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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ALLEN HAMMLER,

Plaintiff,

v.

J. HERNANDEZ, et al.,

Defendants.

Case No.: 18cv259-CAB-MDD

**REPORT AND
RECOMMENDATION ON
DEFENDANTS' MOTION FOR
TERMINATING SANCTIONS**

[ECF No. 81]

This Report and Recommendation is submitted to United States District Judge Cathy Anne Bencivengo pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule 27.1(c) of the United States District Court for the Southern District of California.

For the reasons set forth herein, the Court **RECOMMENDS** Defendants' motion for terminating sanctions be **GRANTED** and this case be **DISMISSED WITH PREJUDICE**.

I. INTRODUCTION

Allen Hammler ("Plaintiff"), a state prisoner proceeding *pro se* and *in forma pauperis* initiated this case by filing a civil rights complaint pursuant to 42 U.S.C. § 1983. (ECF No. 1). After disposition of two motions to dismiss,

1 Plaintiff's sole remaining claim is a First Amendment retaliation claim
2 against J. Hernandez and A. Magallanes (collectively, "Defendants"). (ECF
3 No. 33). Plaintiff generally alleges that Defendants retaliated against him
4 for filing inmate grievances. (ECF No. 25 ("FAC") at 3). Specifically, Plaintiff
5 alleges Defendants retaliated against him on November 7, 2016, November
6 15, 2016, November 17, 2016, November 29, 2016, and December 6, 2016 by
7 either acting violently toward Plaintiff or threatening violence. (FAC at 3-
8 25).

9 Presently before the Court is Defendants' motion for terminating and
10 monetary sanctions for Plaintiff's failure to participate in his deposition and
11 to comply with court orders. (ECF No. 81 ("Mtn.")). Plaintiff filed a response
12 in opposition. (ECF No. 84 ("Oppo.")).

13 II. RELEVANT BACKGROUND

14 On March 10, 2020, Defendants attempted to depose Plaintiff. (ECF
15 No. 58-1 at 4). Plaintiff refused to answer any question he felt was not
16 relevant to his claim. (*Id.* at 5). For example, Plaintiff refused to answer
17 whether he had ever used any aliases or other names in the past. (ECF No.
18 58-2 ("Pl. Mar. 10 Depo") 5:14-6:3). Defendants' Counsel (hereinafter,
19 "Counsel") advised Plaintiff that he could lodge objections, but that he still
20 had to answer the questions. (*Id.*). Plaintiff still refused to answer the
21 questions. (*Id.*). The parties took several breaks in the hopes that Plaintiff
22 would cooperate afterward. (*Id.* at 13:24-14:7). Plaintiff still refused to
23 answer any questions unless the deposition proceeded on his terms. (*See id.*
24 at 20:9-16).

25 Plaintiff did not treat Counsel with civility. At one point, he called
26 Counsel a rookie and told her she was "out of water." (*Id.* at 14:5). He also
27 interrupted Counsel while she was advising him of the rules of the

1 deposition, threatened to end the deposition, and accused Counsel of
2 perjuring herself. (*Id.* at 22:16-18). Counsel suspended the deposition on the
3 grounds that Plaintiff failed to meaningfully participate in the deposition.
4 (*Id.* at 23:18-25).

5 On April 9, 2020, Defendants moved to compel Plaintiff's deposition
6 testimony and for monetary sanctions in the amount of \$3,880.78 for the
7 costs and fees associated with the attempted deposition. (ECF No. 58). On
8 April 16, 2020, the Court held a Mandatory Settlement Conference and
9 discussed the motion to compel. (ECF No. 63). The Court declined to impose
10 monetary sanctions because Plaintiff agreed to be re-deposed, but held the
11 motion in abeyance. (*Id.* at 1). The Court admonished Plaintiff that his
12 behavior was inappropriate.

13 On September 23, 2020, Plaintiff was re-deposed. (Mtn. at 7). At the
14 very beginning of the deposition, Plaintiff demonstrated displeasure at being
15 deposed. (*See* ECF No. 81-2 ("Pl. Depo.") at 38:11-12) (responding to
16 Counsel's "[g]ood morning" with "[i]t's not."). At one point, Counsel stated
17 that "[t]his [deposition] is going to go a lot easier for everyone if you just
18 answer my question." (*Id.* at 115:5-6). Plaintiff responded that "I'm not
19 looking to make things easy for anyone, especially you." (*Id.* at 115:11-12).

20 Plaintiff refused to answer Counsel's first question after objecting to it.
21 After several minutes of discussing the matter with Plaintiff he provided an
22 evasive answer:

23 Q: Have you ever used any aliases or gone by any other names?

24 A: Irrelevant.

25 Q: Your objection is noted for the record. You can answer.
26

27 A: No, I can't. I don't know what you're talking about.

1 Q: Have you ever used a name other than Allen John Hammler?

2 A: Asked and answered.

3
4 Q: Mr. Hammler, you haven't answered my question. Can you
5 please answer my question.

6 A: I have answered your question. If you refuse to accept my
7 answer, that's not my problem.

8 (*Id.* at 38:20-39:8). Counsel then reminded Plaintiff that he was testifying
9 under oath and that this testimony could be used in court. (*Id.* at 39:9-25).
10 Plaintiff also indicated that he understood that his failure to answer
11 appropriate questions could result in sanctions, including dismissal of this
12 action. (*Id.* at 42:12). Counsel reiterated that "in a deposition you have the
13 right to object to my questions and put your objections on the record,
14 however, I am still entitled to your answer, even if you object to a question."
15 (*Id.* at 43:1-4). Plaintiff stated that he "understood that completely." (*Id.* at
16 43:9). After several minutes of back and forth between Counsel and Plaintiff,
17 Plaintiff answered the question.

18 The deposition transcript is replete with examples of bickering over
19 immaterial details about the procedure of the deposition and substance of
20 Plaintiff's First Amended Complaint ("FAC"). (*See e.g., id.* at 43:11-44:20,
21 64:14-69:21, 79:15-82:8, 85:25-87:15, 177:10-180:10, 181:16-182:7, 183:14-
22 185:22). At times, Plaintiff became agitated, raised his voice, and used
23 profanity. However, the Court's concern is with the substance and whether
24 Plaintiff answered appropriate questions about the allegations against
25 Defendants in his FAC. Specifically, the Court is concerned with Plaintiff's
26 refusal to answer questions regarding Defendants' involvement in the
27 incidents alleged in the FAC, as indicated below:

1 Q: . . . [N]either Defendant Hernandez nor Defendant Magallanes
2 were involved in [the October 20, 2016] incident, were they?

3 A: I don't recall to what extent. As I've just said, there were a
4 number of officers involved in all of these events. Yours, your
5 clients basically were involved in some of these events surrounding
6 these instances, as I recall.

7 So right now I don't believe that I can answer that and be
8 totally forthright in saying what parts they played in any of these
9 events.

10 Q: So today you can't say whether or not Defendant Hernandez or
11 Defendant Magallanes had any role in the . . . October 20, 2016
12 incident?

13 A: To the extent that they are listed here, I believe that they are
14 relevant for the simple fact that in the instances in this Complaint
15 alleging the difference that are alleged, they're relevant for the
16 simple that your client at some point in time took place in these
17 events, and be it that I don't have actual notes of those events –
18 those events in front of me, I don't want to speculate on the record
19 what parts they played.

20 Q: So today, as you sit here today you can't tell me what, if any,
21 part Defendant Hernandez played in the October 20, 2016 incident,
22 right?

23 A: I don't have my notes in front of me.

24 Q: As you sit here today do you have notes of this incident that you
25 can refer to?

26 A: Not here before me, no.

27 Q: Do you have notes somewhere else?

A: I do.

Q: What notes do you have?

1 A: I keep notes of all events that occur with me inside of prison
2 setting, and those notes are on record outside prison and inside
3 prison. I have copies of those notes, but those notes are my work
product and I don't have to discuss them here and now.

4 (*Id.* at 83:1-84:14). Plaintiff responded in similar fashion when questioned
5 about Defendants' involvement in the November 7, 2016 and November 28,
6 2016 incidents. (*See id.* at 87:16-89:6).

7 III. LEGAL STANDARD

8 Federal Rule of Civil Procedure 37(d) authorizes the court "to impose a
9 wide range of sanctions when a party fails to comply with the rules of
10 discovery or with court orders enforcing those rules." *Wyle v. R.J. Reynolds*
11 *Indus., Inc.*, 709 F.2d 585, 589 (9th Cir. 1983). The Court may sanction the
12 party by "prohibiting the disobedient party from supporting or opposing
13 designated claims or defenses, or from introducing designated matters into
14 evidence," "staying further proceedings" until the party has complied with
15 discovery requirements, and "dismissing the action or proceeding in whole or
16 in part." Fed. R. Civ. P. 37(d)(3) (incorporating sanctions from Fed. R. Civ. P.
17 37(b)(2)(A)(i)-(vi)).

18 Rule 37 allows for terminating sanctions that dismiss a plaintiff's action
19 where there has been willfulness, bad faith, or fault. Fed. R. Civ. P.
20 37(b)(2)(A)(v); *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639,
21 640 (1976). "Disobedient conduct not shown to be outside the control of the
22 litigant is sufficient to demonstrate willfulness, bad faith, or fault."
23 *Jorgensen v. Cassidy*, 320 F.3d 906, 912 (9th Cir. 2003) (internal quotation
24 marks omitted). Courts may consider not only the effect of sanctions on the
25 party being disciplined, but also the deterrent effect on future litigants and
26 their counsel. *Nat'l Hockey League*, 427 U.S. 639 at 643.

27 In determining whether to dismiss an action, the Court considers: (1)

1 the public's interest in expeditious resolution of litigation; (2) the Court's
2 need to manage its docket; (3) the risk of prejudice to the defendants; (4) the
3 public policy favoring disposition of cases on the merits; and (5) the
4 availability of less drastic sanctions. *Henderson v. Duncan*, 779 F.2d 1421,
5 1423 (9th Cir. 1986). The amount of prejudice resulting from discovery
6 violations and the availability of less drastic sanctions are "key factors."
7 *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990).

8 **IV. DISCUSSION**

9 Defendants contend that Plaintiff "was intentionally obstructionist and
10 antagonistic, and refused to answer appropriate questions" at the second
11 deposition. (Mtn. at 8). Accordingly, they request the Court issue
12 terminating sanctions in this case. (*See generally*, Mtn.). Plaintiff maintains
13 that he answered all questions unless the answers were privileged. (Oppo. at
14 2). He further argues that Counsel attempted to upset Plaintiff by asking
15 inflammatory questions, by making faces while asking questions, and by
16 attempting to assert authority over him.¹ (*Id.* at 5-6, 12).

17 The Court agrees with Plaintiff that some of Counsel's questions were
18 inflammatory and that Counsel did not have the authority to require Plaintiff
19 to act a particular way during the deposition. (*See e.g.*, Pl. Depo. at 91:9-

21
22 ¹ Plaintiff contends the Court should not consider the video of his deposition or the
23 transcript because he did not receive the video and because the transcript was not
24 properly served. (Oppo. at 7). However, Plaintiff does have the transcript and he cites to
25 it throughout his opposition. (*See generally*, Oppo.). Moreover, Plaintiff's argument that
26 he was not permitted to make changes to the deposition prior to the filing of the instant
27 motion is irrelevant because he does not assert that he intends to amend his testimony.
Accordingly, the Court considers the transcript. For purposes of this motion, the Court did
not watch the video of the deposition. Plaintiff also argues the Court should not consider
Deputy Attorney General Carson Niello's declaration because he did not know he attended
the deposition. (Oppo. at 9). The Court did not rely on this declaration in deciding the
instant motion.

1 92:24; 177:19-180:10) (asking Plaintiff whether he is paranoid and
2 instructing Plaintiff to sit down for the deposition). As indicated previously,
3 the deposition transcript is replete with examples of inappropriate behavior
4 from both parties. However, the main concern here is Plaintiff's failure to
5 answer questions about his own allegations in a case he chose to file. The
6 Court, therefore, declines to address the immaterial bickering between the
7 parties at the deposition.

8 **A. Willfulness, Bad Faith, or Fault**

9 The Court takes Defendants' counsel's allegations very seriously and
10 has once already admonished Plaintiff regarding his conduct at the March 10,
11 2020 deposition. The Court also recognizes that terminating sanctions are
12 considered when a party who has previously been admonished repeats the
13 conduct. *See, e.g., Glas-Weld Sys., Inc. v. Boyle*, No. 6:12-CV-02273-AA, 2013
14 WL 4828965, at *1 (D. Or., Sept. 6, 2013) (admonishing a *pro se* defendant
15 that further profanity, threats, and taunts may result in additional
16 sanctions); *Scott v. Palmer*, No. 1:09-CV-01329-LJO-SKO (PC), 2014 WL
17 6685813, at *3 (E.D. Cal., Nov. 26, 2014) (admonishing a state prisoner
18 proceeding *pro se* that use of profanity, abusive conduct, and
19 uncooperativeness at a deposition is grounds for terminating sanctions and
20 advising him *pro se* status does not "shield him from the consequences of
21 abusive behavior"); *Block v. Snohomish Cty*, No. C14-235RAJ, 2014 WL
22 6750475, at *10 (W.D. Wash., Dec. 1, 2014) (admonishing a plaintiff that the
23 court will impose monetary sanctions if she uses "profanity or abusive
24 invective" in communications with defense counsel).

25 Upon review of the deposition transcript, the Court finds that Plaintiff
26 was disobedient and that his conduct was within his control. *See Jorgensen*,
27 320 F.3d at 912. Plaintiff spoke profanely, raised his voice repeatedly, and

1 refused to act with civility. (See Pl. Depo. at 43:11-44:20, 64:14-69:21, 79:15-
2 82:8, 85:25-87:15, 177:10-180:10, 181:16-182:7, 183:14-185:22); (See also
3 Oppo. at 11) (conceding that he became emotional and used “curse words”).
4 While that conduct alone sufficiently shows bad faith, the Court instead
5 focuses on Plaintiff’s refusal to answer substantive questions about the
6 allegations in his FAC. Plaintiff’s failure to answer these questions
7 demonstrates willfulness, especially in light of the fact that the Court
8 admonished him at the Mandatory Settlement Conference. See *Jorgensen*,
9 320 F.3d at 912.

10 Moreover, Plaintiff testified that he has “[u]pwards of 20” civil rights
11 actions against correctional staff. (Pl. Depo. at 47:11-15). Plaintiff is subject
12 to a pre-filing order, which requires him to “seek and obtain leave of the
13 presiding judge of any appropriate Court, prior to filing any new actions,
14 against any defendant, in any forum in the State of California, based upon, or
15 related in any way, to lawsuits alleging civil rights violations, lawsuits
16 against prison officials, or federal habeas petitions.” *Hammler v. Alvarez*, No.
17 18cv326-AJB-WVG, ECF No. 63 at 7. As such, the Court is mindful that
18 imposing sanctions in this case may deter similar conduct in Plaintiff’s other
19 lawsuits. See *Nat’l Hockey League*, 427 U.S. at 643.

20 For these reasons, the Court finds that Plaintiff’s actions were willful.

21 **B. Terminating Sanctions**

22 Having found that Plaintiff’s conduct at his deposition was willful, the
23 Court evaluates the five-factors considered in the Ninth Circuit to determine
24 whether terminating sanctions are appropriate.

25 **1. Public’s Interest in Expeditious Resolution of Litigation**

26 “The public’s interest in expeditious resolution of litigation always
27 favors dismissal.” *Yourish v. Cal. Amplifier*, 191 F.3d 983, 990 (9th Cir.

1 1999). This case has been pending since 2018 and has over 80 docket entries
2 in what should be a relatively straightforward First Amendment retaliation
3 claim. (*See* Docket). As such, this factor favors dismissal.

4 **2. Court's Need to Manage Its Docket**

5 The second factor weighs in favor of dismissal where the Court is
6 required to address a litigant's failure to comply with discovery obligations.
7 *See Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002). This is
8 Defendants' second motion for sanctions regarding Plaintiff's deposition.
9 Moreover, Defendants' motions were brought in good faith. Accordingly, this
10 factor favors dismissal.

11 **3. Risk of Prejudice to Defendants**

12 "To prove prejudice, a defendant must establish that plaintiff's actions
13 impaired defendant's ability to proceed to trial or threatened to interfere with
14 the rightful decision of the case." *Id.* at 642 (citing *Malone v. U.S. Postal*
15 *Serv.*, 833 F.3d 128, 131 (9th Cir. 1987)). Though the pendency of a lawsuit
16 on its own is insufficient prejudice to warrant dismissal, "[u]nnecessary delay
17 inherently increases the risk that witnesses' memories will fade and evidence
18 will become stale." *Id.* at 643 (citing *Sibron v. New York*, 392 U.S. 40, 57
19 (1968)).

20 Defendants contend they "cannot prepare a motion for summary
21 judgment—or even determine if such a motion is warranted—or prepare a
22 defense for trial" due to Plaintiff's failure to meaningfully participate in his
23 deposition. (Mtn. at 13). Defendants are entitled to know the facts upon
24 which Plaintiff bases his claims and the documents which support his claims.
25 Instead of cooperating at his deposition, Plaintiff has engaged in dilatory and
26 obstructionist tactics. Plaintiff was warned that his failure to meaningfully
27 participate in discovery would lead to sanctions, up to and including the

1 dismissal of this action. Nevertheless, Plaintiff refuses to comply.²

2 While Plaintiff indicated that everything he had was in the operative
3 complaint, his failure to be deposed in this action substantially hinders
4 Defendants' ability to investigate and defend against his allegations. (See Pl.
5 Depo. at 182:18-183:13). A deposition is necessary for Defendants to question
6 Plaintiff with respect to the events alleged in the complaint, the
7 circumstances surrounding the events alleged in the complaint, any injuries
8 received, and what damages he is claiming. Instead, due to Plaintiff's
9 conduct, Defendants have been forced to expend time and resources
10 attempting to secure his cooperation by scheduling two depositions and filing
11 two motions. The inability to fully defend the case or to move forward with
12 any potential dispositive motions, coupled with the delay, is prejudicial to
13 Defendants. As such, this factor also weighs in favor of dismissal.

14 **4. Public Policy Favoring Disposition of Cases on Their**
15 **Merits**

16 The fourth factor—public policy favoring disposition of cases on their
17 merits—is strong and weighs against dismissal. *Pagtalunan*, 291 F.3d at
18 643. However, this factor “lends little support” where the behavior of the
19 party against whom dismissal is sought impeded disposition on the merits.
20 *In re: Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1228
21 (9th Cir. 2006); *Sanchez v. Rodriguez*, 298 F.R.D. 460, 472 (C.D. Cal. 2014)
22 (“While the fourth factor of the test generally tends to cut against dismissal
23 as a sanction, the public policy favoring the disposition of cases on their
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26 ² Extending discovery and pretrial deadlines in this case would be futile because Plaintiff
27 failed to meaningfully answer questions regarding allegations in his FAC even after the
Court admonished him at the Mandatory Settlement Conference.

