

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

MICHAEL E. LEWIS,  
Plaintiff,  
v.  
DOT TRANSPORTATION, INC.,  
Defendant.

Case No. 1:16-cv-01918-DAD-EPG

**ORDER GRANTING MOTION TO  
REOPEN DISCOVERY**

(ECF No. 27)

**I. Background**

On December 23, 2016, Plaintiff, Michael E. Lewis, filed this action against Defendant, DOT Transportation, Inc. (ECF No. 1.) Plaintiff did not serve the initial complaint on Defendant, but instead filed an Amended Complaint on June 16, 2017. In the Amended Complaint, Plaintiff brings claims for discrimination and failure to accommodate in violation of the Americans with Disabilities Act (“ADA”); retaliation in violation of the ADA; failure to accommodate in violation of the California Fair Employment and Housing Act (“CFEHA”), and retaliation in violation of CFEHA. (ECF No. 7.) On July 24, 2017, Defendant filed an answer to the Amended Complaint. (ECF No. 11.)

On September 6, 2017, the Court issued a Scheduling Order, setting the following deadlines:

- 1 • May 2, 2018: all non-expert discovery and initial expert witness disclosures;
- 2 • May 18, 2018, rebuttal expert witness disclosures;
- 3 • June 15, 2018, all expert discovery;
- 4 • August 1, 2018, dispositive motions.

5 (ECF No. 15 at 3-4.) The Court also scheduled a mid-discovery status conference for March 7,  
6 2018, and required the parties to file a joint report one week prior to the status conference that  
7 outlined the status of the case, any additional discovery still planned, potential for settlement,  
8 and any other pending issues that would benefit from the Court's assistance or direction. (*Id.* at  
9 4.)

10 On February 28, 2018, the parties filed their joint mid-discovery status report outlining the  
11 status of discovery. (ECF No. 19.) The parties explained that they had not yet completed non-  
12 expert discovery, had not yet engaged in settlement discussions, and that the case was not ripe  
13 for potential settlement. (*Id.* at 2.) At the March 7, 2018, mid-discovery status conference, the  
14 parties were directed to advise the Court, no later than March 30, 2018, on whether the parties  
15 were interested in participating in a court-directed settlement conference. (ECF No. 20.) Based  
16 on the communications received from the parties, the Court set a settlement conference for May  
17 30, 2018. (ECF No. 21.)

18 Approximately a week before the date set for the settlement conference, and after the  
19 May 2, 2018, non-expert discovery deadline had passed, the Court was notified that there were  
20 discovery issues that needed to be addressed and that the settlement conference set for May 30,  
21 2018, should be continued. (*See* ECF No. 22.) On May 24, 2018, the Court held a telephonic  
22 status conference in chambers and off the record to discuss the discovery issues. (*See* ECF No.  
23 23.) Based on information received from the parties during that conference, the Court vacated  
24 the settlement conference and directed Plaintiff to file a motion to reopen discovery no later than  
25 June 6, 2018. (*See* ECF No. 24, 25.)

26 On June 6, 2018, Plaintiff's counsel hand delivered to the Court for filing his motion to  
27 reopen discovery (ECF No. 26). The hand-delivered filing was rejected as non-compliant  
28 because Plaintiff's counsel is required to file all pleadings electronically. *See* Local Rule 133

1 (“Unless excused by the Court or by the electronic filing procedures set forth in these Rules,  
2 attorneys shall file all documents electronically pursuant to these Rules.”). On June 7, 2018,  
3 Plaintiff re-filed his motion electronically. (ECF No. 27.) In his motion, Plaintiff requests that  
4 non-expert discovery be re-opened, and that the Court extend the time permitted for all discovery  
5 by at least one-hundred twenty-three (123) days, from May 2, 2018, to September 2, 2018. (*Id.*  
6 at 13.) Defendant opposes the motion. (ECF No. 28.)

## 7 **II. Discussion**

8 The Court will modify dates set forth in a scheduling order, including a motion to reopen  
9 discovery, only upon a showing of good cause. *See* Fed. R. Civ. P. 16(b); *Johnson v. Mammoth*  
10 *Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992); *Sheridan v. Reinke*, 611 Fed. Appx. 381,  
11 384 (9th Cir. 2015) (applying *Johnson* “good cause” requirement to motions to reopen  
12 discovery).

13 The “good cause” standard primarily considers the diligence of the moving party, and a  
14 court should modify the scheduling order to reopen discovery only if the deadline could not  
15 “reasonably be met despite the diligence of the party seeking” to reopen. *Johnson*, 975 F.2d at  
16 609. In determining whether good cause exists to reopen discovery, courts may consider a variety  
17 of factors, such as:

18 (1) whether trial is imminent, (2) whether the request is opposed, (3) whether the non-  
19 moving party would be prejudiced, (4) whether the moving party was diligent in obtaining  
20 discovery within the guidelines established by the court, (5) the foreseeability of the need  
for additional discovery in light of the time allowed for discovery by the district court, and  
(6) the likelihood that the discovery will lead to relevant evidence

21 *U.S. ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1526 (9th Cir. 1995), *vacated on*  
22 *other grounds*, 520 U.S. 939 (1997).

