to suggest that the sanction permitted under Wis. Stat. § 807.15 is applicable to actions filed in federal court. In any event, Fed. R. Civ. P. 11 states,

A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. . . .

In considering the nature and severity of the sanctions to be imposed, a court may take into consideration many different factors, including whether the improper conduct was willful or intended to injure or infected the entire pleading, and what effect the misconduct had on the litigation process in time and expense. Plaintiff submitted the alleged falsified documents to this court in an effort to prove the merits of his claim that defendants engaged in unconstitutional conduct. A sanction of dismissal of plaintiff's lawsuit may be necessary to deter plaintiff's repetition of such conduct or the comparable conduct by others similarly situated.

Separately, defendant Matthew Sherd has moved for a stay of the proceedings in this action pending resolution of plaintiff's appeal of his criminal conviction in state court. A decision on this motion will be stayed pending a hearing on the present Rule 11 motion and

this court's determination whether dismissal of this action is a necessary sanction.

ORDER

IT IS ORDERED that

1. Plaintiff's motion for an "Emergency Injunction Order" is DENIED.
2. Plaintiff is to show cause in Courtroom 250 at 120 N. Henry Street, Madison, Wisconsin, on April 29, 2004 at 11:00 a.m., why he should not be subject to sanctions under Fed. R. Civ. P. 11 for his falsification of documents filed in this case.
3. The clerk of court is to issue a writ of habeas corpus ad testificandum to secure plaintiff's presence at the hearing.
4. The motion of defendants Bitsky, Silka and Kroetz to extend plaintiff's prison release date pursuant to Wis. Stat. § 807.15 is DENIED.
5. A decision is STAYED on defendant Matthew Sherd's motion for a stay of the proceedings pending resolution of plaintiff's state court appeal of his criminal conviction,

pending resolution of defendants' Rule 11 motion.

Entered this 1st day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge