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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

AARON S. HARPER,

Plaintiff,

No. CIV S-04-0339 FCD JFM P

vs.

DENISE L. HARMON, et al.,

Defendants.

ORDER

_____/

Plaintiff is a state prisoner proceeding in propria persona and in forma pauperis with a civil rights action pursuant to 42 U.S.C. § 1983. On May 16, 2007, plaintiff filed a motion to reopen discovery. Plaintiff also complains that he has not been able to file a meaningful pretrial statement. Despite the issuance of a briefing notice, defendants have not responded to this motion.

Plaintiff seeks to reopen discovery for the limited purpose of (1) serving on defendants Harmon, Lewis and Akin, one set of interrogatories, limited to ten questions; one set of requests for admissions, limited to seven requests; and one set of production of documents, limited to ten requests; and (2) deposing by written questions potential witnesses Warden Cheryl Pliler, Dr. Hoffman, Captain D. Baughman, Sgt. Thurman, E. Stoddard and R. Gardner. Plaintiff does not elaborate on the nature of questions or information he would seek by way of this additional discovery, nor does he identify what information these potential witnesses might have or whether they are percipient witnesses to the events at issue herein.

1 Discovery closed in this matter on October 4, 2005. (June 28, 2005 Scheduling
2 Order.) In his motion to reopen discovery, plaintiff contends his incarceration in administrative
3 segregation from July 14, 2006 to January 22, 2007, and subsequent transfer to a different prison,
4 kept him from propounding discovery herein. However, those events occurred long after
5 discovery had closed.

6 Moreover, plaintiff has adduced sufficient evidence to survive summary
7 judgment, based on the following:

8 The record evidence shows that on October 5, 2005,
9 defendant Harmon twice felt an inmate touch her buttocks with his
10 fingertips. After the second touching, the inmate ran away.
11 Defendant Harmon did not know the name or the housing number
12 of the inmate who had touched her. Defendant Lewis identified the
13 inmate as plaintiff. The day after the incident, both defendants
14 Harmon and Lewis identified plaintiff as the perpetrator from the
15 “picture board.” However, Correctional Sergeant Barlesi told
16 Correctional Officer J. Messner, the investigating employee, that
17 defendant Lewis had stated to Barlesi that “he didn’t see anything
18 happen.” (Ex. A to Defendants’ Statement of Undisputed Facts, at
19 17.) At the disciplinary hearing, plaintiff stated that defendant
20 Lewis had told plaintiff he hadn’t seen the incident “so it was
21 [plaintiff’s] word against [defendant Harmon’s] word.” (*Id.* at 22.)
22 Despite the contradictions in the record, defendant Akin took no
23 steps at the hearing to “adequately address” how plaintiff had been
24 identified as the perpetrator. (*Id.* at 29.)

25 Defendant Harmon’s identification of plaintiff as the
26 perpetrator appears to have been entirely dependent on defendant
Lewis’ identification of plaintiff, and defendant Lewis’ apparently
contradictory statements about what he did or did not see give rise
to a triable issue of material fact as to whether his identification of
plaintiff as the perpetrator was false. Moreover, there is a triable
issue of material fact as to whether or not defendant Akin violated
plaintiff’s right to due process when he failed to allow additional
examination of witnesses to resolve the apparent contradiction in
defendant Lewis’ identification of plaintiff as the perpetrator. For
these reasons, the court finds none of the defendants are entitled to
summary judgment on plaintiff’s claim that the disciplinary
charges were false.

(August 30, 2006 Findings and Recommendations at 8-9.)

 The original complaint in this action was filed on February 18, 2004. Over three
years have now passed, dispositive motions have been filed and resolved, and this case needs to

1 proceed to trial. Plaintiff has failed to articulate specific information he needs to discover to
2 make his case for trial, particularly in light of the record evidence supporting the denial of
3 defendants' motion for summary judgment. Accordingly, plaintiff's request to reopen discovery
4 at this late date will be denied.

5 However, the court agrees that plaintiff's pretrial statement is inadequate,
6 particularly with regard to his request for attendance of witnesses at trial. On June 28, 2005,
7 plaintiff was advised of the requirements for calling witnesses to testify at trial. In his pretrial
8 statement, plaintiff seeks three incarcerated witnesses' testimony and at least thirteen
9 nonincarcerated witnesses' testimony at trial. Plaintiff was advised that he

10 must tender an appropriate sum of money to the witness through
11 the United States Marshal. In the case of an unincarcerated
12 witness, the appropriate sum of money is the daily witness fee of
13 \$40.00 plus the witness' travel expenses.

14 A subpoena will not be served by the United States Marshal
15 upon an unincarcerated witness unless the subpoena is
16 accompanied by a money order made payable to the witness for the
17 full amount of the witness' travel expenses plus the daily witness
18 fee of \$40.00, and a copy of the court's order granting plaintiff in
19 forma pauperis status. Because no statute authorizes the use of
20 public funds for these expenses in civil cases, the tendering of
21 witness fees and travel expenses is required even if the party was
22 granted leave to proceed in forma pauperis.

23 (June 28, 2005 Scheduling Order at 2-4.) In order to obtain incarcerated witnesses' testimony,
24 plaintiff must file a motion with supporting affidavit "showing that each witness is willing to
25 testify and that each witness has actual knowledge of relevant facts." (Id. at 2.) If the
26 prospective witness was an eye witness or an ear-witness to the relevant facts, plaintiff may
provide his own affidavit. (Id. at 3.)

 Good cause appearing, plaintiff will be granted an additional thirty days in which
to file a pretrial statement that complies with the June 28, 2005 scheduling order and Local Rule
16-281. Plaintiff is cautioned that he must address the issue of witness fees in his revised pretrial
statement, as well as file the appropriate motion for attendance of incarcerated witnesses at trial.