### 23 A. Whether the Moving Party was Diligent in Obtaining Discovery within the 24 Guidelines Provided by the Court

25 Of the *Schumer* factors, the Court finds the diligence factor to be the most troubling and to  
26 present the closest question for the Court to resolve. According to Plaintiff, he has been  
27 diagnosed with a panic disorder. He contends that the disorder, combined with the adverse side  
28 effects of the medications that he has been taking to treat the disorder, has made it difficult for

1 him to provide counsel with information and generally assist his counsel in prosecuting this case.  
2 Those side effects include the inability to concentrate, to remember things, and brain fog, which  
3 has only recently begun to lift. (*See, e.g.*, ECF No. 27 at 4-5, 8-9, 11-13, 16, 20-22.)

4 Plaintiff served his first round of discovery requests on April 12, 2018. (ECF No. 28 at 3.)  
5 This was only twenty days before the non-expert discovery deadline of May 2, 2018. Plaintiff  
6 does not provide any explanation for his delay in serving written discovery. Defendant has not  
7 responded to the discovery requests, presumably because the requests were not served far enough  
8 in advance of the non-expert discovery deadline to give Defendant the full thirty-day response  
9 time. *See* Fed. R. Civ. P. 33(b)(2).

10 Plaintiff was deposed on April 20, 2018. Plaintiff indicates that during the deposition, he  
11 was still suffering from the lingering effects of brain fog and inability to concentrate. (ECF No.  
12 27 at 8.) The deposition questions and exhibits triggered Plaintiff to remember additional details  
13 about his employment with Defendant that he had not previously shared with his counsel. These  
14 details include the information that Plaintiff had a job performance evaluation by Defendant's  
15 management team in 2011, and possibly also in other years. (*Id.* at 16.) The management team  
16 involved in those evaluations includes Don Worley and Torey Welsh, the two witnesses Plaintiff  
17 seeks to depose.

18 Although both Worley and Welsh were listed by Plaintiff in his initial disclosures as  
19 potential witnesses with knowledge, Plaintiff contends that it was not until his deposition that it  
20 became clear that these two individuals would have direct knowledge relevant to Plaintiff's case.  
21 Plaintiff concedes that Worley and Welsh could have been deposed at an earlier date, but that  
22 his counsel did not think the deposition of these witnesses was needed. Plaintiff also concedes  
23 that the cost of deposing these two witnesses, in light of his extremely limited financial resources,  
24 influenced the decision not to depose these witnesses earlier.<sup>1</sup> It was only after the additional  
25 information was disclosed during Plaintiff's deposition that counsel realized that the deposition  
26 testimony of these two witnesses is critical. (ECF Nos. 27 at 8-9, 29 at 3.)

---

27  
28 <sup>1</sup> Plaintiff states that he was terminated by Defendant in September 2014 and only recently obtained a new position with a different employer.

1 On April 25, 2018, a few days after Plaintiff's deposition and approximately a week before  
2 the close of non-expert discovery, Plaintiff's counsel contacted Defendant's counsel and  
3 requested dates for Worley's deposition. Defendant refused to provide dates, noting that Plaintiff  
4 was past the "reasonable notice" period required for deposition notice. (ECF No. 28 at 3.)

5 On May 8, 2018, a few days after the non-expert discovery deadline, Plaintiff's counsel  
6 received notice of the availability of the transcript of Plaintiff's deposition.<sup>2</sup> On May 10, 2018,  
7 Plaintiff's counsel requested that Defendant stipulate to an extension of the discovery deadline,  
8 but Defendant refused. The next day, Plaintiff tendered to Defendant a proposed stipulation and  
9 order to extend discovery, which Defendant rejected on May 14, 2018. (*See* ECF No. 27 at 15.)  
10 The parties then contacted the Court regarding this dispute.

11 The Court does not find any diligence in Plaintiff serving written discovery. Plaintiff  
12 waited until the end of non-expert discovery, without sufficient time remaining for Defendant to  
13 respond, before serving any written discovery. Plaintiff does not provide any reason for this  
14 delay. The Court finds that Plaintiff was not diligent in seeking this discovery and does not  
15 provide good cause to extend the discovery deadline for the purpose of obtaining responses to  
16 written discovery.

17 As to the depositions, while the Court is troubled by the delay, the Court finds that there  
18 were extenuating circumstances here, including Plaintiff's difficulty assisting his counsel in  
19 prosecuting this case, and his difficulty remembering information that would be helpful to his  
20 case. The lack of this information led Plaintiff's counsel to the conclusion that it was not critical  
21 to depose Worley and Welsh. Plaintiff's long period of unemployment and limited resources to  
22 expend on the costs of discovery were also factors that played into his counsel's hesitancy to  
23 engage in extensive discovery, including the depositions of these witnesses. The Court is  
24 persuaded that these combined circumstances somewhat mitigate and explain Plaintiff's  
25 counsel's delay regarding taking the depositions of Don Worley and Torey Welsh.

26 \\\

---

27 Plaintiff states that he did not receive the email version of Plaintiff's deposition transcript until the very end of  
28 May/beginning of June, and as of the date he filed his motion to reopen discovery, he is still awaiting a hard copy  
and a copy of the exhibits used at the deposition. (ECF No. 27 at 8-9.)

1           B.           The Likelihood that the Discovery will Lead to Relevant Evidence

2           Plaintiff contends, and Defendant does not dispute, that the requested depositions will  
3 likely lead to relevant evidence. The two witnesses that Plaintiff seeks to depose appear to have  
4 information regarding whether Plaintiff was unlawfully discriminated against and whether he  
5 was wrongfully discharged. Plaintiff contends that, without the deposition testimony of the two  
6 witnesses, it is doubtful that the parties can have meaningful settlement discussions. Presumably,  
7 the lack of these depositions (and lack of responses to written discovery served on Defendant)  
8 will also negatively impact Plaintiff's ability to defend against dispositive motions and to  
9 proceed with trial. The Court finds this factor to weigh in favor of reopening discovery as to the  
10 depositions.

11           Plaintiff does not address the need for the written discovery, however. While written  
12 discovery no doubt will lead to relevant information, it is not clear what information is needed  
13 beyond what has already been disclosed through initial disclosures or already in the possession  
14 of the Plaintiff. The Court finds that Plaintiff has not established that written discovery is needed  
15 to obtain relevant evidence in this case.

16           C.           Prejudice to Defendant

17           Defendant contends that it will be prejudiced because immediately after the discovery cut-  
18 off occurred, Defendant's counsel began drafting a dispositive motion. (ECF No. 28 at 6.)  
19 However, Plaintiff served Defendant with written discovery requests and requested a deposition  
20 date for Worley several weeks before the non-expert discovery deadline. Shortly after that  
21 deadline, Plaintiff again reached out and requested Defendant agree to an extension of the  
22 discovery deadlines. Thus, Defendant was on notice prior to the non-expert discovery deadline  
23 that Plaintiff was seeking additional discovery. Defendant also was on notice a week after the  
24 deadline that Plaintiff wanted an extension of the deadline. Any prejudice to Defendant under  
25 these circumstances is minimal. If the Court grants an extension for depositions, the prejudice  
26 to Defendant will be minimal as well.

27           D.           Additional Factors

28           Trial in this case is set to begin on January 19, 2019, and is thus not imminent, which

1 weighs in favor of granting the request to reopen discovery. On the other hand, Defendant's  
2 opposition to the reopening of discovery weighs against reopening.

3 Another factor that has some impact in the Court's decision is that Plaintiff's counsel has  
4 not previously requested an extension of deadlines, and that Plaintiff had agreed to an extension  
5 of time for Defendant to file its answer to the Amended Complaint. This factor weighs slightly  
6 in favor of reopening.

7 Although the question of whether to reopen discovery in this case is a close call, after  
8 weighing the relevant factors, the Court finds good cause exists to reopen discovery for a limited  
9 time and for limited purposes to take the two depositions identified by Plaintiff. However, the  
10 Court will not extend the deadline for written discovery. The Court finds that there was no cause  
11 for Plaintiff's delay in serving discovery and Plaintiff's motion contains very little argument  
12 about the necessity of such discovery. The Court will therefore exercise its discretion and grant  
13 the motion to reopen and extend discovery deadlines, subject to the limits set forth herein.

### 14 **III. CONCLUSION**

15 The Court finds, after a thorough review of the record and arguments of the parties, and a  
16 weighing of relevant factors, that good cause exists for reopening discovery and granting an  
17 extension of the discovery deadlines for a limited purpose described below. Accordingly,

18 The Court GRANTS the motion to reopen and extends the discovery deadlines as follows:

- 19 1. The non-expert discovery deadline is extended to August 10, 2018, for the  
20 limited purpose of allowing Plaintiff to depose witnesses Worley and Welsh.
- 21 2. The initial expert witness disclosures deadline is extended to August 10, 2018.
- 22 3. The rebuttal expert witness disclosures deadline is extended to August 24, 2018.
- 23 4. The expert discovery deadline is extended to September 21, 2018.
- 24 5. The dispositive motion deadline is extended to October 19, 2018.

25 The Parties are directed to inform the Court, no later than August 10, 2018, whether they  
26 want the Court to reset the settlement conference.

27 **IT IS SO ORDERED.**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Dated: June 27, 2018

/s/ Eric P. Gray  
UNITED STATES MAGISTRATE JUDGE