IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GEORGE A. MUDROVICH,

Plaintiff,

v.

D.C. EVEREST AREA SCHOOL DISTRICT, ROGER W. DODD, ROBERT C. KNAACK, DANIEL L. HAZAERT, THOMAS R. OWENS, LAW FIRM OF RUDER, WARE & MICHLER, LLSC, and RONALD J. RUTLIN,

Defendants.

OPINION AND ORDER

04-C-398-C

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Plaintiff George A. Mudrovich, proceeding pro se, alleges that defendants D.C. Everest Area School District, Roger W. Dodd and Robert C. Knaack terminated his employment as a part-time French teacher in retaliation for his filing of a lawsuit against two other teachers in the defendant school district. Plaintiff alleges also that defendants Roger W. Dodd, Robert C. Knaack, Daniel L. Hazaert, Thomas R. Owens, the law firm of Ruder, Ware and Michler, LLSC and Ronald J. Rutlin conspired against him to harm his profession in violation of Wis. Stat. § 134.01. Jurisdiction is present. 28 U.S.C. §§ 1331 and 1367.

Presently before the court are the parties' cross motions for summary judgment,

plaintiff's motion to make a finding of admissions by defendants and defendants' motion for sanctions under Fed. R. Civ. P. 16(f). The motions for summary judgment raise two questions. The threshold question is whether plaintiff's lawsuit is precluded under the doctrine of collateral estoppel because of the prohibited practice complaint that plaintiff filed with the Wisconsin Employment Relations Commission. I hold that plaintiff's current lawsuit is not barred by the doctrine of collateral estoppel because the Wisconsin Employment Relations Commission did not address the question whether defendants retaliated against him for filing a lawsuit against two other teachers. Because defendants' issue preclusion argument fails, I must address the question whether plaintiff's lawsuit against two other teachers was a matter of public concern. I conclude that it was not because allegations of defamation and conspiracy to harm one's reputation are matters of private concern, not public. Therefore, I will grant defendants' motion for summary judgment on plaintiff's First Amendment retaliation claim. Because there is no common nucleus of operative fact, the court does not have supplemental jurisdiction over plaintiff's state law conspiracy claim.

Although I agree with plaintiff that defendants did not follow this court's Procedure to Be Followed on Motions for Summary Judgment, I will deny plaintiff's motion to make a finding of admissions by defendants; it is within the court's discretion to decide which facts are undisputed and relevant to the motions for summary judgment. I considered and

incorporated many of plaintiff's relevant proposed facts. In addition, I will deny defendants' motion for sanctions under Fed. R. Civ. P. 16(f) because defendants were not prejudiced by plaintiff's failure to follow court procedure and because it is unclear that they incurred extra costs by having to bring a motion for sanctions.

From the parties' proposed findings of fact and the record, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

A. The Parties

Plaintiff George Mudrovich was a part-time French teacher subject to a collective bargaining agreement for defendant D.C. Everest School District, which is located in Marathon County, Wisconsin. Defendant Roger W. Dodd was principal of the senior high school within defendant school district. Robert C. Knaack was principal of the junior high school within defendant school district. Defendant Daniel L. Hazaert is Assistant Superintendent for defendant school district and responsible for instruction and pupil services. Defendant Thomas R. Owens is an administrator for defendant school district. Defendant Ronald J. Rutlin is a lawyer with defendant law firm Ruder, Ware and Michler, LLSC and represents defendant D.C. Everest School District.

B. Plaintiff's Hiring by Defendant School District

Before 1993, the foreign language department at the senior and junior high schools within defendant district offered programs in German and Spanish, but not in French. At a public meeting, 147 members of the public expressed their desire for a French program. Defendant Dodd was opposed to the institution of a French program, as was defendant Knaack. However, in May 1995, defendant school district hired plaintiff for a half-time French teacher position for the 1995-96 school year.

During the 1995-96 and 1996-97 school years, the foreign language department at the junior high school devoted four classrooms to Spanish classes and one classroom to German classes. French classes were taught in various classrooms scattered throughout the school. On May 29, 1997, plaintiff proposed a plan for getting the French program its own dedicated classroom without significantly disrupting the Spanish teachers, who would share three dedicated Spanish classrooms. The next day, plaintiff put copies of his plan into the mailboxes of all the junior high foreign language department teachers. That same morning, Spanish teachers Shar Soto and Holly Martin and two other unidentified teachers approached defendant Principal Knaack and informed him of a note that plaintiff had written to a teacher's aide, Carol Maki, on May 19, 1997. Soto and Martin submitted false allegations to Knaack by telling him that plaintiff had been verbally abusive to Maki and that they were very offended by plaintiff's behavior.

Defendant Knaack wrote plaintiff a note, stating "I want to see you concerning your treatment of Carol Maki." When plaintiff reported to Knaack's office, Knaack told him, "This morning four teachers came to me together; they said that you had been verbally abusive to Carol Maki and that they were very offended by it." That afternoon and again on June 2, 1997, plaintiff asked Principal Knaack to hold a conference with Soto, Martin, Maki, Knaack and plaintiff to discuss the allegations by Soto and Martin. Knaack refused both requests.

Plaintiff asked local union representative Bob Coleman to mediate matters among plaintiff, Soto and Martin. Coleman told plaintiff that union leadership had declined involvement. On July 25, 1997, plaintiff's attorney, Ryan Lister, sent letters to Soto and Martin informing them that to correct any harm done to him, plaintiff would "accept a public apology and admission that the allegations [that plaintiff had verbally abused Maki] were false or untrue" and saying that Soto and Martin could "resolve this matter short of litigation" if they agreed to the above-stated terms. Soto and Martin refused to mediate if Lister was present.

C. Plaintiff's Lawsuit and Grievances

On August 5, 1997, plaintiff filed a lawsuit against Soto and Martin, alleging that they had defamed him and conspired to harm his reputation during a dispute about

classroom assignments in violation of Wis. Stat. § 134.01. His purpose in filing the lawsuit was to show the falsity of Soto's and Martin's allegations that he had verbally abused Maki. Plaintiff would not have instituted the litigation against Soto and Martin if they had admitted that the allegations were false. On November 14, 1998, the Circuit Court for Marathon County dismissed plaintiff's complaint against Soto and Martin after finding that plaintiff could not state a claim for defamation or civil conspiracy against them and that his exclusive remedy was under the Worker's Compensation Act. The circuit court awarded Martin and Soto $21,196 in attorney fees and costs on the ground that plaintiff's claims against them were frivolous. Had the lawsuit gone to trial, taxpayers in defendant school district would have learned that the school district had committed thousands of taxpayer dollars to fighting a lawsuit that could have been settled at no cost. Plaintiff appealed the decision and the Wisconsin Court of Appeals upheld the circuit court's decision granting summary judgment but reversed the finding of frivolousness on the ground that Wisconsin's conspiracy statute had not been analyzed previously under the exclusivity provision of the Worker's Compensation Act.

On October 29, 1997, plaintiff filed a grievance under the terms of the collective bargaining agreement, alleging that defendant Knaack had treated him in a hostile and inappropriate manner and had verbally abused him during the dispute about creating a dedicated French classroom and that defendant Knaack, Assistant Principal Mike Sheehan

and defendant Superintendent Dodd had created a hostile work environment after the classroom dispute was resolved by threatening plaintiff with classroom observations. Defendant school district denied plaintiff's grievance on January 20, 1998. On June 5, 1998, plaintiff filed a second grievance under the collective bargaining agreement, asserting that the school district had improperly posted an opening for a 30 percent French teacher instead of considering him for a full-time position.

On June 10, 1998, defendant Dodd informed plaintiff that he was going to recommend to the school board that plaintiff be laid off under Article 32(I) of the collective bargaining agreement. Defendants Knaack and Dodd told plaintiff that the reason for their decision was that plaintiff had been hired for his part-time job from a small pool of applicants and the school district now wanted to gather the best candidates from a larger pool of applicants. During a June 23, 1998 school board meeting, the board members voted to lay off plaintiff.

Plaintiff filed a grievance on July 7, 1998, arguing that he should not have been terminated and required to apply for the full-time position. Plaintiff applied for the full-time position but it was awarded to another individual. The June 5 and July 7, 1998 grievances were combined and went to arbitration, where they were ultimately dismissed.

On May 26, 1999, plaintiff filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against the school district, alleging that the district had

unlawfully retaliated against him by terminating his employment because he filed grievances against the district under the collective bargaining agreement.

