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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ARTHUR RAY DEERE, Sr.,
Plaintiff,
v.
JOE LIZARRAGA, ,
Defendant.

No. 2:16-cv-1694 DB P

ORDER

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with an action under 42 U.S.C. § 1983. Plaintiff alleges the air quality at Mule Creek State Prison (“MCSP”) was so poor that it worsened his Chronic Obstructive Pulmonary Disease (“COPD”) and his overall health. Before the court are two motions. Plaintiff seeks “whistleblower protection” for a prison employee witness. (ECF No. 33.) In addition, plaintiff moves to re-open discovery. (ECF No. 34.) For the reasons set forth below, the court will deny plaintiff’s motion for whistleblower protection and grant plaintiff’s motion to re-open discovery.

BACKGROUND

Plaintiff is currently incarcerated at the California Institution for Men. This case is proceeding on the Eighth Amendment claim in plaintiff’s second amended complaint. (ECF No. 19.) Plaintiff’s allegations involve conduct that occurred when he was incarcerated at MCSP. Plaintiff alleges defendant Lizarraga, the warden at MCSP, was aware that plaintiff was a high

1 risk medical inmate with chronic COPD and emphysema but nonetheless exposed plaintiff to
2 hazardous materials, including dust, pollens, and asbestos. Plaintiff alleges he suffered daily
3 asthma attacks and constant stress that aggravated his heart condition and that his lung condition
4 worsened. The court found these allegations sufficient to state a claim that defendant was
5 deliberately indifferent to plaintiff's serious medical needs in violation of the Eighth Amendment.
6 (See ECF No. 21.)

7 On February 28, 2018, defendant filed an answer. (ECF No. 28.) On March 1, the court
8 issued a Discovery and Scheduling Order, which set deadlines of June 22, 2018 for discovery and
9 September 14, 2018 for pretrial motions. (ECF No. 29.) On July 13, 2018, plaintiff filed the
10 present motions. Each is addressed below.

11 MOTION FOR WHISTLEBLOWER PROTECTION

12 Plaintiff states that he is seeking a court order granting "whistleblower protection" to an
13 employee of the California Department of Corrections and Rehabilitation ("CDCR") who,
14 plaintiff alleges, informed plaintiff about air-borne asbestos generated by a rock quarry near
15 MCSP. (ECF No. 33.) Plaintiff contends whistleblower protection is necessary because
16 defendant "could and would retaliate against this employee." Plaintiff asks the court to order
17 defendant to refrain from questioning this witness before trial. Plaintiff also appears to seek
18 permission to withhold this witness's name until trial. (Id. at 3.)

19 Defendant argues that state and federal whistleblower laws provide protections for
20 employees and those protections must be sought by the employees. (ECF No. 36.) Defendant is
21 correct. California's Whistleblower Protection Act provides for a cause of action by an employee
22 who suffered an adverse employment action as a result of protected activity. See Robles v.
23 Agreserves, Inc., 158 F. Supp. 3d 952, 1007-08 (E.D. Cal. 2016); Cal. Lab. Code § 1102.5(b).
24 Similarly, the whistleblower protections contained in the federal Clean Air Act and Toxic
25 Substances Control Act provide for actions by employees against employers who have retaliated
26 against them. See 42 U.S.C. § 7622(b)(1) (Clean Air Act); 42 U.S.C. § 2622(b)(1) (Toxic
27 Substances Act). Additionally, plaintiff lacks standing to seek whistleblower protection for a
28 third party CDCR employee.

1 Plaintiff's motion can also be construed as seeking a protective order preventing
2 defendant from contacting this witness prior to any trial and, possibly, to allow plaintiff to refuse
3 to identify the witness before trial. In opposing the motion, defendant relies on the standards for
4 issuance of a protective order during discovery under Federal Rule of Civil Procedure 26.
5 However, this issue is not arising during discovery so Rule 26 is not applicable.

