

IN THE UNITED STATES DISTRICT COURT
OR THE EASTERN DISTRICT OF CALIFORNIA

TIMOTHY DUNCAN,

Plaintiff,

No. CIV S-05-2613 FCD JFM P

VS.

ALAN SOARES,

Defendant.

ORDER

Plaintiff has requested the attendance of three incarcerated witnesses at trial.

Plaintiff avers that prison officials and counsel for defendant have been unwilling to provide plaintiff with the current addresses of these witnesses, so he has been unable to secure their declarations as to their testimony. However, plaintiff has provided an affidavit stating that two of these witnesses have not refused to testify and confirmed they have given verbal support for plaintiff's claim agreeing to testify. (June 4, 2007 Motion at 4.) Defendant has filed objections.

Specifically, plaintiff contends inmate Patrick Donahue will testify as to the condition of the grinder and use of broken tools by defendant. Donahue will also testify that defendant told Donahue "in detail" what happened on February 1, 2005, and admitted that defendant felt bad about the incident because he knew that the grinder was broken. Plaintiff will be permitted to call this witness; defendant will be required to provide the court with inmate

1 Patrick Donahue's inmate locator number as well as his current location to enable the court to
2 issue a writ for his attendance at trial.

3 Plaintiff seeks the testimony of Rudy Mercado. Plaintiff states defendant also told
4 Mercado about the events of February 1, 2005. However, plaintiff has not identified any party
5 admission or other relevant testimony that Mercado might provide. Accordingly, plaintiff's
6 motion to call Mercado will be denied.

7 Inmate Billy Flemming has refused to testify and plaintiff seeks an order requiring
8 him to testify at trial. Plaintiff contends Flemming heard defendant admitting he refused plaintiff
9 the required safety gear to perform the task using broken machinery. (Id. at 17.) Flemming will
10 also testify as to his personal knowledge of working with defendant. Plaintiff's motion will be
11 granted and defendant will be directed to provide the court with inmate Billy Flemming's inmate
12 locator number as well as his current location to enable the court to order his attendance at trial.

13 With regard to the remaining witnesses, plaintiff has failed to tender witness fees
14 or address same, despite this court's prior orders requiring same. (July 28, 2006 Scheduling
15 Order; July 3, 2007 Order at 1-2.) Accordingly, plaintiff's motion to subpoena unincarcerated
16 witnesses is denied in toto. However, defendants have noted their intention to call seven of the
17 same witnesses plaintiff has requested:

- 18 1. Sgt. Brant, CSP-Sacramento
- 19 2. Officer Hanna, CSP-Sacramento
- 20 3. Officer Lucero, CSP-Sacramento
- 21 4. Dr. Sahota, CSP-Sacramento
- 22 5. R.N. Chris, CSP-Sacramento
- 23 6. Phil Albee, Supervisor of Building and Trades, CSP-Sacramento
- 24 7. Officer Stone, CSP-Sacramento

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1 To the extent any of these seven witnesses are called as witnesses by defendants, plaintiff is
2 entitled to call them as witnesses, too.

3 Accordingly, IT IS HEREBY ORDERED that plaintiff's June 4, 2007 motion for
4 the attendance of witnesses is granted in part and denied in part:

5 1. Plaintiff may call Patrick Donahue and Billy Flemming as witnesses on his
6 behalf.

7 2. Within thirty days, defendant shall provide the court with the inmate locator
8 numbers and current custodial location for inmates Patrick Donahue and Billy Flemming.

9 Subsequently, the court will issue the appropriate orders and/or writs to facilitate their attendance
10 at trial.

11 3. Plaintiff's motion to compel the attendance of Rudy Mercado is denied.

12 4. Plaintiff's motion to compel the attendance of unincarcerated witnesses by
13 subpoena is denied, with the exception that plaintiff may call those witnesses called by defendant
14 as witnesses at trial.

15 DATED: February 4, 2009.

16 
17 John F. Ward
18 UNITED STATES MAGISTRATE JUDGE

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