Fifteen days of hearing were held in the matter throughout 2000 and 2001 where plaintiff appeared pro se. Plaintiff argued, among other things, that defendants Dodd, Hazaert and Knaack gave false testimony on various occasions during various proceedings concerning the allegations that defendants conspired against plaintiff. The hearing examiner concluded that the district committed a prohibited practice when Knaack recommended to Dodd that plaintiff be laid off at the conclusion of the 1997-98 school year, in part because of the grievances that he filed under the collective bargaining agreement, but that the district did not commit a prohibited practice when it refused to rehire him.

Plaintiff appealed the examiner's decision to the full commission, which affirmed the examiner's conclusion that Principal Knaack was unlawfully motivated in recommending plaintiff's layoff, but reversed the examiner's conclusion that the district had acted lawfully in laying off plaintiff. Instead, the commission concluded that the district's decision was tainted by animus attributable to Knaack. The commission affirmed the examiner's conclusion that the district did not violate the law in failing to rehire plaintiff for the full-time position and it awarded plaintiff back pay from the date of his termination through June 2, 2004. Both plaintiff and defendant school district filed petitions for judicial review of the Wisconsin Employment Relations Commission ruling. Both petitions were pending

review in the Circuit Court for Marathon County when plaintiff filed his lawsuit against defendants in this court on June 22, 2004. In this lawsuit, plaintiff alleges that defendants' June 23, 1998 action of laying him off was an act of retaliation motivated, in part, by his filing of the 1997 lawsuit against Soto and Martin and that it violated his First Amendment rights.

This court's September 15, 2004 Preliminary Pretrial Conference Order required any amendments to the pleadings to be filed and served no later than November 1, 2004. Plaintiff served defendant law firm Ruder Ware with his amended complaint on November 8, 2004. Plaintiff served defendants Knaack, Owens and Hazaert with the amended complaint on November 10, 2004. Plaintiff served defendant Dodd on November 23, 2004. Plaintiff served defendant Rutlin on November 28, 2004.

OPINION

Defendants seek to quash plaintiff's claims against them on two grounds. First, they argue that plaintiff is precluded from raising his First Amendment retaliation claim and civil conspiracy claim because he litigated those claims and the Wisconsin Employment Relations Commission issued a decision on those claims. Second, defendants argue that even if the doctrine of issue preclusion does not bar plaintiff's First Amendment retaliation claim, the claim still fails because plaintiff's 1997 lawsuit against co-workers Soto and Martin was not

a matter of public concern and therefore not protected by the First Amendment. However, before I address these arguments, I must first consider whether plaintiff prejudiced defendants by delaying service to defendants Ruder Ware, Knaack, Owens, Hazaert, Dodd and Rutlin.

Defendants argue that the court should impose sanctions on plaintiff under Fed. R. Civ. P. 16(f) because, with the exception of defendant D.C. Everest School District, plaintiff failed to serve defendants in a timely manner. According to defendants, this court's preliminary pretrial conference order required plaintiff to serve all defendants by November 1, 2004, but plaintiff did not serve defendant Ruder Ware until November 8, 2004, defendants Knaack, Owens and Hazaert until November 10, 2004, defendant Dodd until November 23, 2004 and defendant Rutlin until November 28, 2004. Defendants contend that plaintiff's failure to comply with the court's scheduling order prolonged this action and request that plaintiff pay their expenses incurred in bringing their motion for sanctions.

This court is authorized to impose sanctions for failure to meet briefing schedule deadlines pursuant to Fed. R. Civ. P. 16(f), which provides as follows:

> if a party or party's attorney fails to obey a scheduling or pretrial order . . . the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just . . . In lieu of or in addition to any other sanction, the judge shall require the party or both to pay the reasonable expenses incurred because of any non-compliance with this rule, including attorney's fees, unless the judge finds that the non-compliance was substantially justified or that other circumstances make an award of expenses unjust.

Defendants were not prejudiced by plaintiff's delay in serving them. According to this court's scheduling order, dispositive motions were due by April 1, 2005. Am. Sched. Order, dkt. #14. Defendants filed their motion for summary judgment concerning all defendants on December 15, 2004, almost four months before such a motion was due. Moreover, I am granting them summary judgment. In addition, defendants have not shown that they have incurred any additional expenses in bringing a motion for sanctions along with their motion for summary judgment. As a result, I will deny defendants' motion for sanctions.

A. Issue Preclusion

As a general rule, claim preclusion refers to the effect that a prior judgment has in foreclosing successive litigation of the same claim or cause of action against the same party; issue preclusion refers "'to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim.'" New Hampshire v. Maine, 532 U.S. 742, 748 (2001) (citing Restatement (Second) of Judgments §§ 17, 27 (1980)). Issue preclusion requires a showing that the same issue has been actually litigated and necessarily decided in a prior action and that the party against whom preclusion is asserted was a party to the prior action. Garza v. Henderson, 779 F.2d

390, 393 (7th Cir. 1985). It is not necessary that the person asserting preclusion have been a party to the previous action. If a party can be barred from re-litigating the issue with its opposing party, it can be barred from litigating the issue against a third party, unless the party to be precluded deserves an additional opportunity to litigate the issue because of particular circumstances, such as the lack of a full and fair opportunity to litigate in the first action. Restatement (Second) of Judgments § 29. See also Adair v. Sherman, 230 F.3d 890, 893 (7th Cir. 2000) ("'Under collateral estoppel [currently referred to as issue preclusion], once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.'") (quoting Montana v. United States, 440 U.S. 147, 153 (1979)).

Although I may give preclusive effect to the decision by the Wisconsin Employment Relations Commission, University of Tennessee v. Elliott, 478 U.S. 788, 797-98 (1986) (it is sound policy to apply principles of issue preclusion to factfinding of administrative bodies acting in judicial capacity), I am not persuaded that the commission decided the same issue that is now before this court. It is undisputed that the prohibited practice complaint that plaintiff filed with the Wisconsin Employment Relations Commission concerned his termination by defendant district in retaliation for his filing of the October 29, 1997 and June 5, 1998 grievances against the district under the collective bargaining agreement and

that it did not concern retaliation for plaintiff's filing of the 1997 suit against Soto and Martin. It seems clear under Wis. Stat. § 111.70(2) and (3)(a) that retaliation for the filing of a lawsuit would be a prohibited practice. Id. (municipal employer commits prohibited practice when it interferes with, restrains or coerces employees in exercise of their rights to self-organize, form, join or assist labor organizations, bargain collectively through representatives of their own choosing or engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection). Neither side argues that retaliation for filing the 1997 lawsuit against Soto and Martin was not a prohibited practice as defined by the Wisconsin statutes. Whether defendants retaliated against plaintiff for filing the 1997 lawsuit against Soto and Martin is a separate question from whether defendants retaliated against plaintiff for filing grievances under the collective bargaining agreement, which was the subject of the Wisconsin Employment Relations Commission decision. Therefore, it would not be proper to give preclusive effect to the commission's decision.

It is unnecessary to determine whether the commission decided plaintiff's civil conspiracy claim because that claim arises only under state law. This court's supplemental jurisdiction does not extend to plaintiff's state law claim, as discussed in Part C, below.

B. First Amendment Retaliation

Defendants argue that plaintiff's First Amendment retaliation claim fails because the 1997 lawsuit against Soto and Martin did not relate to matters of public concern. "Retaliation for filing a lawsuit is prohibited by the First Amendment's protection of free speech." Zorzi v. County of Putnam, 30 F.3d 885, 896 (7th Cir. 1994). However, this protection is limited in the case of public employees. Id. "If a public employee is retaliated against for filing a lawsuit, the public employee has no First Amendment claim unless the lawsuit involves a matter of public concern." Id. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." Connick v. Myers, 461 U.S. 138 147-48 (1983). Even if an employee's speech is protected by the First Amendment, the government is justified in discharging an employee if it can clearly demonstrate that the speech involved "substantially interfered" with official responsibilities. Id. at 150.

Plaintiff argues that the lawsuit he filed against Soto and Martin was a matter of public concern because, if the case had gone to trial, the public would have learned that: 1) defendant Knaack failed to do his job by refusing two requests by plaintiff to resolve the dispute between him and the other teachers; 2) defendant Knaack had engaged repeatedly in sexual harassment of female teachers; 3) the school board vice president failed to take steps to resolve the workplace dispute and instead allowed it to degenerate into litigation, which would have affected the public's perception of the quality of the administration of

their public schools; and 4) defendant Knaack and a superintendent of the public school system approved two female employees' false accusation of a fellow male employee of abuse. In addition, he argues, the public would have found out whether the exclusive remedy provision of the Worker's Compensation Act bars claims under Wis. Stat. § 134.01. Plt.'s Br., dkt. ## 30, 31, at 26-30. For support, plaintiff cites Azzaro v. County of Allegheny, 110 F.3d 968, 981 (3d Cir. 1997), which found an employee's reports of sexual harassment to be a matter of public concern.