6 Rather, the court appears to have discretionary authority to issue a protective order upon a
7 showing of good cause to prevent interference with a potential witness, Disability Rights New
8 Jersey, Inc. v. Velez, Civ. No. 10-3950(DRD), 2011 WL 2937355, at *4 (D. N.J. July 19, 2011),
9 or because a witness fears retaliation, Ben David v. Travisono, 495 F.2d 562, 564 (1st Cir. 1974)
10 (protective order may be appropriate where witness faces a reasonable fear of retaliation).¹ To
11 show good cause, a plaintiff must present evidence of conduct that would give rise to a reasonable
12 fear of interference with a witness. Velez, 2011 WL 2937355, at *5; Adams v. NaphCare, Inc.,
13 No. 2:16-cv-229, 2016 WL 10492102, at *10 (E.D. Va. July 25, 2016), rep. and reco. adopted,
14 2016 WL 4618894 (E.D. Va. Sept. 6, 2016). A plaintiff may also be required to show that the
15 court's factfinding "may be materially impaired unless a protective order is entered." Adams,
16 2016 WL 10492102, at *10.

17 In the present case, plaintiff provides no basis for this court to find that the unnamed
18 CDCR employee would face retaliation or any sort of harassment if he were to be identified as a
19 witness in this case. The court finds no basis for issuance of the protective order plaintiff seeks.

20 **MOTION TO RE-OPEN DISCOVERY**

21 In his second motion, plaintiff seeks to re-open discovery. In the March 1, 2018 order, the
22 court set a discovery deadline of June 22. That order informed the parties that "[a]ll requests for
23 discovery . . . shall be served not later than sixty days prior to" the discovery deadline. That
24 means plaintiff must have served his discovery by April 23, 2018 to be timely.

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26 ¹ In Memphis Invest., GP v. Waite, No. 2:13-cv-1282-JAD-NJK, 2014 WL 547962, at *5 (D.
27 Nev. Feb. 11, 2014), the court found that such a protective order required a showing of
28 entitlement to a preliminary injunction, a higher standard than good cause. Because this court
finds plaintiff fails to meet even a good cause standard, his motion would also fail under a
preliminary injunction standard.

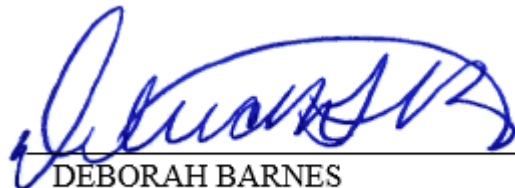
1 Plaintiff seeks to re-open discovery because he mistakenly thought he had until June 22 to
2 serve discovery requests. (ECF No. 34 at 1-2.) He served interrogatories on defendant on May
3 21, 2018. (See id. at 4.) Defendant served his response on July 3, in which he objected to all
4 interrogatories as untimely. (See id. at 7-10.) Pursuant to the mailbox rule, plaintiff filed this
5 motion on July 9 when he placed it in the prison mail. (See id. at 12.)

6 Modification of a scheduling order requires a showing of good cause. Fed. R. Civ. P.
7 16(b)(4). Given plaintiff's pro se status, and his timely filing of this motion shortly after he
8 received defendant's response to his interrogatories, the court finds plaintiff's mistake justifies a
9 finding of good cause to modify the scheduling order. Accordingly, the court will extend the
10 discovery deadline so that plaintiff's interrogatories will be considered timely.

11 For the reasons set forth above, and good cause appearing, IT IS HEREBY ORDERED as
12 follows:

- 13 1. Plaintiff's motion for whistleblower protection (ECF No. 33) is denied.
- 14 2. Plaintiff's motion to re-open discovery (ECF No. 34) is granted. The discovery
15 deadline, which includes any motions to compel discovery, is continued to October 8,
16 2018. The deadline for other pretrial motions is continued to December 15, 2018.
- 17 3. The interrogatories served by plaintiff on May 21, 2018 shall be deemed re-served as
18 of the date of this order. Defendant shall serve a response to those interrogatories
19 within thirty days of the date of this order.

20 Dated: August 21, 2018

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DEBORAH BARNES
UNITED STATES MAGISTRATE JUDGE

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25 DB/prisoner-civil rights/deer1694.whistle
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