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

MICHAEL A. HUNT,

Plaintiff,

No. CIV S-09-3525 KJM GGH P

vs.

D. FIELDS,

Defendant.

ORDER

_____/

Plaintiff, a state prisoner proceeding pro se and in forma pauperis, seeks relief pursuant to 42 U.S.C. § 1983. Pending before the court are the following motions: (1) plaintiff's motion to file a second amended complaint (Doc. No. 30); (2) plaintiff's motion for sanctions (Doc. No. 33); (3) defendant's request to excuse her late compliance with the court's July 11, 2011 order granting in part plaintiff's motion to compel (Doc. No. 32); and (4) defendant's motion to strike plaintiff's motion for summary judgment as untimely, or, in the alternative, for an additional 30 days in which to file her own motion for summary judgment (Doc. No. 39).

The undersigned will address each of these motions in turn.

Background

The gravamen of this action, which is currently proceeding on the original complaint filed on December 11, 2009 (see Doc. Nos. 15, 17), is that defendant Fields violated

1 plaintiff's First Amendment right to file inmate grievances and pursue civil rights litigation. The
2 complaint reads that plaintiff was transferred to CSP-Sacramento's Facility C in August 2007 as
3 a non-gang-affiliated prisoner, and that in February or March 2008, Fields retaliated against
4 plaintiff for filing past grievances by adding him to C-Facility's list as a Blood gang associate.
5 (Doc. No. 1, hereinafter "Complaint," at ¶¶ 7, 10, 24). As a result, plaintiff was included in
6 lockdowns of Blood and Crip gang associates in April and June 2008, and continues to suffer
7 restrictions and hardships as a result of being identified as a gang associate among the prison
8 population. (*Id.* at ¶¶ 11, 13, 17). Plaintiff further alleges that, after defendant Fields was served
9 with plaintiff's complaint and summons in another legal action in August 2008, Fields retaliated
10 by having plaintiff fired from his job assignment. (*Id.* at ¶ 16). Plaintiff alleges that, due to
11 Fields' retaliatory actions, he remains vulnerable to future lockdowns and associated injuries as a
12 purported Blood associate. (*Id.* at ¶¶ 28, 29).

13 On June 7, 2010, this court screened plaintiff's original complaint and amended
14 complaint, and dismissed the amended complaint with leave to file a second amended complaint
15 within 28 days. (Doc. No. 15). On September 1, 2010, after plaintiff failed to file a second
16 amended complaint, the court dismissed defendant Walker with prejudice and directed that the
17 case proceed on the original complaint. (Doc. No. 18).

18 On July 26, 2010, this court entered a "Discovery and Scheduling Order," setting
19 various deadlines for discovery and dispositive motions in this action. (Doc. No. 16) Discovery
20 was to be completed by October 29, 2010, and dispositive motions were to be filed by January
21 28, 2011. By order dated December 1, 2010, this court extended the discovery deadline,
22 pursuant to plaintiff's unopposed motion, for an additional forty-five days, or through Tuesday,
23 January 18, 2011.¹ (Doc. No. 23) Prior to the close of the extended discovery deadline, plaintiff
24

25 ¹ Because the actual deadline fell on a weekend, the deadline is moved to the next court
26 business day. *See* Fed. R. Civ. Proc. 6(a)(1)(C). In this case, the next weekday, Monday,
January 17, 2011 was a court holiday, so the deadline is moved to Tuesday, January 18, 2011.

