

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

RICHARD E. ENYART, JR.,

Plaintiff,

vs.

Civil Action 2:09-CV-687  
Judge Smith  
Magistrate Judge King

SHERIFF JIM KARNES, et al.,

Defendants.

OPINION AND ORDER

Plaintiff, a state inmate proceeding without the assistance of counsel, brings this action under 42 U.S.C. § 1983, alleging that he was denied due process while detained in the Franklin County jail.<sup>1</sup> This matter is before the Court on two pending motions, *Plaintiff's Motion to Compel*, Doc. No. 53, and plaintiff's *Rule 56(f) Motion for Continuance Alternative*, Doc. No. 61 ("*Rule 56(f) Motion*").

**I. BACKGROUND**

Plaintiff alleges that on August 11, 2007, he was arrested by the Columbus Police for "pandering and voyeurism"<sup>2</sup> and taken to Franklin County Corrections Center I ("FCCCI"). *Complaint*, Doc. No. 2, ¶¶ 9-10. After spending the night in a holding cell, plaintiff alleges that he was moved to the fifth floor. *Id.* at ¶¶ 10-11. While he was held as a pre-trial detainee on the fifth floor, plaintiff alleges, a deputy "yelled out my [plaintiff's] name and said 'the media wants to

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<sup>1</sup>After performing an initial screen of the *Complaint*, Doc. No. 2, the court determined that plaintiff's action could proceed on this claim. *Order*, Doc. No. 5.

<sup>2</sup>Elsewhere, the *Complaint* suggests that plaintiff's alleged crimes involved sex crimes against children. *Complaint*, ¶¶ 10, 12, 25, 26.

interview you about those little kids you molested.'" *Id.* at ¶ 12. After plaintiff declined the media request and the deputy left the area, plaintiff alleges that nine of the ten inmates sharing plaintiff's cell attacked him. *Id.* After two deputies returned to the cell and left again, he was attacked a second time. *Id.* Shortly thereafter, the two deputies returned to the cell and took plaintiff to the infirmary. *Id.* at ¶ 12. Photos of plaintiff's injuries were taken at the infirmary and he was then taken to the hospital and treated for injuries. *Id.* at ¶¶ 13-15. Plaintiff filed this action on August 18, 2009.

## **II. PLAINTIFF'S MOTION TO COMPEL**

In *Plaintiff's Motion to Compel*, plaintiff complains that, on May 28, 2010, he "issued" *Plaintiff's Second Request for Production of Documents*, Doc. No. 45, and *Plaintiff's Second Interrogatories to Defendant Jim Karnes*, Doc. No. 46 (collectively, "disputed discovery requests"), but that defendant Karnes<sup>3</sup> failed to respond. *Plaintiff's Motion to Compel*, pp. 1-2. Defendant Karnes opposes plaintiff's motion, arguing that it should be denied because (1) plaintiff essentially concedes that he failed to attempt to resolve the matter extrajudicially prior to filing his motion; (2) defendant Karnes was never served with copies of the disputed discovery requests; and (3) even if the Court regards plaintiff's filing of the requests with the Court on June 2, 2010, as "service," the requests were untimely because responses were due after the June 30, 2010 discovery

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<sup>3</sup>As discussed in the Court's recent *Order and Report and Recommendation*, Doc. No. 69, the record was unclear at the time as to who the defendants in this action were. Accordingly, this Court will address this matter only as it relates to defendant Karnes.

completion date. *Defendant's Memorandum contra Plaintiff's Motion to Compel*, Doc. No. 55, pp. 1-2 ("*Memo. Contra*").

Defendant Karnes's arguments are well-taken. First, a party moving to compel discovery responses must certify that it "has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Fed. R. Civ. P. 37(a)(1). See also S.D. Ohio Civ. R. 37.2. Although plaintiff contends that he conferred or attempted to confer prior to filing this motion, counsel for defendant Karnes represents that plaintiff never conferred with him before filing the motion. *Memo. Contra*, p. 1.