1 merits is not furthered by litigants who . . . refuse to provide the defense with
2 critical discovery, thereby hindering the preparation of a defense on the
3 merits.”).

4 Plaintiff’s willful conduct has delayed the discovery process and has
5 prevented this case from progressing towards a resolution on the merits. By
6 failing to meaningfully participate in his deposition, Plaintiff has prevented
7 Defendants from ascertaining the necessary facts to defend against his
8 claims. In light of Plaintiff’s conduct, the Court finds that this factor does not
9 weigh against dismissal.

10 **5. Consideration of Less Drastic Sanctions**

11 A district court must consider the impact of a sanction and whether a
12 less severe sanction would adequately address a party’s failure to engage in
13 the discovery process. *Malone*, 833 F.2d at 131-32. The Court has considered
14 lesser sanctions, but no lesser sanction is warranted. Evidentiary sanctions
15 would be ineffective, as Plaintiff would still be able to testify to information
16 that he withheld from Defendants at the deposition and the Court would
17 have no practical way of excluding such testimony. Monetary sanctions are
18 also ineffective because of Plaintiff’s *in forma pauperis* status. He would
19 likely be unable to pay any monetary sanctions.

20 Additionally, the Court admonished Plaintiff about his discovery
21 obligations and warned him about the consequences of noncompliance, but
22 Plaintiff has indicated no intent to comply with any rulings or orders by the
23 Court. The Ninth Circuit has explained that “[a] district court need not
24 exhaust every sanction short of dismissal before finally dismissing a case, but
25 must explore possible and meaningful alternatives.” *Henderson*, 779 F.2d at
26 1424. The Court finds that there are no other, lesser sanctions that would be
27 satisfactory or effective.

1 **6. Conclusion**

2 Upon due consideration of the five factors, the Court finds dismissal of
3 this case warranted.

4 **C. Reasonable Expenses**

5 Defendants also request fees and costs associated with their two
6 attempts to take Plaintiff's deposition and their two motions for sanctions.
7 (Mtn. at 16). Counsel declares that Defendants incurred \$3,880.78 in fees
8 and costs associated with Plaintiff's March 10, 2020 deposition and \$2,410.60
9 in fees and costs for Plaintiff's September 23, 2020 deposition. (ECF No. 81-2
10 ("Shryock Decl.") ¶¶ 25-27).

11 Federal Rule of Civil Procedure 37 requires "the party failing to act . . .
12 to pay the reasonable expenses, including attorney's fees, caused by the
13 failure, unless the failure was substantially justified or other circumstances
14 make an award of expenses unjust." Fed. R. Civ. P. 37(d)(3).

15 As noted, Plaintiff is proceeding *in forma pauperis*, which makes it
16 unlikely that he would be able to pay any monetary sanctions. As such, it
17 would be unjust to require Plaintiff to pay the reasonable expenses caused by
18 his failure to meaningfully participate in his deposition.

19 **V. CONCLUSION**

20 For the reasons set forth above, the Court **RECOMMENDS** that
21 Defendants' motion for terminating sanctions be **GRANTED** and that this
22 case be **DISMISSED WITH PREJUDICE**.

23 **IT IS ORDERED** that no later than **December 9, 2020**, any party to
24 this action may file written objections with the Court and serve a copy on all
25 parties. The document should be captioned "Objections to Report and
26 Recommendation."

27 **IT IS FURTHER ORDERED** that any reply to the objections shall be

1 filed with the Court and served on all parties no later than **December 16,**
2 **2020.** The parties are advised that failure to file objections within the
3 specified time may waive the right to raise those objections on appeal of the
4 Court's order. *See Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1988).

5 **IT IS SO ORDERED.**

6 Dated: November 17, 2020

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8 Hon. Mitchell D. Dembin
9 United States Magistrate Judge
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