

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

---

CHRISTOPHER ROLLER,

Plaintiff,

v.

Case No. 05-CV-1297 MJD/AJB

GE MEDICAL SYSTEMS INFORMATION  
TECHNOLOGIES, INC.,

Defendant.

---

**DEFENDANT GEMS IT'S MEMORANDUM OF LAW  
IN SUPPORT OF ITS MOTION TO STRIKE PLAINTIFF'S SURREPLY OR, IN THE  
ALTERNATIVE, FOR LEAVE TO FILE A SURRESPONSE**

---

Plaintiff has filed a surreply in response to GEMS IT's reply brief in support of its motion to dismiss. GEMS IT requests that this Court strike Plaintiff's surreply. The Local Rules of Civil Procedure do not allow for a surreply and Plaintiff has not sought leave from this Court to file a surreply. Moreover, Plaintiff's surreply does not respond to any new arguments raised by GEMS IT in its reply, but instead attempts to raise arguments that he failed to raise for no apparent reason in his initial response. For these reasons, Plaintiff's surreply should be stricken.

If the Court does not strike Plaintiff's surreply, GEMS IT would request that the Court grant it leave to file the attached surrespone. GEMS IT should be allowed the opportunity to respond to Plaintiff's surreply given that it raises new legal theories which GEMS IT would have had the right to respond to in its reply had Plaintiff appropriately raised them in his initial response.

**FACTUAL BACKGROUND**

The Court's briefing schedule for GEMS IT's motion states that Plaintiff's opposition to Defendant's motion is to be filed by noon on October 27, 2005 and Defendant's reply

memorandum of law is to be filed by noon on November 4, 2005. (Affidavit of Judith Williams-Killackey, ¶2). On July 18, 2005, Plaintiff filed his response to GEMS IT's motion to dismiss. (Id. at ¶3). On August 26, 2005, GEMS IT filed its reply brief. (Id. at ¶4).

On September 24, 2005, Plaintiff filed a surreply. (Id. at ¶5). Prior to filing this surreply, Plaintiff did not seek leave from the Court to file it. (Id.). In this surreply, Plaintiff raises new legal arguments – in particular, that his claim pursuant to the SDHRA is saved by Minn. Stat. § 541.31(2). (Id.).

### ARGUMENT

#### **I. THIS COURT SHOULD NOT CONSIDER PLAINTIFF'S SURREPLY**

The Local Rules of Civil Procedure clearly state that, “Except with permission of the Court, no memoranda of law will be allowed except as provided in these rules.” Minn. L.R. 7.2. Because the Local Rules do not contemplate the filing of a surreply, and because Plaintiff did not obtain permission from the Court to file it, GEMS IT's motion to strike the surreply should be granted. See In re Buffets, Inc. Securities Litigation, 906 F.Supp. 1293, 1295 n. 3 (D. Minn. 1995) (J. Davis) (refusing to consider surreply filed by Plaintiff because it was not contemplated by the Rules or by Pretrial Order).

Furthermore, Plaintiff cannot raise new legal theories in a reply brief. See Schiffli Embroidery Workers Pension Fund v. Ryan, Beck & Co., 869 F.Supp. 278, 281 (D.N.J. 1994) (declining to consider new arguments raised initially in reply because the opponent has no opportunity to respond). Yet, by filing his surreply, Plaintiff has raised new arguments to which GEMS IT should have had the ability to respond in its reply.

Notably, Plaintiff cannot point to any new legal arguments raised by GEMS IT in its reply brief which would justify his filing a surreply. Instead, GEMS IT's reply simply addresses the arguments raised by Plaintiff in his response. Thus, there is no reason to allow Plaintiff a

surreply. See Apodaca v. Mesa County, Civ. No. 04-1379 at 2 (D.N.M. June 1, 2005) (Williams Aff., Ex. A) (noting that surreplies are disfavored and generally only allowed if a party filing a reply has raised new issues, argument or evidence not addressed in previous briefs); Love v. Smith, 2005 WL 1163143 at \*4 (D.Md. May 17, 2005) (Williams Aff., Ex. B) (striking surreply because filing violated local rule prohibiting surreply and party had opportunity to address arguments since they were not raised for first time in reply).

**II. IF PLAINTIFF'S SURREPLY IS NOT STRICKEN, GEMS IT REQUESTS LEAVE TO FILE THE ATTACHED SURRESPONSE**

If this Court does not strike Plaintiff's surreply, GEMS IT requests that it be granted leave to file the attached surrespone. Plaintiff's surreply raises new arguments. In particular, Plaintiff for the first time in his surreply asserts that his claim is saved by Minn. Stat. § 541.31(2).

Parties cannot raise new legal arguments in a reply brief, thereby preventing the opposing side from having an opportunity to respond to the arguments. Johnson v. PS Illinois Trust, 2005 WL 2035589 at \*6 (N.D. Ill. Aug. 17, 2005) (Williams Aff., Ex. C); Aliwoli v. Gilmore, 127 F.3d 632, 635 (7<sup>th</sup> Cir. 1997). Indeed, the one circumstance in which surreplies are generally allowed is where a party raises an argument for the first time in a reply. See Hammett v. Am. Bankers Ins. Co., 203 F.R.D. 690, 695 n.1 (S.D. Fla. 2001) (granting leave to file surreply where new arguments were raised in reply). Here, it is unequivocal that prior to the filing of his surreply, Plaintiff nowhere alleged that Minn. Stat. § 541.31(2) saved his claim. GEMS IT should be allowed to respond to Plaintiff's arguments regarding this statute.

**CONCLUSION**

Based on the foregoing, GEMS IT respectfully requests that the Court either strike Plaintiff's surreply or, in the alternative, that it be granted leave to file the attached surrespone.

Dated: October 14, 2005.

s/JUDITH A. WILLIAMS-KILLACKEY  
Judith Williams-Killackey  
Minnesota State Bar No. 0280227  
Attorneys for Defendant  
GE Medical Systems Information  
Technologies, Inc.  
QUARLES & BRADY LLP  
411 East Wisconsin Avenue  
Suite 2040  
Milwaukee WI 53202-4497  
Phone: (414) 277-5439  
Facsimile: (414) 978-8702

**CERTIFICATE OF COMPLIANCE WITH WORD COUNT**

This certification states that this Memorandum of Law complies with the length limitation of L.R. 7.1(e) and type size requirements of L.R. 7.1(e) and has 933 words. The software used for the Memorandum and the word count was Microsoft Word and the count applied included all text, including headings, footnotes and quotations.