It is undisputed that plaintiff's purpose in filing the lawsuit against Soto and Martin was to show the falsity of their allegations that he had verbally abused Maki. He admits that he would not have instituted the litigation against Soto and Martin if they had admitted that the allegations were false. The content of the suit and plaintiff's motivation for filing it make it clear that it was exclusively a personal matter. Plaintiff's case is similar to Connick, 461 U.S. at 141, in which a disgruntled employee who was about to be transferred prepared a questionnaire soliciting the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors and whether employees felt pressured to work in political campaigns. When her supervisor terminated her for insubordination, she sued. Id. The United States Supreme Court found that none of the issues addressed in the employee's questionnaire were matters of public concern except the questions regarding political campaign work. Id. at 147-49.

The majority of the issues raised in the questionnaire were "mere extensions" of the employee's dispute over her job transfer. Id. at 148.

Like the employee in Connick, plaintiff did not file his lawsuit to inform the public about the poor administration of the defendant school district. Id. (purpose of questionnaire was not to inform public that district attorney's office was not discharging its governmental responsibilities in investigating and prosecuting criminal cases but to convey fact that single employee is upset with status quo). Rather, plaintiff's "public concern reasons" for filing the lawsuit against Soto and Martin are mere extensions of the true reason for filing the lawsuit, which was to clear his name. Although the general issue of sexual harassment by a school administrator may be one of public concern, the possibility that a trial on the merits of his case against Soto and Martin would have revealed sexual harassment of other teachers by defendant Knaack is unlikely and irrelevant to plaintiff's purpose in bringing the lawsuit. Furthermore, when plaintiff argues that useful precedent regarding the Worker's Compensation Act or knowledge about school administration may have surfaced from plaintiff's lawsuit, the same could be said of any lawsuit. Because plaintiff's defamation lawsuit against Soto and Martin was not of public concern, defendants did not violate the First Amendment when they terminated his employment. Defendants are entitled to summary judgment in their favor on plaintiff's retaliation claim.

C. State Law Conspiracy Claim

There remains the question whether this court has subject matter jurisdiction over plaintiff's state law conspiracy claim made in connection with his federal retaliation claim. 28 U.S.C. § 1367(a) provides in relevant part:

> [I]n any civil action of which the district courts have original jurisdiction, the district court shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

The existence of supplemental jurisdiction is predicated on 1) the existence of a substantial federal claim and 2) a common nucleus of operative fact as to state and federal claims such that the claims would ordinarily be tried in one proceeding. United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

It is undisputed that plaintiff's First Amendment retaliation claim relates to the decision by defendants D.C. Everest School District, Dodd and Knaack to terminate his employment on June 23, 1998 because he filed the 1997 lawsuit against Soto and Martin. In the conspiracy claim, plaintiff alleges that defendants Dodd, Knaack, Hazaert, Owens, Ruder Ware and Rutlin conspired to harm his profession starting on June 24, 1998, *after* defendants terminated his employment. Plt.'s Am. Cpt., dkt. #9, at 4. Plaintiff's state law conspiracy claim requires a court to consider facts entirely different from those underlying his federal retaliation claim. Because plaintiff's federal claim no longer exists and even if it

did, his state law claim rests on entirely different factual circumstances, supplemental jurisdiction does not extend to his state law claim. If plaintiff wishes to pursue his state law claim, he may do so in state court.

ORDER

IT IS ORDERED that

1. The motion for summary judgment by defendants D.C. Everest Area School District, Roger W. Dodd, Robert C. Knaack, Daniel L. Hazaert, Thomas R. Owens, the law firm of Ruder, Ware and Michler, LLSC and Ronald J. Rutlin is GRANTED as to plaintiff George A. Mudrovich's First Amendment retaliation claim;

2. Plaintiff's state law conspiracy claim is DISMISSED for lack of supplemental jurisdiction under 28 U.S.C. § 1367(a);

3. Plaintiff's motion for the court to make a finding of admissions by defendants is DENIED as unnecessary;

4. Defendants' motion for sanctions under Fed. R. Civ. P. 16(f) is DENIED;

5. The clerk of court is directed to enter judgment for the defendants and close this

case.

Entered this 6th day of April, 2005.

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