1 filed a motion to compel defendant's responses to discovery. (Doc. No, 24)

2 By order filed July 11, 2011, this court granted in part plaintiff's motion to
3 compel, in which plaintiff had sought, among other things, a response to his request for an
4 "Inmate Interview Form" completed when defendant allegedly interviewed plaintiff in February
5 and March 2008. (Doc. No. 29) Defendant had initially responded that no such document could
6 be located. See Doc. No. 27, p. 3. In response, this court noted:

7 [D]efendant is a CDCR employee who... may be presumed to have a legal right to
8 obtain the requested record upon demand. Moreover, the requested document is
9 highly relevant to plaintiff's allegations Any interview that defendant
10 conducted with plaintiff during this two-month period is likely to shed light on her
11 basis for classifying him as a Blood gang associate (if indeed she did so), and may
12 lead to the discovery of admissible evidence of retaliatory motive or lack thereof.
13 Defendant does not maintain that the alleged interview never took place, nor that
14 this particular document does not exist. If it does exist, it is not clear to the court
15 why defendant would be unable to locate a document that presumably was filed as
16 a matter of course in the prison's recordkeeping system. The court will therefore
17 grant plaintiff's motion as to RFP No. 7 and instruct defendant to redouble her
18 efforts to locate the document.

14 Doc. No. 29 at pp. 6-7. The supplemental responses were due on August 4, 2011.

15 In her request to respond to the court's order beyond time, defendant's counsel
16 declares that she went to the California State Prison-Sacramento on August 2, 2011 "to review
17 Plaintiff's central file, and to search for a copy of the interview notes that were completed during
18 the lockdown in question." Doc. No. 32, p. 2, ¶ 5.

19 In her supplemental response, defendant again reports that she is unable to locate
20 the requested document:

21 Defendant has been unable to locate this document. Plaintiff, along with all other
22 inmates in the unit, were [sic] interviewed following the incident that took place
23 on February 7, 2008. Those documents were collected and maintained by the
24 Facility Captain. A diligent search was conducted and those documents could not
25 be located.

24 Doc. No. 38, Ex. B. The copy of the supplemental responses provided to the court is signed by

25 _____
26 See Fed. R. Civ. Proc. 6(a)(6)(A).

1 counsel for the defendant.

2 A. Plaintiff's Motion to File A Second Amended Complaint (Doc. No. 30)

3 On June 7, 2010, this court dismissed plaintiff's first amended complaint with
4 leave to amend the complaint within 28 days. On July 21, 2011, more than a year after
5 expiration of the twenty-eight day period, plaintiff filed a motion for leave to file a second
6 amended complaint. (Doc. No. 30.)

7 The Federal Rules of Civil Procedure provide that a party may amend his or her
8 pleading "once as a matter of course within: (A) 21 days after serving it, or (B) ... 21 days after
9 service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f),
10 whichever is earlier." Fed. R. Civ. P. 15(a). "In all other cases, a party may amend its pleading
11 only with the opposing party's written consent or the court's leave. The court should freely give
12 leave where justice so requires." Id.; see also E.D. Local Rule 220. Although the allegations of a
13 pro se complaint are held to "less stringent standards than formal pleadings drafted by lawyers,"
14 Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam), plaintiff is required to comply with the
15 Federal Rules of Civil Procedure and the Local Rules of the Eastern District of California.

16 Having reviewed the amended pleading, the court concludes that justice does not
17 require leave to amend in this instance, because the changes proposed by the plaintiff do not alter
18 the underlying gravamen of the suit. The proposed second amended complaint does not add any
19 additional defendants or legal causes of action. Instead, plaintiff "seeks to clarify and simplify
20 the factual allegations contained in the original complaint," based in part upon what he has
21 learned in discovery. See Doc. No. 30, p. 4.

22 For example, plaintiff seeks to clarify that defendant is being sued in her official
23 capacity, as well as in her individual one. The original complaint does not specifically articulate
24 the capacity in which defendant is sued, a fact previously noted by this court in overruling
25 defendant's custody and control discovery objections:

26 In this case, plaintiff did not specify in what capacity he sued the defendant.

1 However, he did ask for injunctive relief in the complaint, including relief which
2 exceeded a simple order vis-a-vis the named defendant to restrain individual
3 action Therefore, it can only be presumed that the defendant has been sued in
 her official capacity on account that the relief requested, at least in part, could not
 be obtained against a defendant in individual capacity status.

4 Doc. 29, p. 5.

5 Thus this action continues to proceed on the original complaint, as outlined in the
6 June 7, 2010 order.

7 B. Defendant's Request to Respond to the Court's Order, Issued July 11,
8 2011, Beyond Time (Doc. No. 32) and Plaintiff's Motion for Sanctions
9 (Doc. No. 33)

10 Plaintiff seeks sanctions, pursuant to Federal Rule of Civil Procedure 37, for
11 defendant's failure to comply timely with the court's July 11, 2011 order granting in part and
12 denying in part plaintiff's motion to compel discovery. Defendant has filed a request to excuse
13 her late compliance with the court's order, explaining that, because of a mistake in counsel's
14 office, the responses were not timely served.

15 Plaintiff's Reply, dated September 7, 2011 (Doc. No. 38), reads that plaintiff has
16 now received supplemental responses to his request for admission, his request for production of
17 documents, and his interrogatory requests. Plaintiff was served with the documents on August
18 26, 2011 and August 29, 2011, a delay of twenty-one and twenty-five days from the original due
19 date of August 4, 2011. Nevertheless, plaintiff continues to seek sanctions (1) because the
20 responses were late; and (2) because defendant did not produce any documents in its
21 supplemental response to the plaintiff's request for documents.

22 Defendant's opposition to plaintiff's motion for sanctions does not address
23 plaintiff's allegation that the supplemental response to the document request is insufficient in
24 light of the court's prior order. See Doc. No. 34. However, defendant reports that her counsel
25 has examined the file, and is unable to locate the requested documents. In light of defendant's
26 efforts to produce the requested document, and her counsel's representation that the document is

1 not available, the court will not sanction defendant for her inability to comply with the court's
2 prior order.

3 As to defendant's untimeliness in responding to the July 11, 2011 order, the court
4 will not sanction defendant for the short delay occasioned by the errors in counsel's office.
5 Plaintiff has now received the responses, and has not identified any specific harm related to the
6 delay. Accordingly, defendant's request to excuse counsel's late compliance with the court's
7 July 11, 2011 order (Doc. No. 32) is granted, and plaintiff's motion for sanctions (Doc. No. 33) is
8 denied.

9 C. Defendant's Motion to Strike Plaintiff's Motion for Summary Judgment
10 (Doc. No. 39)

11 Defendant seeks to strike plaintiff's motion for summary judgment, alleging that it
12 is untimely filed pursuant to this court's July 26, 2010 scheduling order. The court notes that
13 there has been at least one ordered modification of the schedule (Doc. No. 23), and that the
14 defendant has only recently served plaintiff with supplemental discovery responses. Because
15 defendant does not articulate any prejudice suffered by defendant as a result of the delay, the
16 court will deny the motion to strike.

17 Defendant's motion to strike plaintiff's motion for summary judgment as untimely
18 is denied. Defendant's request for 30 days to oppose plaintiff's motion and to file a cross motion
19 for summary judgment is granted.

20 Any opposition and/or cross-motion for summary judgment by defendant shall be
21 filed within 30 days of the filing date of this order. Any additional briefing on the motion(s) for
22 summary judgment must be done in compliance with Local Rule 230(1).

23 Accordingly, it is hereby ORDERED that:

- 24 (1) Plaintiff's motion to file a second amended complaint (Doc. No. 30) is
25 denied;
26 (2) Plaintiff's motion for sanctions (Doc. No. 33) is denied;

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(3) Defendant's Request to Respond to the Court's Order Issued July 11, 2011 Beyond Time (Doc. No. 32) is granted; and

(4) Defendant's motion to strike plaintiff's motion for summary judgment as untimely (Doc. No. 39) is granted in part and denied in part.

The court shall address the remaining, pending motion for summary judgment (Doc. Nos. 35, 36, 37) after completion of briefing on the motion and any cross-motion for summary judgment by defendant.

DATED: October 24, 2011

/s/ Gregory G. Hollows
UNITED STATES MAGISTRATE JUDGE

GGH:rb
hunt3525.mts.wpd