More significantly, a party must actually serve a written discovery request before seeking to compel a response under Rule 37. See Fed. R. Civ. P. 5(a)(1)(C); 33(b)(2); 34(b)(2)(A); 37(a)(3)(B). Service must be made by providing the written request to defense counsel. See Fed. R. Civ. P. 5(b)(1). In the case *sub judice*, plaintiff has not disputed counsel's representation that plaintiff never served on counsel for defendant Karnes the disputed discovery requests. See *Memo. Contra*, p. 2.

Finally, a party ordinarily has 30 days to respond to interrogatories and document requests. Fed. R. Civ. P. 33(b)(2); 34(b)(2)(A). Thus, discovery propounded fewer than 30 days prior to the discovery completion date is not timely. *Cf. Podlesnick v. Airborne Express, Inc.*, 94 F.R.D. 288, 292 (S.D. Ohio 1982) (observing that a document request "with a twenty-eight day response time [] must be served upon the opposing party with sufficient time to allow said party to respond prior to the discovery 'cut off' date"). Thus,

plaintiff's June 2, 2010 discovery requests were untimely in light of the established discovery completion deadline of June 30, 2010.

For all these reasons, the Court **DENIES** *Plaintiff's Motion to Compel*, Doc. No. 53. However, in light of the extended discovery period in this case, *Order and Report and Recommendation*, Doc. No. 69, this Court **DIRECTS** plaintiff to serve a copy of *Plaintiff's Second Request for Production of Documents*, Doc. No. 45, and *Plaintiff's Second Interrogatories to Defendant Jim Karnes*, Doc. No. 46, on counsel for defendant Karnes<sup>4</sup> within fourteen (14) days of the date of this *Opinion and Order*. Defendant Karnes must respond within rule, *i.e.*, within 30 days after service of the requests.

In so ordering, the Court notes that defendant Karnes believed that the disputed discovery requests consisted largely of requests to "clarify" earlier responses. *Memo. Contra*, p. 2. However, the Court notes that many of plaintiff's requests are actually plaintiff's attempts to clarify his own prior requests, to which defendant Karnes had objected. *See, e.g., Plaintiff's Second Request for Production of Documents*, Doc. No. 45, pp. 2-3 (requests numbered 1 through 7). In addition, other requests seek specific information, not merely "translations." *See, e.g., Plaintiff's Second Interrogatories to Defendant Jim Karnes*, Doc. No. 46, p. 2 (seeking, under interrogatory number three, the identity of "those designated as the 'Response Team' for 5E4 at the time of the alleged assault, described in [Regulation] AR867"). Accordingly, the Court will expect that, once defendant

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<sup>4</sup>Because of the confusion regarding the identity of the parties referenced *supra*, the Court instructs plaintiff to serve only defendant Karnes with these discovery requests.

Karnes is properly served, he will give individual consideration to each of these requests and provide appropriate response.

### III. **RULE 56(F) MOTION**

After defendant Karnes filed a motion for summary judgment, Doc. No. 52,<sup>5</sup> plaintiff filed his *Rule 56(f) Motion*, asking the Court to delay ruling on the motion for summary judgment so that plaintiff may obtain "declarations, affidavits, or depositions" from the "dozen detainees" who plaintiff believes "can bear witness to the allegations in the complaint." *Rule 56(f) Motion*, pp. 1-2. Plaintiff further asserts that "[t]hese two dozen men were present during the alleged assault [underlying plaintiff's claim], and the very nature of the incident suggests that most (if not all) observed and can bear witness." *Id.* at 2. Defendant Karnes has not filed a response to plaintiff's motion.

Rule 56(f) of the Federal Rules of Civil Procedure establishes the proper procedure where a party concludes that additional discovery is necessary in order to respond to a motion for summary judgment:

**When Affidavits Are Unavailable.** If a party opposing the motion [for summary judgment] shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the Court may:

- (1) deny the motion;
- (2) order a continuance to enable affidavits to be obtained, depositions to be taken or other discovery to be undertaken; or
- (3) issue any other just order.

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<sup>5</sup>Because plaintiff's anticipated amended complaint only adds new parties that do not change the substantive allegations against defendant Karnes, *Order and Report and Recommendation*, Doc. No. 69, the anticipated amended complaint will not moot defendant Karnes's pending motion for summary judgment.

Fed. R. Civ. P. 56(f). The affidavit required by the rule must "indicate to the district court [the party's] need for discovery, what material facts it hopes to uncover, and why it has not previously discovered the information." *Cacevic v. City of Hazel Park*, 226 F.3d 483, 488 (6th Cir. 2000) (citing *Radich v. Goode*, 866 F.2d 1391, 1393-94 (3d Cir. 1989)). A motion under Rule 56(f) may be properly denied where the requesting party "makes only general and conclusory statements regarding the need for more discovery and does not show how an extension of time would have allowed information related to the truth or falsity of the [document] to be discovered," *Ball v. Union Carbide Corp.*, 385 F.3d 713, 720 (6th Cir. 2004) (citing *Ironside v. Simi Valley Hosp.*, 188 F.3d 350, 354 (6th Cir. 1999)), or where the affidavit "lacks 'any details' or 'specificity.'" *Id.* (quoting *Emmons v. McLaughlin*, 874 F.2d 351, 357 (6th Cir. 1989)). See also *Cardinal v. Metrish*, 564 F.3d 794, 797-98 (6th Cir. 2009) ("If the plaintiff makes only general and conclusory statements in his affidavit regarding the needed discovery, lacks any details or specificity, it is not an abuse of discretion for the district court to deny the request.").

In the case *sub judice*, plaintiff offers a declaration pursuant to 28 U.S.C. § 1746. In it, plaintiff represents that the declarations that he seeks "would allow a showing of the existence of genuine issues of material fact[.]" *Rule 56(f) Motion*, p. 3. However, this declaration lacks the necessary "details" or "specificity" required by the rule. See *Ball*, 385 F.3d at 720. In particular, plaintiff's declaration does not comply with Fed. R. Civ. P. 56(f) because it fails to identify any material facts plaintiff

hopes to uncover and address by way of affidavit, nor does it specify why these facts are material to plaintiff's response to the motion for summary judgment. Moreover, plaintiff's conclusory assertion that the declarations that he seeks would establish genuine issues of material facts is based on plaintiff's unfounded personal belief that other, unidentified inmates (1) actually observed the incident, (2) remember it more than three years later, and (3) are willing to provide a supporting affidavit or declaration.

Under these circumstances, plaintiff has not complied with Rule 56(f) and has provided absolutely no reason for the Court to believe that there are any specific, material facts that he could present in affidavits or declarations from unidentified inmates. Accordingly, plaintiff's *Rule 56(f) Motion for Continuance Alternative*, Doc. No. 61, is **DENIED**.

Notwithstanding the denial of this motion, however, and in light of defendant Karnes's forthcoming answers to the disputed discovery requests identified above, the Court will grant plaintiff fourteen (14) days from the date of service of those answers to supplement his opposition to defendant Karnes's motion for summary judgment, Doc. No. 52.<sup>6</sup> Defendant Karnes may thereafter supplement his reply memorandum within seven (7) days of the date of plaintiff's supplemental opposition brief.

**WHEREUPON**, *Plaintiff's Motion to Compel*, Doc. No. 53, and plaintiff's *Rule 56(f) Motion for Continuance Alternative*, Doc. No.

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<sup>6</sup>To clarify the record, the Court notes that the motion for summary judgment, Doc. No. 52, relates only to the claims against defendant Karnes. Accordingly, the Court expects the parties to confine their arguments in the supplemental memoranda to the claims and defenses related to defendant Karnes.

61, are **DENIED** consistent with the foregoing.

November 12, 2010

s/Norah McCann King  
Norah M<sup>c</sup>Cann King  
United States Magistrate Judge