IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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HENRY V. KROKOSKY, JR.,

ORDER

Plaintiff,

03-C-0078-C

v.

UNITED STAFF UNION,

Defendant.

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Plaintiff Henry V. Krokosky, Jr. has filed a motion to alter or amend the judgment entered in favor of defendant United Staff Union on October 2, 2003. Defendant argues that the motion is untimely because Fed. R. Civ. P. 59(e) requires motions to alter or amend judgments to be filed within ten days of the entry of judgment and plaintiff did not file his motion until October 14, 2003. Defendant has overlooked the provisions of Fed. R. Civ. P. 6(a), under which intermediate Saturdays, Sundays and legal holidays are excluded when computing time periods of fewer than 11 days. Under Rule 6(a), plaintiff had until October 17, 2003, in which to file a timely motion under Rule 59(e).

Although plaintiff's motion is timely, it is unavailing. Plaintiff's primary contention is that I did not consider his "Combined Proposed Findings of Fact in Support of Plaintiff's

Response to Defendant's Supplemental Motion for Summary Judgment and in Support of Plaintiff's Reply to Defendant's Response to Plaintiff's Cross-Motion for Summary Judgment" as the final undisputed facts in this case. However, it would have been improper to rely on this document for reasons I will explain in this opinion. In addition, plaintiff contends that his motion for summary judgment would have been granted had the court applied the law properly to all of the material facts. However, his contention is that the court did not consider certain facts in conjunction with an argument that he failed to develop. The remainder of plaintiff's arguments for reconsideration are premised on misstatements of the holding. Plaintiff's motion for alteration of the judgment will be denied because he has not shown the judgment to be legally erroneous. Fine v. Paramount Pictures, Inc., 181 F.2d 300, 302 (7th Cir. 1950) (purpose of Rule 59 motion is to correct errors).

In the opinion and order granting judgment in favor of defendant, I held that plaintiff was not entitled to see a certain bill for attorney fees paid by defendant (plaintiff's union) pursuant to 29 U.S.C. § 431(c) because he had not shown "just cause" as required under that provision. Plaintiff sought access to an itemized billing statement that was paid by defendant to a lawyer, Nola Cross, supposedly for investigating a sexual harassment claim that had been made against plaintiff by his co-worker and fellow member of the defendant union. In response to plaintiff's earlier requests for the bill, defendant had informed him

when it had made the payment, to whom it was paid, the total amount due and the portion of that amount attributable to this investigation. Defendant did not allow plaintiff to see the bill or provide him with information about the individual time entries.

The Court of Appeals for the Seventh Circuit has recognized that the § 431(c) "just cause" requirement is satisfied (1) when "the union member had some reasonable basis to question the accuracy of the [financial disclosure report] or the documents on which it was based"; or (2) when "information in the [financial disclosure report] has inspired reasonable questions about the way union funds were handled." Kinslow v. American Postal Workers Union, Chicago, 222 F.3d 269, 274 (7th Cir. 2000). In his motion for summary judgment, plaintiff asserted two possible bases for just cause: (1) defendant's board of directors' failure to follow its internal procedures in hiring and paying Cross; and (2) the "significant disparity" in professional fee expenditures reported on defendant's financial disclosure reports between two successive years.

I held that even if plaintiff were able to show that defendant's board did not follow certain internal procedures in hiring and paying Cross, he would not establish just cause because these rule violations would not fall under either of the categories set out in Kinslow. Plaintiff did not draw his reasons for believing that rules had been violated from the face of the disclosure report and he did not argue that he suspected that either the disclosure report or the bill may have been inaccurate because of the rule violations. I held also that the

"significant disparity" that plaintiff pointed to on defendant's financial disclosure report did not exist and therefore, it did not establish just cause, as that standard has been understood by other courts. Moreover, any discrepancy was readily explained by information that plaintiff had at the time he first reviewed the report. Mallick v. International Brotherhood of Electrical Workers, 749 F.2d 771, 781 (D.C. Cir. 1984) (change in report must be "sudden, apparently significant, and unexplained" to establish just cause), cited with approval in Kinslow, 222 F.3d at 274.

A. Error in Failing to Use Plaintiff's "Combined Proposed Findings of Fact in Support of Plaintiff's Response to Defendant's Supplemental Motion for Summary Judgment and in Support of Plaintiff's Reply to Defendant's Response to Plaintiff's Cross-Motion for Summary Judgment"

Plaintiff argues that I used the wrong set of facts in analyzing his claim. He asserts that the court must use all of the "facts" proposed in his document titled "Combined Proposed Findings of Fact in Support of Plaintiff's Response to Defendant's Supplemental Motion for Summary Judgment and in Support of Plaintiff's Reply to Defendant's Response to Plaintiff's Cross-Motion for Summary Judgment" because defendant did not respond to them. However, plaintiff submitted this document improperly. According to "Helpful Tips for Filing a Summary Judgment Motion in Cases Assigned to Judge Barbara B. Crabb," which plaintiff cites in his motion, a party filing a motion for summary judgment is to submit a

separate document containing the party's proposed findings of facts. In response, the party opposing the motion is to identify which of the proposed facts are not disputed and the reasons for disputing the others. A non-moving party may propose new facts in its response. The moving party then has a final opportunity to challenge anything in the non-moving party's response, but not to propose new facts.

In this case, both parties filed motions for summary judgment. Plaintiff submitted his response in opposition to defendant's motion for summary judgment simultaneously with his reply in support of his own motion. Accompanying these documents were his response to defendant's proposed facts and his reply is support of his own proposed facts. However, plaintiff filed a third document containing a comprehensive list of factual proposals, a large number of which appear to have been drawn from the facts that the parties had already proposed and responded to. It appeared that plaintiff wanted the court to consider this submission as the final and complete set of facts in this case. From plaintiff's argument that the court was required to rely on this document, I infer that he assumed that his submission of this document would start the proposal, response and reply process anew.

I did not consider the document for several reasons. First, it was not properly submitted as an addition to the facts already proposed. The document's title indicates that it is intended as a supplement to both plaintiff's response in opposition to defendant's motion and his reply in support of his own motion. A party is not permitted to propose new

facts with his reply. Although the non-moving party is generally permitted to propose new facts in its response, plaintiff did not indicate which if any of the 128 proposed facts were new and which were drawn from the two other statements of proposed facts he had submitted. Moreover, the procedures state that only a "non-movant" may include new proposed facts in its response. Plaintiff was not a non-movant; he had filed a cross motion for summary judgment and had had an opportunity to propose whatever facts he wished to have considered in conjunction with that motion.

It would have been unfair to require defendant to respond to these proposed facts. Defendant had responded to a number of these proposed facts when plaintiff submitted them the first time. Moreover, defendant should not have been obligated to sift through plaintiff's new list and insure that none of its proposed facts had been omitted.

Plaintiff argues that defendant's supplemental motion for summary judgment forced him to respond in a very short period of time. However, the court's order granting defendant's motion to file this supplemental motion provided its standard 21/10 briefing cycle applicable to any motion that has not been fully briefed.

B. Error in Concluding that Plaintiff Did Not Suspect that Cross's Bill was Inaccurate

In addition to his dispute over the appropriate set of facts governing this case, plaintiff argues that the proper application of law to the facts should have resulted in the

granting of his motion for summary judgment. Plaintiff quotes the following passage from page 20 of the September 30 order: "Because plaintiff does not question the accuracy of the [financial disclosure report] or point to anything on [it] that would inspire reasonable suspicion that union funds were being mishandled, he has not shown just cause pursuant to § 431(c) as understood in this circuit." He argues that "[t]his statement advances the proposition that the plaintiff did not question the accuracy of the Cross bill." He need not bother with this last argument. It is clear from page 11 of the order. I found expressly that the first category of just cause recognized in Kinslow is not relevant "because plaintiff has never questioned the accuracy of either defendant's [financial disclosure report] or Cross's bill." This statement was correct.

Plaintiff did not question the accuracy of the Cross bill in either his complaint or his brief in support of his motion for summary judgment. He did allude to the bill's accuracy twice in his reply brief, but he was too late. By not raising the argument until his reply brief, when defendants would have had no chance to respond to it, he waived the argument. United States v. Turner, 203 F.3d 1010, 1019 (7th Cir. 2000); Eby-Brown v. Wisconsin Department of Agriculture, 213 F. Supp. 2d 993, 1011 (W.D. Wis. 2001). Moreover, the references in the reply brief did not indicate that plaintiff actually suspected that the bill was inaccurate. Instead, they merely mention the bill's accuracy in connection to other issues. "Arguments not developed in a meaningful way are waived." Central States, Southeast and

Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999).

Plaintiff's first reference to the bill's accuracy is a response to defendant's charge that the only thing plaintiff could do with the bill would be to get his co-worker in trouble with their employer for talking to Cross on the phone during working hours. Plaintiff's reply brief states:

> What could be revealed by the bill? Minimally what should have been done originally. A review and verification. An opportunity to discover what she alleges she did and then verify whether it actually took place. For example, if Cross billed for a "written investigation" and there is no evidence of any report, then this is an issue that needs to be further investigated.

