IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LAWRENCE E. WILSON,

Plaintiff,

v. **Case No. 2:08-CV-552**
MAGISTRATE JUDGE KING

LEON HILL,

Defendant.

OPINION AND ORDER

This matter is before the Court, with consent of the parties pursuant to 28 U.S.C. § 636(c), for consideration of the Plaintiff's *Motion for Reconsideration and Motion to Compel Discovery*, Doc. No. 69. For the reasons that follow, the motion is granted.

I.

Plaintiff, an inmate at the Pickaway Correctional Institution ["PCI"], brings this action pursuant to 42 U.S.C. § 1983 against Defendant Leon Hill, a Captain at PCI, claiming that Defendant used excessive force against Plaintiff in violation of the Eighth Amendment to the United States Constitution. In his verified *Complaint*, Plaintiff alleges that, on January 3, 2008, Defendant "used excessive physical force, without need or provocation, and not applied in a good faith effort to maintain or restore discipline." *Complaint*, Doc. No. 3, at 3. Plaintiff claims that, as a result of the incident, he lost two teeth and has been diagnosed with carpal tunnel syndrome. *Id.* at 4. Plaintiff also claims that "concussive or head trauma injury is suspected." *Id.*

On February 22, 2010, this Court issued an *Opinion and Order* which addressed, *inter alia*,

Plaintiff's request to compel Defendant Hill to respond to the following interrogatory:

> State the name and location of all complaints, records, and/or reports of each instance of the use of force alleged, actual or attempted, substantiatied [*sic*] or unsubstantiated while employeed [*sic*] within any institution within ODRC.

See Attachment 1 to Doc. No. 31.[1] Defendant objected to this request. In resolving Plaintiff's motion to compel a response, the Court held:

> [I]nformation relating to past uses of force by defendant, if any, is unrelated to the claim asserted in this action; whether or not defendant participated in a use of force prior to the alleged events at issue in this action is simply irrelevant to plaintiff's claim that, on January 3, 2008, defendant applied excessive force against plaintiff.

Opinion and Order, Doc. No. 45, at 4.

Following this decision, counsel was appointed for Plaintiff and supplemental discovery requests were served on Defendant Hill. Defendant objected to certain discovery requests on the grounds of relevance. Plaintiff now moves to compel responses to the following requests:

> REQUEST FOR ADMISSION NO. 2: Admit whether you have been, prior to January 3, 2008, accused of using excessive force against an inmate.
>
> REQUEST FOR ADMISSION NO. 3: Admit whether you have been, subsequent to January 3, 2008, accused of using excessive force against an inmate.
>
> SUPPLEMENTAL INTERROGATORY NO. 1: If your response to Request for Admission No. 2 is in the affirmative, please identify each alleged excessive use of force, including identifying the date, time and place of the alleged excessive use of force, a description of the alleged excessive use of force, whether a complaint (formal or informal) was filed with respect to that alleged excessive use of force, and the result of any such complaint.
>
> DOCUMENT REQUEST NO. 1: If your response to Request for Admission No. 2 is in the affirmative, please produce documents that refer, reflect, or relate in any way to each alleged excessive use of force.
>
> SUPPLEMENTAL INTERROGATORY NO. 2: If your response to Request for Admission No. 3 is in the affirmative, please identify each alleged excessive use of force, including identifying the date, time and place of the alleged excessive use of force, a description of the

[1]The discovery request was made prior to counsel being appointed for Plaintiff.

alleged excessive use of force, whether a complaint (formal or informal) was filed with respect to that alleged excessive use of force, and the result of any such complaint.

DOCUMENT REQUEST NO. 2: If your response to Request for Admission No. 3 is in the affirmative, please produce documents that refer, reflect, or relate in any way to each alleged excessive use of force.

See Exhibits A, B attached to *Plaintiff's Motion for Reconsideration and to Compel*, Doc. No. 69.

II.

Rule 37 of the Federal Rules of Civil Procedure permits a discovering party to file a motion for an order compelling discovery if another party fails to respond to discovery requests, provided that the motion to compel includes a certification that the movant has, in good faith, conferred or attempted to confer with the party failing to respond to the requests. The Court is satisfied that this prerequisite to a motion to compel has been met in this case.

Determining the proper scope of discovery falls within the broad discretion of the trial court. *Lewis v. ACB Business Services, Inc.*, 135 F.3d 389, 402 (6th Cir. 1998). Fed. R. Civ. P. 37 authorizes a motion to compel discovery when a party fails to provide proper response to interrogatories under Rule 33 or requests for production of documents under Rule 34. "Although a plaintiff should not be denied access to information necessary to establish [his] claim, neither may a plaintiff be permitted 'to go fishing and a trial court retains discretion to determine that a discovery request is too broad and oppressive.'" *Surles v. Greyhound Lines, Inc.*, 474 F.3d 288, 305 (6th Cir. 2007), quoting *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 592 (5th Cir. 1978). "The proponent of a motion to compel discovery bears the initial burden of proving that the information sought is relevant." *Martin v. Select Portfolio Serving Holding Corp.*, No. 1:05-CV-273, 2006 U.S. Dist. LEXIS 68779, at *2 (S.D. Ohio September 25, 2006), citing *Alexander v. Fed. Bureau of*

Investigation, 186 F.R.D. 154, 159 (D. D.C. 1999).

