

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

Keen v. Cross

No. 2:24-cv-0299-JDP (P), slip op. (E.D. Cal. Aug. 4, 2025) · No. 2:24-cv-0299-JDP (P) · Decided August 4,
2025

OPINION

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 FOR THE EASTERN DISTRICT OF
CALIFORNIA 10 11 BRANDON KEEN, Case No. 2:24-cv-0299-JDP (P) 12 Plaintiff, 13 v.
ORDER 14 CROSS, et al., 15 Defendants. 16 17 18 Plaintiff, a state inmate proceeding pro se,
brought this § 1983 action against defendants 19 Cross and Wallace, alleging that they violated his
Eighth Amendment rights when they became 20 aware that plaintiff had set a fire in his cell but
failed to help him.

Now pending before the court 21 are defendants' and plaintiff's motions to compel. Defendants
further seek to modify the 22 discovery and scheduling order to allow additional time to retake
plaintiff's deposition. For the 23 following reasons, defendants' motion is granted and plaintiff's is
denied. 24 Defendants' Motion to Compel Plaintiff's Deposition 25 Defendants' move to compel
plaintiff to resume his deposition testimony.

ECF No. 43. 26 Discovery opened February 20, 2025, and the deadline for completion of
discovery was June 13, 27 2025. ECF No. 35. On March 13, 2025, defendants served plaintiff
with a deposition notice for 28 1 April 30, 2025. ECF No. 43-2 at 5-6.

The deposition was scheduled for April 30, 2025, at 9:00 2 a.m. at California Men's Colony via
audio-visual conference. Id. 3 On April 30, 2025, plaintiff and defense counsel appeared for the
deposition. ECF No. 4 43-2 at 12-16.

The deposition started at 9:09 a.m., id. at 16, and defense counsel ended the 5 deposition for the
day at 10:33 a.m., id. at 55. At 10:07 a.m., the parties took a break and 6 resumed the deposition at
10:24 a.m. Id. at 47-48. Prior to the break, plaintiff informed defense 7 counsel that he was
finished with the deposition because he did not have counsel and because 8 defense counsel had
not shown plaintiff the video recording of the alleged fire.

Id. at 44-47. 9 Q. Sir, are you refusing to participate in the rest of this deposition? 10 A. I need to
get hold of somebody to help me for assistance. 11 Q. I get that, sir. But we're going to still
continue with this deposition today. Okay? 12 A. I'm done. Done answering questions. I'm not
refusing. I'm 13 done. That's it. I don't know what to tell you. I don't recall anything else.

14 Q. Okay. Well -- 15 A. I need help. I need assistance and help with this issue. Because 16 if I don't recall, the only thing you are going to twist it against me. And it's all on camera. You seen the film over and over. And I 17 haven't had the opportunity to look at it. 18 Id. at 46. When the parties returned from the break, defense counsel verbalized for the record that 19 plaintiff had placed a sheet over his holding cell such that he was not visible on the screen. 1 Id. at 20 48.

21 Defense counsel asked plaintiff if he was refusing to answer questions based on plaintiff's 22 lack of recall and lack of desire to continue the deposition. Id. at 49-50. Plaintiff responded that 23 he needed to view the video of the incident to refresh his memory to answer defense counsel's 24 questions, that he could not answer questions due to his mental health medications, and that he 25 needed first to speak with the court.

Id. at 50-51. Following the deposition, defense counsel sent 26 plaintiff a letter that explained that if plaintiff did not inform him that he would sit for another 27 1 Defendants lodged with the court a video recording on the deposition and the court 28 agrees that plaintiff had placed a white sheet over the holding cell and was not visible. 1 deposition, defendants would file a motion to compel plaintiff's deposition.

Id. at 60. Defendants 2 did not receive a response. 3 Defendants are entitled to conduct discovery, which includes the deposition of plaintiff, to 4 obtain all information pertaining to the factual allegations, and legal claims and defenses at issue 5 in this action. Fed. R. Civ. P. 26(b)(1) & 30. "An objection at the time of the examination— 6 whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking 7 the deposition, or to any other aspect of the deposition—must be noted on the record, but the 8 examination still proceeds." Fed.

