

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

LUIS A. RAMIREZ,

Plaintiff,

v.

GARY R. McCAUGHTRY, MATTHEW
FRANK, CURT JANSEN, STEVEN
SCHUELER, MARC CLEMENTS and
STEVEN CASPERSON,

Defendants.

ORDER

04-C-335-C

The parties in this action are briefing cross motions for summary judgment. Plaintiff's motion was filed on January 11, 2005. He supported it with documents titled "Statement of Undisputed Facts," "Declaration in Support of Plaintiff's Motion for Partial Summary Judgment" and "Brief in Support of Plaintiff's Motion for Partial Summary Judgment." Attached to plaintiff's brief are a number of purported "exhibits." A schedule for briefing plaintiff's motion was established on January 13, 2005. According to that schedule, defendants had until February 10, 2005, in which to oppose the motion and plaintiff has until February 21, 2005, in which to serve and file a reply.

On February 10, defendants not only opposed plaintiff's motion, they filed a cross motion for summary judgment. Their motion was accompanied by a supporting brief, proposed findings of fact in support of their motion, a response to plaintiff's "statement of undisputed facts," and several affidavits. Pursuant to a schedule established for briefing defendants' motion, plaintiff has until March 14, 2005, in which to file his response to defendants' legal arguments and proposed findings of fact. Both parties' motions were filed well within the February 25 deadline for filing dispositive motions set by the United States Magistrate Judge in a preliminary pretrial conference order dated October 12, 2004.

Now plaintiff has filed a document titled "Motion for Judgment as a Matter of Law." In this document, plaintiff attempts to clarify the documents he filed in support of his motion for summary judgment. In particular, plaintiff states that he intended his "statement of undisputed facts" to be nothing more than facts to which he stipulated. He then explains that he intended his "declaration" in support of the motion for summary judgment to be his proposed findings of fact. He notes that defendants failed to respond to these purported proposed facts when they responded to his motion and that, therefore, he is entitled to a finding that these "facts" are undisputed. Plaintiff is wrong.

This court's summary judgment procedures make it clear that a party's proposed findings of fact are to be set out in a separate document (Proc. I.A.2.) and in numbered paragraphs (Proc. I.B.1.). Proc. I.B.2. also states clearly, "Each factual proposition must be

followed by a reference to evidence supporting the proposed fact.” This same provision provides an example: “1. Plaintiff Smith bought six Holstein calves on July 11, 2001. Harold Smith Affidavit, Jan. 6, 2002, p.1., ¶ 3.” Finally, the procedure advises the parties that “the court will not consider facts contained only in a brief.” (Proc. I.B.4.)

Plaintiff has received three sets of this court’s summary judgment procedures. He received one set with the preliminary pretrial conference order issued on October 12, 2004. A second set of procedures was attached to the letter establishing the schedule for briefing his motion for summary judgment. A third set was sent to the parties with the briefing schedule established on defendants’ motion. Nevertheless, plaintiff’s “declaration” cannot be construed as anything more than an affidavit. It is true that plaintiff does not cite to his affidavit or any paragraph in it to support one or more of his “undisputed facts.” Instead, he cites exclusively to the exhibits attached to his brief, none of which are authenticated. Under the court’s procedures, plaintiff cannot rely on his affidavit as containing both his testimony about facts relating to his case and an additional statement of proposed facts. This dual-purpose kind of document is not acceptable. Instead, plaintiff’s proposed findings of fact must be separate and distinct from the documents he submits as evidence. An affidavit is evidence if it is made on personal knowledge and sworn or declared to be true under penalty. Such an affidavit may be referred to as evidentiary support for a proposed finding of fact, but it cannot serve as plaintiff’s statement of proposed facts.

I am aware that in the magistrate judge's preliminary pretrial conference order, the magistrate judge cautioned plaintiff that he was to read the court's procedures governing summary judgment motions carefully. Plaintiff was told that if he failed to follow the court's procedures, he would not get an extension of time to do it over again unless this court were to decide that he should get a second chance. Thus, I construe plaintiff's "Motion for Judgment as a Matter of Law" as including a request for a second opportunity to submit proper support for his motion for summary judgment. In this instance, I conclude that it is unnecessary to grant plaintiff's request, because he already has another chance to correct his submissions. Specifically, he has nearly another month to oppose defendants' motion for summary judgment. When he does that, he is permitted under the court's summary judgment procedures to respond to facts proposed by defendants with a number of the facts he has proposed in support of his own motion and he is permitted to propose additional findings of fact as permitted under Proc. II.B. He can support certain of his factual propositions with citations to statements he has made in his "declaration," if those factual propositions are relevant or he can submit a new declaration containing relevant proposed facts. If plaintiff intends to cite the evidentiary materials attached to his brief when he responds to defendants' proposed findings of fact, he can supplement those materials with a stipulation from counsel for defendants to the effect that the documents are what they seem to be or, in the alternative, he can submit an affidavit from someone having personal

knowledge of the accuracy of the documents. Without such a stipulation or sworn statement, however, the documents are not admissible as evidence.

ORDER

IT IS ORDERED that plaintiff's "Motion for Judgment as a Matter of Law," construed as a request for a second opportunity to submit proper support for his motion for summary judgment, is DENIED as unnecessary.

Entered this 18th day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge