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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOHN GALLAGHER,
Plaintiff,
v.
SAN DIEGO UNIFIED PORT
DISTRICT, CITY OF CORONADO,
and DOES 1 through 20, inclusive,
Defendants.

Case No.: 08cv0886 AJB (WVG)
ORDER:
(1) GRANTING PLAINTIFF’S
RULE 56(d) REQUEST FOR
FURTHER DISCOVERY, (Doc. Nos.
91; 101); and
(2) CONTINUING DEFENDANT’S
MOTION FOR SUMMARY
JUDGMENT, (Doc. No. 91).

This is a claim for retaliation under the Americans with Disabilities Act (“ADA”) against the San Diego Unified Port District (“District”). The District moved for summary judgment on Plaintiff John Gallagher’s only remaining cause of action, retaliation under the ADA, arguing the “but-for” standard of causation is applicable to the instant case. The Court heard oral arguments on April 11, 2014 on the appropriate causation standard applicable to Plaintiff’s claim and found Plaintiff’s ADA retaliation claim is indeed governed by the but-for standard and the District did not waive its reliance on this argument. (Doc. No. 96.) The Court granted Plaintiff an opportunity to supplement his brief. Plaintiff did so, filing supplemental briefing on April 30, 2014. This Order follows.

1 **I. BACKGROUND**¹

2 Plaintiff initiated the instant action on May 19, 2008. On May 6, 2009, Plaintiff
3 filed his Third Amended Complaint (“TAC”). On August 31, 2009, the Court granted in
4 part and denied in part the District’s Motion to Dismiss the TAC, thereby dismissing all
5 of Plaintiff’s claims with prejudice except the claims for: (1) discrimination under the
6 ADA, premised upon the District’s denial of an A-9 Anchorage Permit; and (2) retalia-
7 tion under the ADA, also premised upon the District’s denial of the A-9 Anchorage
8 permit. (Doc. No. 43.)

9 On July 27, 2011, this Court granted summary judgment on all of Plaintiff’s
10 claims for the District and entered judgment in favor of the District. (Doc. No. 69.)
11 Plaintiff subsequently appealed. (Doc. No. 74.) The Ninth Circuit Court of Appeals
12 affirmed all of the Court’s dismissal but found that the Court erred in granting summary
13 judgment to the District on Plaintiff’s ADA retaliation claim. The Ninth Circuit held that
14 Plaintiff had made a prima facie case of retaliation and although the District had
15 articulated a plausible non-retaliatory reason for its actions, Plaintiff satisfied the burden
16 of “raising a genuine factual issue as to whether the District’s proffered reason is a
17 pretextual ruse to mask retaliatory action.” The Ninth Circuit remanded the case for
18 further proceeding.

19 The Court held a hearing spreading the mandate on January 30, 2014 and setting
20 the case for trial. During the hearing, counsel for the District alerted the Court to an
21 intervening change in law under the Supreme Court’s June 24, 2013 decision, *University*
22 *of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013). Special
23 briefing regarding the appropriate standard of causation governing Plaintiff’s retaliation
24 claim was ordered and the Court heard oral arguments on the matter on April 11, 2014.
25 A subsequent Order was issued finding the but-for causation standard applicable to
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28 ¹ The Court’s previous Order establishing the causation standard for Plaintiff’s ADA retaliation claim contains a detailed factual background. This Order only contains the procedural background as it relate to the instant matter.

1 Plaintiff's ADA retaliation claim. (Doc. No. 96). While the District's moving papers
2 presented arguments and evidence in the record regarding Plaintiff's ability to show but-
3 for causation, Plaintiff's brief primarily focused on the issue of what causation standard
4 is applicable, as instructed by the Court. Accordingly, Plaintiff was given an opportunity
5 to fully present arguments and evidence to rebut the District's motion.

6 Plaintiff did so on April 30, 2014. In his Response, Plaintiff also requested a
7 reopening of discovery pursuant to Federal Rule of Civil Procedure 56(d). The District
8 replied on May 9, 2014, arguing additional discovery is unwarranted given Plaintiff's
9 "lack of diligence, prejudice to the District, and the unlikelihood of further discovery to
10 lead to any relevant evidence." (Doc. No. 99 at 2.)

11 **II. LEGAL STANDARDS**

12 Rule 56(d) provides a device for litigants to avoid summary judgment when they
13 have not had sufficient time to develop affirmative evidence.² *Burlington Northern Santa*
14 *Fe R. Co. v. Assiniboine and Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 773
15 (9th Cir. 2003). "The general principle of Rule 56(f) is that 'summary judgment should
16 be refused where the nonmoving party has not had the opportunity to discover informa-
17 tion that is essential to his opposition.'" *Price v. Western Resources, Inc.*, 232 F.3d 779,
18 793 (10th Cir.2000) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 250 n.5, 106 S.
19 Ct. 2505 (1986)). District courts should grant a Rule 56(d) motion "fairly freely" where
20 a summary judgment motion is filed before a party has had a realistic opportunity to
21 pursue discovery relevant to its theory of the case. *Burlington*, 323 F.3d at 773.

22 Pursuant to Rule 56(d), this Court has the discretion to either deny or continue a
23 motion for summary judgment "if a party opposing the motion shows by affidavit that,
24 for specified reasons, it cannot present facts essential to justify its position." Thus, this
25 Court has discretion to continue this motion for summary judgment if opposing party
26 needs to discover essential facts. *Cal. Union. Ins. Co. v. American Diversified Sav.*

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28 ² The 2010 Amendments brought former subdivision (f) to subdivision (d) without substantial
change. Fed. R. Civ. Proc. 56 advisory committee's note to 2010 Amendments.

1 *Bank*, 914 F.2d 1271 (9th Cir.1990), *cert. denied*, 498 U.S. 1088, 111 S. Ct. 966 (1991).

2 A party must show how additional discovery would preclude summary judgment and
3 why a party cannot immediately provide “specific facts” demonstrating a genuine issue
4 of material fact. *Mackey v. Pioneer Nat. Bank*, 867 F.2d 520, 523-24 (9th Cir. 1989).

5 The party requesting a continuance must identify by affidavit the specific facts that
6 further discovery would reveal, and explain why those facts would preclude summary
7 judgment. *California v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998).

8 **III. DISCUSSION**

9 Plaintiff argues that the application of the but-for standard of causation necessitat-
10 es the reopening of discovery. In requesting a Rule 56(d) continuance, the moving party
11 must demonstrate by affidavit, specific reasons supporting their position and how further
12 discovery would preclude summary judgment. Plaintiff’s Response failed to meet this
13 standard so the Court requested a supplemental declaration from Plaintiff to specify what
14 discovery was needed and how it would support his position. Plaintiff filed his declara-
15 tion on May 23, 2014. The District filed its Opposition on May 30, 2014.

16 Plaintiff specifies five pieces of discovery needed so that he may effectively
17 demonstrate a genuine issue of material fact with regards to the District’s motion for
18 summary judgment. (Doc. No. 101 at 3-4.) Plaintiff’s counsel states that Mr. Gallagher
19 has not taken any depositions or any written discovery in this case and he relied entirely
20 on indirect evidence in opposing the District’s first summary judgment as well as on
21 appeal. (*Id.* at 2.) The District argues that Plaintiff had more than two years prior to the
22 discovery cut-off date to seek this information, yet he failed to do so. (Doc. No. 102 at
23 3-4.) Though the Court is mindful of the District’s concern that this delay may cause
24 undue prejudice, the Court finds Plaintiff’s position persuasive.

25 Plaintiff was able to rely on indirect evidence to support his claim of retaliation
26 under the lesser motivating factor test. However, given that this Court found the but-for
27 causation standard appropriate after the discovery cut off date on the District’s renewed
28 motion for summary judgment, fairness dictates that Plaintiff should be allowed to fully

1 develop the record of evidence. Plaintiff should have the opportunity to conduct
2 discovery on any alleged “direct evidence” to show that but for engaging in protected
3 activity, the District would not have taken the action it did. The Court disagrees with the
4 District’s objection that Plaintiff failed to identify specific facts. Each of the five items
5 listed, if in existence and true, tends to contradict the District’s position on summary
6 judgment and would establish a genuine issue of material fact that would preclude this
7 Court from granting summary judgment.

8 Though Plaintiff’s ultimate position appears precarious, given the unique postural
9 circumstances of this case and the heavy burden he bears, it is proper to allow further
10 discovery so that Plaintiff may present all the essential facts for this matter. The Court
11 should and will consider the entire record after a meaningful opportunity to fully develop
12 it. Finally, the Court acknowledges the District’s reservations of its right to make further
13 objections to any discovery allowed.

14 **III. CONCLUSION**

15 Accordingly, the Court, in its discretion, GRANTS Plaintiff’s Rule 56(d) request
16 to allow further discovery. Plaintiff’s five discovery requests are permitted but with the
17 following limits:


- 18 (1) Plaintiff’s request under section 8(a) and (b) for internal documents and
19 communication by the District that refer or relate to Gallagher and/or his
20 previous lawsuits against the Port District is permitted but only as related
21 specifically to the decision denying him the anchorage permit; and
- 22 (2) Plaintiff’s request under section 8(d) and (e) should proceed pursuant to
23 Rule 30(b)(6), so that a designated representative of the defendant can
24 address the areas proposed..

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1 Plaintiff has sixty (60) days from the date of this Order to complete discovery **and**
2 file briefing in support of his opposition to the Motion for Summary Judgment. The
3 District may file any response fourteen (14) days after that. No other briefing will be
4 entertained. If oral arguments are deemed necessary, the Court will schedule a hearing on
5 the matter. Otherwise, the matter will be determined on the papers.

6 IT IS SO ORDERED.

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8 DATED: June 2, 2014

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12 Hon. Anthony J. Battaglia
13 U.S. District Judge
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