Rule 26(b) provides that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . ." Fed. R. Civ. P. 26(b)(1). Relevance for discovery purposes is extremely broad. *Miller v. Fed. Express Corp.*, 186 F.R.D. 376, 383 (W.D. Tenn. 1999). "The scope of examination permitted under Rule 26(b) is broader than that permitted at trial. The test is whether the line of interrogation is reasonably calculated to lead to the discovery of admissible evidence." *Mellon v. Cooper-Jarrett, Inc.*, 424 F.2d 499, 500-01 (6th Cir. 1970).

III.

Plaintiff argues that the information sought from Defendant Hill is reasonably calculated to lead to the discovery of admissible evidence. Plaintiff cites Fed. R. Evid. 404(b), which provides that evidence of other acts is admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." According to Plaintiff, evidence of other instances of alleged excessive use of force is probative of Defendant's intent in this case.

Defendant disagrees and argues that the danger of unfair prejudice and confusion outweighs any probative value of such "other acts" evidence. *See* Fed. R. Evid. 403. Defendant further argues that, to the extent that Plaintiff "is only requesting information regarding whether Defendant has been 'accused' of excessive force (as opposed to actually using excessive force), the information is plainly irrelevant and extraordinarily prejudicial." *Defendant's Memorandum contra*, Doc. No. 71, at 2.

In the Court's view, whether evidence of alleged other instances of excessive force is more prejudicial than probative of Plaintiff's claim should await resolution at trial. At this juncture, the

Court makes no determination as to the ultimate admissibility of "other acts" evidence.[2] Rather, the Court simply considers whether Plaintiff's requests for information concerning any other instances of alleged excessive use of force is reasonably calculated to lead to the discovery of admissible evidence and is therefore discoverable under Fed. R. Civ. P. 26(b)..

The Court agrees with Plaintiff that evidence of other instances of alleged excessive use of force could be probative of intent in connection with Plaintiff's Eighth Amendment claim. Again, it is premature to render a decision on the admissibility of any such evidence. Furthermore, as the Court held in its earlier decision, under Rule 404(b), evidence of past uses of force cannot be used to establish that Defendant actually used excessive force against Plaintiff on January 3, 2008. Nevertheless, in view of the broad scope of discovery under Rule 26(b), the Court agrees that Plaintiff's discovery requests are not improper.

The Court notes Defendant's concern about instances of accusastions of excessive force as opposed to instances of the actual use of excessive force. The distinction between substantiated and unsubstantiated claims of excessive force has been considered by other courts. In *Pacheco v. City of New York*, 234 F.R.D. 53 (E.D. N.Y. 2006), plaintiff claimed that defendant police officers used excessive force against him and sought discovery of other instances of alleged excessive use of force by defendants. In resolving a motion to compel discovery of other instances of alleged excessive force, the court held:

> "[I]nstances of prior misconduct may be offered at trial to prove intent if the misconduct constitutes similar acts evidence. . . . [R]ecords concerning allegations of . . . excessive force by defendants could lead to evidence admissible at trial, and are therefore discoverable. That the allegations may not have been substantiated in

[2]Fed. R. Evid. 404(b) provides that "[e]vidence of other . . . acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith . . . ." In addition, under Fed. R. Evid. 403, relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ."

> those tribunals does not protect records from discovery. Of course, the mere allegations in those records would not be admissible at trial. But the plaintiff should be given an opportunity to seek out the witnesses to the other allegations of misconduct and produce them at trial if they have evidence that would tend to prove defendants' intent.

Id. at 55.

Similarly, in this case, although unsubstantiated allegations of other instances of excessive use of force would not be admissible at trial, such instances could lead to the discovery of admissible evidence. Thus, discovery of both "accusations" and "actual instances" of other instances of excessive force by Defendant Hill, if any, will be permitted.

IV.

WHEREUPON Plaintiff's *Motion for Reconsideration and Motion to Compel Discovery*, **Doc. No. 69**, is **GRANTED**. Defendant is **DIRECTED** to respond to *Plaintiff's Plaintiff's Requests for Admission* Nos. 2 and 3, *Supplemental Interrogatories* Nos. 1 and 2, and *Document Requests* Nos. 1 and 2, within **fourteen (14) days** of the date of this *Order*.

December 3, 2010
DATE

s/ Norah McCann King
NORAH McCANN KING
UNITED STATES MAGISTRATE JUDGE