This passage identifies a proper use to which the bill could be put, but does not indicate that plaintiff suspects that the bill is inaccurate or has any reason to suspect that it is inaccurate. The second reference is found in the following passage mocking and purporting to summarize defendant's argument:

> What did you say? We don't know what this attorney did or whether her bill was accurate? We don't know whether our [financial disclosure report] is accurate? We don't know if we have a cash or accrual accounting system? We don't know? We don't know? Ah, well, um, hey, he didn't know about all these issues when he asked for the bill the first time so it doesn't count.

In this passage, plaintiff charges defendant's officers with breaching their fiduciary duties by

failing to insure that the bill was accurate. It is directed at the officers' actions and inactions and mentions the accuracy of the bill only as it relates to this issue. Neither of these passages indicates that plaintiff suspected the bill to be inaccurate or had any reason for suspicion other than an absence of proof to the contrary. Thus, even if these references had not been made for the first time in plaintiff's reply brief, they did not meaningfully advance an argument that plaintiff reasonably suspected that the bill was inaccurate. Central States, 181 F.3d at 808 (arguments must be meaningfully developed).

Despite plaintiff's invocation of the doctrine of res ipsa loquitur and his repeated hope that the facts would speak for themselves, a plaintiff must advance his own theories of liability. Id. Plaintiff indicates that it would have been inappropriate for him to advance this argument because he could not "specifically state [that] the bill is inaccurate" unless he had seen it. He argues also that it would be an unwarranted repudiation of the law to hold that you "must raise specific inaccuracies of a bill that you are not permitted to see." However, neither of these things were required of him. On page 11 of the opinion, I stated that a plaintiff need assert only that he *questions* the bill's accuracy and has some minimal basis for his suspicions; he need not swear that the document *is* inaccurate or point to a specific flaw.

C. Error in Concluding that Plaintiff Did Not Point out Any Reason to Suspect Financial

Mishandling

Plaintiff argues next that the court concluded incorrectly that he had failed to point to anything that would inspire reasonable suspicion that union funds were being mishandled. However, the language in the opinion to which plaintiff refers states only that plaintiff did not "point to anything *on the* [*financial disclosure report*] that would inspire reasonable suspicion that union funds were being mishandled." (Emphasis added). None of the evidence plaintiff has revived in his motion reveals error in the judgment because none of it is drawn from the face of the financial disclosure report. Kinslow, 222F.3d at 274; Mallick, 749 F.2d at 481. Other evidence of wrongdoing is relevant only when a plaintiff questions the accuracy of the report or its underlying documents, which is something plaintiff has not done in this case.

D. Error in Failing to Recognize that Plaintiff Had Raised Certain Issue

Plaintiff asserts that despite his multiple references to defendant's "flagrant" and "inappropriate" breach of the internal policy regarding approval of attorneys for representing members (assuming, contrary to the sworn testimony of defendant's officials, that Cross was hired to represent one of defendant's members and not defendant), "the court's order says this wasn't raised as a cause of suspicion." Contrary to plaintiff's assertion, I stated at page 16 that "plaintiff contends that defendant's hiring of Cross violated its policy that it is 'not

to provide representation to its members in disputes with the employer through outside retained attorneys unless no internal union representatives are available or the relevant proceedings or forum requires legal representation.'" Plaintiff is referred to pages 16 through 19 for the reasons for the conclusion that proof of these alleged infractions would not establish just cause.

E. Court May Not Have Considered All the Facts on the Record

With respect to plaintiff's concern that not all the proposed facts appeared in the opinion, only those facts that were undisputed, properly supported by the evidence and material to the outcome were considered at the summary judgment stage. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). As I noted on page 8 of the opinion:

> [T]here are a number of genuine factual disputes relating to the potential violation by defendant of its policies and by-laws in the hiring and payment of Cross. However, violations of these rules would not establish just cause even if proved and for that reason, they do not preclude a grant of summary judgment. Donald v. Polk County, 836 F.2d 376, 379 (7th Cir. 1998) (disputed facts will not bar summary judgment unless facts are material).

Plaintiff argues that the court overlooked facts relating to a "potential violation by defendant of its policies and by-laws in the hiring and payment of Cross." These factual disputes were not overlooked, but were immaterial to the resolution of this case and therefore, did not

preclude the entry of judgment in favor of defendant.

F. Policy Concerns

Finally, plaintiff raises some policy concerns that the holding provides union officials with "free reign [sic] to loot their union treasuries." The court's task is to interpret the statutes enacted by Congress. If plaintiff believes the statutes do not provide sufficient protections for union members, he should raise his concerns with the legislature.

OPINION

IT IS ORDERED that plaintiff Henry V. Krokosky's motion filed pursuant to Fed. R. Civ. P. 59(e) to alter or amend judgment granting defendant United Staff Union's motion for summary judgment, is DENIED.

Entered this 21st day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge