

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

MICHAEL HILL,

Plaintiff,

v.

GARY THALACKER, GREGORY
GOODHUE, MICHAEL BARTKNECHT,
TERRY CARD and JOHN SHOOK,

Defendants.

ORDER

04-C-732-C

Plaintiff is proceeding in this action on his claims that defendants Gary Thalacker, Terry Card and John Shook denied him a pay grade promotion because of his race, that defendants Thalacker, Card and Shook, Gregory Goodhue and Michael Barknecht retaliated against him for filing an administrative grievance about the allegedly discriminatory promotional practices and that all defendants conspired to retaliate against him for filing a grievance. Now plaintiff has filed documents titled "Plaintiff's Motion for a Protective Order" and "Plaintiff's Rebuttal to Defendant's Answer to His Complaint and Amendments to said Complaint."

I construe plaintiff's "Motion for a Protective Order" as a motion for an order

enjoining defendants preliminarily from retaliating against plaintiff for filing this lawsuit. In his motion, plaintiff contends that in late January 2005, he was given an incident report for possession of a weapon and subsequently found guilty of the charge. Recently, on March 16, 2005, he was shaken down, threatened with a conduct report for being out of bounds, placed in a holding cell and forgotten for a number of hours and had his postage stamps confiscated. Plaintiff believes that these acts were taken in retaliation for his having filed this lawsuit.

Plaintiff's claim of retaliation cannot be brought in the context of this lawsuit. In situations in which a plaintiff alleges that state officials have retaliated against him for initiating a lawsuit, it is the policy of this court to require the claim to be presented in a lawsuit separate from the one which is alleged to have provoked the retaliation. This is to avoid the complication of issues which can result from an accumulation of claims in one action.

The court recognizes an exception to this policy only where it appears that the alleged retaliation would directly, physically impair the plaintiff's ability to prosecute his lawsuit. In this case, plaintiff suggests that when prison officials confiscated his postage stamps, he was unable to mail anything without the help of others. However, given plaintiff's obvious ability to file his motions with this court, this temporary situation did not physically impair plaintiff's ability to prosecute his lawsuit. If plaintiff files a new lawsuit raising his claim of

retaliation, he is free to move for a preliminary injunction in the context of that lawsuit.

In the document titled “Plaintiff’s Rebuttal to Defendant’s Answer . . . ,” plaintiff replies to factual statements made in defendants’ answer and denies the validity of defendants’ affirmative defenses. Fed. R. Civ. P. 12(b) permits defendants to avoid litigation of a case if plaintiff’s allegations of fact, even if accepted as true, would be insufficient to make out a legal claim against the defendants. Although defendants have raised certain affirmative defenses in their answer they have not filed a motion to dismiss. If such a motion were to be filed, plaintiff would be allowed to respond to it. Otherwise, it is not necessary for plaintiff to respond to defendants’ answer. Indeed, Fed. R. Civ. P. 7(a) forbids a plaintiff to submit a reply to an answer unless the court directs a reply to be filed. No such order has been made in this case. Plaintiff should be aware, however, that he is not prejudiced by Rule 7(a). Fed. R. Civ. P. 8(d) provides averments in pleadings to which a response is not allowed are assumed to be denied. Therefore, although plaintiff is not permitted to respond to defendants’ answer, the court assumes that he has denied the factual statements and affirmative defenses raised in that answer.

ORDER

IT IS ORDERED that plaintiff’s motion for a preliminary injunction enjoining defendants from retaliating against him for filing this lawsuit is DENIED.

Further, IT IS ORDERED that plaintiff's reply to the answer will be placed in the court's file but will not be considered.

Entered this 29th day of March, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge