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

GARY L. HARPOOL,

Plaintiff,

No. CIV S-10-1253 MCE GGH P

vs.

M. BEYER, et al.,

Defendants.

ORDER

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By order, filed on October 25, 2011, this court vacated the filing date of plaintiff's then pending motion to compel discovery as amended and deemed the amended motion as plaintiff's notice of motion, filed on October 25, 2011, pursuant to L.R. 251(a). See docket # 54. Discovery was re-opened for the limited purpose of adjudicating this motion and defendants' counsel was directed to meet and confer with plaintiff to resolve discovery disagreements, and if matters remained unresolved, to submit a joint statement re: discovery disagreement, per L.R. 251(c), within twenty-one days. See, id. Defendants' counsel submitted a joint statement timely, evidently following a telephonic meet-and-confer with plaintiff. See docket # 57.

Plaintiff's Allegations

Plaintiff now proceeds against defendants Correctional Officer (C/O) Beyer; C/O Carter; and Correctional Sergeant Fowler in the remaining allegations of the first amended complaint. On April 29, 2009, defendant C/O Beyer ordered plaintiff to pack his property for a

1 move to a different housing unit despite plaintiff's explanation to him that he had physical  
2 limitations and qualifying disabilities under the Americans With Disabilities Act (ADA) and that  
3 he had been ordered by the chief medical officer not to lift more than two pounds. First  
4 Amended Complaint (FAC), p. 3. Plaintiff tried to move several boxes to show defendant Beyer  
5 the chrono showing he had had recent surgery on the ulnar nerve in his left hand, which had  
6 caused atrophy of the muscle. Id. In doing so, he re-injured his ulnar nerve causing extreme pain  
7 and more muscle atrophy. Id. at 4. Plaintiff asked to speak to a lieutenant or sergeant; instead,  
8 defendant Beyer hand-cuffed him, placed him in Administrative Segregation and issued false  
9 misconduct charges against him alleging he was delaying a peace officer and refusing to move.  
10 Id., at 3-4, 15, 25-29.

11 Plaintiff claims that the day before, on April 28, 2010, defendant C/O Carter had  
12 made false allegations against him (plaintiff) to defendant Corr. Sgt. Fowler which had led to  
13 defendant Fowler's threatening to move plaintiff if he were disrespectful toward any C/O. FAC,  
14 p. 4. Defendant Carter accused plaintiff of "snitching on the C/O's" by writing inmate  
15 grievances and Men's Advisory Council (MAC) Reports to the associate warden. Id. Plaintiff  
16 therefore alleges retaliation against him by these three defendants for his grievances, resulting in  
17 false disciplinary charges in violation of his First Amendment rights. Id. He also alleges that  
18 defendant Beyer violated his rights under the ADA. Id., at 4-5. Plaintiff seeks injunctive relief  
19 and money damages. Id., at 11.

20 Motion to Compel- Joint Statement

21 As correctly identified in the joint statement, plaintiff's motion to compel is  
22 directed to each defendant's responses to plaintiff's requests for admissions, interrogatories,  
23 requests for production of documents and to defendants' failure to respond to plaintiff's  
24 deposition of defendants by written questions. Joint Statement (JS), p. 2.

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1                   Requests for Admissions

2                   Defendant Beyer

3                   As to defendant Beyer, plaintiff propounded twelve requests for admission upon  
4 him. JS, p. 2, Attachment 1. Although it is posited by counsel that defendant denied each request  
5 and stands by each denial, as to request for admission (RFA) no. 7, it appears that the defendant,  
6 objecting on the basis that the request was compound, actually denied and admitted different  
7 portions. Id. As to RFA no. 9, defendant Beyer does not admit or deny having thrown plaintiff's  
8 property, including legal documents, into the trash, but avers that he cannot recall, recounting his  
9 custom and practice as being only to throw away contraband. Id. The court will deem this  
10 response a denial. With those caveats, the court's review demonstrates that, notwithstanding  
11 objections raised as to some requests, defendant Beyer expressly denied each of the other  
12 requests. Id.

13                   Although plaintiff does not believe that defendant Beyer's denials are truthful and  
14 that they contradict statements this defendant made at plaintiff's disciplinary hearing (which  
15 gives rise to the gravamen of plaintiff's claims against this defendant), the court cannot compel a  
16 further response. Attachment no. 13 is a copy of the disciplinary hearing at issue and it is not  
17 readily apparent that defendant Beyer's responses to the RFA contradicts his testimony there.  
18 Plaintiff may seek to impeach this defendant in any declaration or testimony he offers with any  
19 perceived contradictions; however, since it is evident that defendant Beyer stands by his  
20 responses, the court cannot compel any further response from him as to the requests for  
21 admission.

22                   Defendant Carter

23                   Plaintiff propounded eight requests for admission upon defendant Carter. JS, p. 2,  
24 Attachment 4. The court's review shows that as to RFA nos. 1, 2, 3, 6, defendant Carter asserts  
25 that he "lacks sufficient knowledge or information to admit or deny this request."

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1 RFA no. 1: You did have an encounter or confrontation with the  
2 plaintiff Harpool on or about April 27, 2009 and/or April 28,  
2009?

3 RFA no. 2: On or about April 27, 2009 and/or April 28, 2009, you  
4 was [sic] never disrespected by the plaintiff Harpool?

5 RFA no. 3: On April 27th and/or April 28, 2009, you did contact  
6 defendant Fowler via institutional telephone and ask for guidance,  
7 instruction for a confrontation you had with plaintiff Harpool?

8 RFA no. 6: On April 27th and/or April 28, 2009, you did contact  
9 defendant Fowler who came and spoke with you about the log  
10 book that a [sic] inmate was keeping concerning the yard/dayroom  
11 releases?

9 JS, Attachment 4.

10 As to each of these RFA, the response is simply “responding party lacks sufficient knowledge or  
11 information to admit or deny this request for admission.”

12 Fed. R. Civ. P. 36(a)(4) states, in relevant part:

13 An answering party may assert lack of knowledge or information  
14 as a reason for failing to admit or deny only if the party states that  
15 it has made reasonable inquiry and that the information it knows or  
16 can readily obtain is insufficient to enable it to admit or deny.

16 The parties indicate that plaintiff continues to find these (and all) responses untruthful because he  
17 believes them to be contradicted by evidence he intends to present, including the testimony of  
18 other inmates, and because he believes defendant Carter does not, in fact, lack the knowledge or  
19 information to admit or deny the requests. JS, p. 3. Nevertheless, defendant Carter continues to  
20 decline to change any of his responses. Id.

21 The court finds that defendant Carter’s responses to RFA nos. 1, 2, 3, and 6 do not  
22 require a supplemental response. Generally, a defendant must do some basic inquiry about a  
23 certain request, and state the level of inquiry made. However, in a situation where it is not likely  
24 that information was written down or should have been, there may be little or nothing to consult  
25 – the matter is strictly one of memory. The requests at issue would seem to simply inquire about  
26 the defendant’s memory, and the court will presume there were not written materials to consult.

1 *However, given this ruling, and defendant's implicit statement that no material exist with which*  
2 *he could obtain his recollection, if any, of the asserted events, defendant will not be permitted at*  
3 *trial or summary judgment to testify to a restored memory on the subjects of the requests above*  
4 *at odds with his statement here that he simply does not have enough information to give a*  
5 *response on the merits.<sup>1</sup>*

6 As to RFA no. 2, the undersigned finds that request too ambiguous or speculative  
7 to require a further response.

8 With regard to RFA nos. 4, 5, 7 and 8, the court's review indicates that defendant  
9 Carter essentially denied no. 4, objected to no. 5 accurately as compound but nevertheless denied  
10 two of its subparts and claimed a lack of sufficient knowledge or information to respond to the  
11 third, objected to but denied no. 7, objected to but admitted in no. 8 to having had two or three  
12 "verbal encounters" with plaintiff, although he could not recall their nature. The court finds that  
13 compelling further responses as to these requests is not warranted.

14 Defendant Fowler

15 Plaintiff believes that defendant Fowler is not being truthful in his responses to  
16 the requests for admission for the same reasons as expressed against the other defendants, while  
17 defendant Fowler has no inclination to alter his responses. JS, p. 3. The court's review shows  
18 that defendant Fowler denied RFA nos. 4, 5, and 7 and denied no. 6 on belief. JS, Attachment 7.  
19 As to RFA nos. 1, 2 and 3, defendant Carter indicated that he lacked sufficient knowledge or  
20 information to admit or deny this request for admission. Number 1 has been answered  
21 sufficiently. For the same reasons as articulated above with respect to defendant Carter,

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24 <sup>1</sup> The utility of requests for admission to narrow the factual controversies in a case would  
25 be completely eviscerated, if a party were allowed to "play dumb" for the responses, only to have  
26 schooled responses ready for the trier of fact. The court has reviewed Carter's declaration  
submitted as a basis for summary judgment and does not find that Carter is attempting to testify  
to facts he could not recollect for the requests for admissions.

1 defendant Fowler will not be directed to supplement his responses to RFA no. 2 and RFA no. 3.<sup>2</sup>  
2 *However, again, defendant Fowler, because of his implicit response that he inquired as to make*  
3 *himself able to admit or deny that request, will not be permitted to testify to the subject of these*  
4 *requests.*

5           Where plaintiff objects to defendant Fowler’s response when he has given a  
6 definitive one, regardless of whether plaintiff suspects the veracity of the response, the court  
7 cannot compel more.

8           Interrogatories

9           Plaintiff propounded fifteen interrogatories upon defendant Beyer. JS, p. 3,  
10 Attachment 2. Defendant Beyer maintains a response is provided to each. Id. Plaintiff is  
11 evidently dissatisfied with eleven of this defendants’ responses. Id. The court agrees with  
12 defendant Beyer (as well as defendants Carter and Fowler), with respect to Interrogatory (INT)  
13 no. 1, that it is sufficient that plaintiff is provided with the initial of this C/O’s first name (and,  
14 of course, last name) and that plaintiff is not prejudiced by not having the full first name. Id.  
15 The court will not require, for security reasons, that he or any other defendant provide a fuller  
16 name. As to all other interrogatories, while defendant Beyer occasionally has interposed  
17 objections, the court’s review has determined that almost all interrogatories have a substantive  
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19           <sup>2</sup> RFA no. 2: On April 27, 2009 and/or April 28, 2009, you did contract [sic] defendant  
20 Carter via institutional telephone and he asked you for instructions for a confrontation he had  
21 with plaintiff Harpool?

22           Response: Responding Party lacks sufficient knowledge of  
23 information to admit or deny this request for admission.

24           RFA no. 3: On April 27, 2009 and/or April 28, 2009, you did “page” for plaintiff  
25 Harpool via Facility one, “P.A. System” and plaintiff reported to the facility one  
26 program office?

          Response: Responding Party lacks sufficient knowledge of  
information to admit or deny this request for admission.

JS, Attachment 7.

1 response. With respect to INT no. 14, the only question to which defendant Beyer indicates that  
2 he lacks sufficient knowledge or information to respond, the question – whether “on or before  
3 April 29, 2009 ” this defendant spoke with defendants Carter and Fowler, and inquiring as to the  
4 nature of any such conversation – the question is indeed vague and overboard as well. Plaintiff’s  
5 objections to defendant Beyer’s responses to INT nos. 5, 7 and 8 are predicated, according to the  
6 joint statement, upon plaintiff’s belief that the answers are false and that the defendant should  
7 know they are false because he gave contrary responses at plaintiff’s disciplinary hearing. JS, p.  
8 3. Plaintiff’s dissatisfaction with Beyer’s responses to INT nos. 9-15 arise from plaintiff’s belief  
9 that defendant Beyer’s responses to these interrogatories are knowingly false and documentation  
10 will prove this. Id., at 3-4. Defendant Beyer, on the other hand, does not believe his answers  
11 contradict his statements at the disciplinary, but even if that were so, he stands by the answers  
12 and declines to modify them. If plaintiff believes these responses are false and that can be  
13 proven, plaintiff may seek to impeach defendant Beyer at trial. However, this court finds that  
14 since substantive responses are provided, further responses cannot be compelled. Plaintiff’s  
15 motion must be denied as to defendant Beyer’s interrogatory responses.

16 Defendant Carter

17 Plaintiff propounded twelve interrogatories upon defendant Carter. JS, p. 3,  
18 Attachments 5. Plaintiff is evidently satisfied only with defendant Carter’s response to INT no. 2  
19 asking by whom he was employed on April 28, 2009. Id. Plaintiff believes that defendant  
20 Carter’s responses to nos. 3-8 are demonstrably false and defendant Carter evidently disagrees  
21 and declines to change any. JS, p. 4. After the court’s review, for very much the same reason  
22 that defendant Carter will not be required to supplement some of his responses to plaintiff’s RFA  
23 (see above), he must do so with the following:

24 INT no. 6: On April 27th, 2009 or April 28th 2009, did the  
25 Plaintiff Harpool disrespect you and did you write a disciplinary  
26 report against plaintiff Harpool?

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1 Response: Responding Party does not recall whether plaintiff  
2 Harpool did or said anything that was disrespectful to responding  
3 party on April 27 or 28, 2009, but does not believe that he wrote a  
disciplinary report against plaintiff concerning any incident on  
those dates.

4 INT no. 7: On April 27th, 2009 or April 28th 2009, did you contact  
5 Sergeant Fowler/defendant Fowler via Inst. Telephone and ask for  
6 guidance, instructions for a confrontation you had with plaintiff  
7 Harpool?

8 Response: Responding Party does not recall and lacks sufficient  
9 information or belief to provide any further answer to this  
10 interrogatory.

11 INT no. 10: Did defendant Fowler come and speak to you about the  
12 log book that a [sic] inmate was keeping concerning the  
13 yard/dayroom releases?

14 Response: Responding Party objects to this interrogatory on the  
15 ground that it is vague and to time. Responding Party does not  
16 recall that [sic] Sergeant Fowler came to speak with him about a  
17 log book that an inmate was keeping concerning yard/dayroom  
18 releases.

19 INT no. 11: Have you ever had problems and/or wrote any  
20 disciplinary reports against plaintiff Harpool on or prior to April  
21 28, 2009.

22 Response: Responding Party does not recall writing any  
23 disciplinary reports against plaintiff on or before April 28, 2009.

24 As to the preceding responses, defendant Carter does not indicate that he has done  
25 anything beyond consulting his memory in order to provide a response. But again, the nature of  
26 the information sought would tend to be a “memory only” situation. *But once more, having been  
presumed to have made the inquiry required of the rules, defendant Carter will not be permitted  
at trial to have an epiphany with respect to the information requested.*

#### Defendant Fowler

27 Plaintiff propounded eight interrogatories upon defendant Fowler. JS, p. 3,  
28 Attachment 8. Apparently, plaintiff is only satisfied with this defendant’s response to INT. no. 2,  
29 wherein Fowler informed plaintiff that he was employed by the California Department of  
30 Corrections and Rehabilitation [on April 27-28, 2009]. The court will not reprise the parties’



1 positions as to this defendant's other responses. The motion is denied. *Fowler again will be*  
2 *bound by his responses in any testimony that he gives.*

3 Requests for Production of Documents

4 As noted in the joint statement, plaintiff propounded three identical requests to  
5 each defendant. JS, p. 4, Attachments 3, 6 & 9. The first two requests seek production of  
6 plaintiff's medical and central prison file records; in RFA no. 1, he asks for all of his medical and  
7 central file records from January 2008 to the present and in RFA no. 2, he seeks all of his  
8 medical and central file records "to be produced before any deposition and/or jury trials." Id.  
9 The third request asks for "the (ADA) log book that was in building #3 at CSP-Solano on or  
10 about April 27, 2009 and/or April 28, 2009" to defendant Fowler and for production of the same  
11 logbook for "on or about April 29, 2009" to defendants Beyer and Carter. JS, Attachments 3, 6  
12 & 9. Defendants have objected that they do not have possession, custody or control of plaintiff's  
13 medical and central file records and have advised plaintiff in their responses that he can "inspect  
14 his medical file through established procedures at that institution where he is housed." Id.

15 In the joint statement, defendants' counsel explains that when plaintiff served his  
16 discovery requests upon defendants he was no longer housed at CSP-Solano, where the events  
17 from which this case arises occurred and where defendants work. JS, p. 5. Rather at that time,  
18 plaintiff was housed at Pleasant Valley State Prison (PVSP), where he remains; thus, "if  
19 defendants ever had possession, custody, or control of Harpool's medical and central file records,  
20 they did not have such once Harpool was transferred to PVSP." Id. During their telephonic  
21 conference, defendants' counsel offered to help ensure that arrangements were made promptly  
22 for plaintiff's inspection of his medical and central files if plaintiff made a request through the  
23 established channels such as through his counselor. Id. However, because plaintiff believes  
24 defendants could provide the records through computer access, he continues to demand that the  
25 defendants produce the documentation. Id.

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1 Defendants also state that they will not be taking any deposition of plaintiff (with  
2 respect to RFA no. 2) as discovery is closed (id.) (that is, with respect to all discovery but this  
3 motion). They also assert that should this case go to trial, plaintiff will have access to  
4 defendants' list of trial exhibits. Id. Also, of course, plaintiff would have pre-trial access to  
5 defendants' intended trial exhibits pre-trial when they are exchanged between the parties.

6 As to access to his medical and central records, the court will require defendants'  
7 counsel to ascertain that plaintiff has prompt access to them at his present facility, should  
8 plaintiff wish to inspect them there, as these records should have accompanied plaintiff to PVSP,  
9 but defendants themselves will not be required to produce any such records at this time. As to  
10 plaintiff's third request, defendants stated that they lacked possession, custody or control of the  
11 ADA logbook in CSP-Solano building 3 on April 29, 2009, but plaintiff maintains that as one or  
12 more of the defendants work in that area that they have control of what he has requested. JS, pp.  
13 5-6. Defendants dispute that use of the log book in their work area means that they have control  
14 of it and refuse to alter their response.

15 Defendants will be required to produce the portion of the ADA logbook  
16 requested. Plaintiff has sued the defendants in both their official and individual capacities and  
17 has sought injunctive relief as well as money damages. Although plaintiff's subsequent transfer  
18 has likely rendered his claims for injunctive relief moot, see, e.g., Sample v. Borg, 870 F.2d 563  
19 (9th Cir. 1989); Darring v. Kincheloe, 783 F.2d 874, 876 (9th Cir. 1986), at this point plaintiff  
20 still proceeds against the defendants in their official capacities and, at a minimum, defendant  
21 Fowler, in his capacity as a Correctional Sergeant, should have sufficient control of the log book  
22 to be able to produce the requested documentation. The documentation appears to be particularly  
23 relevant since plaintiff has sued at least one defendant, C/O Beyer, pursuant to the ADA.

24 *Deposition by Written Questions*

25 Plaintiff purported to propound, under Fed. R. Civ. P. 31, "Depositions by Written  
26 Questions" upon each defendant. See JS, p. 6, Attachments 10-12. Under Fed. Rule 31(a)(3), in

1 the required notice that a party who wishes to depose a person by written questions, inter alia,  
2 “the name or descriptive title and address of the officer before whom the deposition will be  
3 taken” must be stated. Under Rule 31(b), “[t]he party who noticed the deposition must deliver  
4 to the officer a copy of all the questions served and of the notice.” Thereafter, the officer is to  
5 take the testimony of the deponent, prepare and certify the deposition and return it to the  
6 deposing party. As defendants observe, plaintiff failed to comply with the requisites for taking  
7 depositions by written questions. In addition, the court’s review indicates that plaintiff’s  
8 deposition questions largely duplicate his requests for admission and/or interrogatories  
9 propounded upon the defendants. The motion as to the plaintiff’s deposition by written questions  
10 must be denied.

11 Motion for Summary Judgment

12 Defendants filed a motion for summary judgment on October 26, 2011, to which  
13 plaintiff filed his opposition, after which defendants filed a subsequent reply. In his November 7,  
14 2011, opposition, plaintiff noted, inter alia, that discovery had remained re-opened for the limited  
15 purpose addressed herein. Plaintiff will be granted an opportunity to supplement his opposition  
16 and defendants to supplement their reply, as set forth below.

17 Accordingly IT IS ORDERED:

18 1. Plaintiff’s motion to compel discovery, deemed filed on October 25, 2011 (for  
19 which limited purpose discovery has been re-opened) is denied in part and granted in part, as  
20 follows:

21 a) DENIED as to defendant Beyer’s responses to plaintiff’s requests for admission  
22 (RFA);

23 b) DENIED as to defendant Carter’s responses to RFA nos. 1, 2, 3 and 6, as set  
24 forth above;

25 c) DENIED as to defendant Fowler’s responses;

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1 d) DENIED as to defendant Beyer's responses to plaintiff's interrogatories, set  
2 one;

3 e) DENIED as to defendant Carter's responses to plaintiff's interrogatories;

4 f) DENIED as to defendant Fowler responses to interrogatories;

5 g) GRANTED as to plaintiff's request for production of documents no. 3, directed  
6 to defendants, but DENIED as to plaintiff's requests for production of documents, nos. 1 and 2,  
7 however, defendants' counsel must ensure plaintiff has prompt access to his medical and central  
8 file records at PVSP if plaintiff wishes to inspect them there; plaintiff has twenty-one days from  
9 the filed date of this order to inform defendants of his decision in that regard;

10 h) DENIED as to plaintiff's "Deposition by Written Questions," deficiently served  
11 upon the defendants.

12 2. Plaintiff may supplement his opposition to defendants' pending summary  
13 judgment motion within forty-five days of the date of this order and defendants may supplement  
14 their reply within seven days thereafter, after which the motion will be deemed submitted.

15 DATED: February 16, 2012

16 /s/ Gregory G. Hollows  
17 UNITED STATES MAGISTRATE JUDGE

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