R. Civ. P. 30(c)(2). Objections must be stated concisely in a 9 non-argumentative and non-suggestive manner. Id. The deponent may refuse to answer a 10 question "only when necessary to preserve a privilege, to enforce a limitation ordered by the 11 court, or to present a motion under Rule 30(d)(3)." Id. The court may impose a sanction— 12 including of reasonable expenses and attorney's fees—on any person who "impedes, delays, or 13 frustrates the fair examination of the deponent." Fed.

R. Civ. P. 30(d)(2). 14 Under Rule 37(a), a party seeking discovery may move for an order compelling discovery 15 when an opposing party has failed to respond. Fed. R. Civ. P. 37(a). In filing a motion to 16 compel, the moving party bears the burden of demonstrating that he will suffer "actual and 17 substantial prejudice" from the denial of discovery. *Veterans for Common Sense v. Shinseki*, 644 18 F.3d 845, 888 (9th Cir.

2011) (citing *Hallen v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002)). 19 During the deposition, plaintiff advanced two primary bases for refusing to answer 20 defense counsel's questions. First,

he objected that he could not recall the answers to certain 21 questions because he had not seen the video. ECF No. 43-2 at 50-52.

Second, he stated that he 22 needed either to speak with the court or to be represented by counsel before answering questions. 23 Id. Both objections are unavailing. 24 Plaintiff's first objection, that he could not recall answers without first seeing the video of 25 the incident, is not a valid basis under Rule 30 for refusing to answer a question. Plaintiff 26 voluntarily invoked the procedures of this court when he filed this lawsuit, and he must comply 27 with his discovery obligations.

Madrid v. De La Cruz, No. 1:18-cv-00947-DAD-EPG, 2019 WL 28 2994301, at *3 (E.D. Cal. July 9, 2019) (quoting Tene v. City and Cnty of San Francisco, No. C 1 00-03868 WHA, 2004 1465726 (N.D. Cal. May 12, 2004). Defendants have a fundamental right 2 to discovery and to effectively defend themselves. Fed. R. Civ. P. 26, 30. Plaintiff's refusal to 3 answer questions at his deposition prejudices defendants' ability to defend against this case.

See 4 Green v. CDCR, No. 2:14-cv-2854-TLN-AC, 2018 WL 4963122, at *2 (E.D. Cal. Oct. 15, 2018) 5 ("It would be fundamentally unfair and prejudicial to defendants to permit plaintiff to continue to 6 pursue this action without requiring his attendance and cooperation at his deposition."). 7 Plaintiff's second argument, that he may refuse to participate in his deposition unless he is 8 represented by counsel or talks to the court first, is equally without merit.

See Pulliam v. Lozano, 9 No. 1:07-cv-964-LJO-MJS, 2011 WL 335866, at *3 (E.D. Cal. Jan. 31, 2011) (noting that a pro 10 se inmate must fully participate and cooperate in properly noticed deposition despite his 11 preference for appointed counsel); Green, 2018 WL 4963122, at *2 (noting that a pro se plaintiff 12 is "required to fully participate in all stages of the proceedings").

As I have explained to plaintiff 13 previously, see ECF Nos. 7, 17, & 42, there is no right to counsel in 1983 cases. See Nicholson v. 14 Rushen, 767 F.2d 1426, 1427 (9th Cir. 1985) (per curiam). Although a court may request counsel 15 to represent an inmate, such requests are only warranted when justified by exceptional 16 circumstances. Rand v. Rowland, 113 F.3d 1520, 1525 (9th Cir.

1997). And as previously 17 evaluated, this case does not present exceptional circumstances justifying the appointment of 18 counsel. Because defendants' ability to adequately defend against plaintiff's claims will be 19 prejudiced without his deposition testimony, plaintiff will be compelled to sit for his deposition 20 without court appointed counsel. 21 Plaintiff is informed that he is required to appear at a properly noticed deposition and 22 respond to questions by defendants' counsel.

In answering questions, plaintiff is not required to 23 speculate or guess, although he may be asked to give an estimate of matters where estimates are 24 commonly made (e.g., distance, size,

weight, etc.). Plaintiff may review documents or other evidence available at the deposition for the purpose of refreshing his memory. If plaintiff does not have to certain documentation, through no fault of his own, he must still appear for a properly noticed deposition.

Plaintiff is further advised that if he fails to cooperate with discovery, this action may be subject to terminating sanctions due to his failure to obey a court order and failure to cooperate in discovery. See Fed. R. Civ. P. 37(b)(2)(a)(v). Defendants' Motion to Modify the Scheduling Order Defendants move to modify the scheduling order (1) to extend the discovery cutoff deadline from June 13, 2025 to 90 days from the date of the court's order on defendants' motion to compel for the limited purpose of permitting plaintiff's deposition, and (2) to extend the pretrial motion deadline from September 5, 2025 to 90 days from the new discovery cutoff deadline.

ECF No. 43-1 at 16. Plaintiff has not filed an opposition. Good cause appearing, the motion is granted. The discovery deadline, for the limited purpose of allowing defendants to depose plaintiff is set for 90 days from the date of this order, and the deadline to file dispositive motions is 90 days from the date of the new discovery deadline. Plaintiff's Motion to Compel Plaintiff has filed a motion requesting that defendants provide production of the video.

ECF No. 44. Defendants oppose the motion, arguing that the motion is untimely, that is improper because plaintiff did not previously seek discovery of the video, and plaintiff offers no reason for why he has delayed seeking the video. ECF No. 45. Plaintiff's motion is denied. At bottom, plaintiff's motion does not state whether he previously sought production of the video from defendants through a request for production of documents.² Plaintiff cannot file a motion to compel before defendants fail to adequately respond to his discovery requests.

See Fed. R. Civ. P. 37(a) (A motion to compel may be brought "[i]f a party fails to make a disclosure required by Rule 26(a)" or replies to a discovery request with an "evasive or incomplete disclosure, answer, or response.").

In addition, the deadline for plaintiff to seek discovery expired April 14, 2025, and the discovery cutoff, including filing motions to compel, was on June 13. See ECF No. 35. Plaintiff signed the instant motion on June 22, 2025, after both deadlines expired. See ECF No. 44 at 2. Defendants assert that plaintiff has not sought discovery of the video evidence.

ECF No. 45 at 3-4. 1 Lastly, plaintiff does not explain why he was unable to seek this discovery from defendants prior to the cutoff of discovery. As early as July 2024, the court informed plaintiff that he must comply with the Federal Rules of Civil Procedure, which includes seeking discovery from defendants. See ECF No. 17 at 1 ("Plaintiff is informed that court permission is not necessary for discovery requests and that neither discovery requests served on an opposing party nor that party's responses should be filed until such time as a

party becomes dissatisfied with a 7 | response and seeks relief from the court pursuant to the Federal Rules of Civil Procedure.

8 | Discovery requests between the parties shall not be filed with the court unless, and until, they are 9 | at issue.”); ECF No. 42 at 2 (“On February 20, 2025, I issued the scheduling order in this case, in 10 | which I informed both parties that discovery requests must be served by the party seeking 11 || discovery on all parties to the action. ECF No. 35 at 5.

I warned that discovery requests should 12 | not be filed with the court unless required by Local Rules. Id. As it currently stands, no Local 13 | Rule requires this court to review plaintiff's discovery request, and, as I have previously informed 14 | plaintiff, see ECF No. 17, court permission is not necessary for discovery requests. Additionally, 15 | to the extent that plaintiff intended to serve defendants with his discovery request by filing them 16 | with the court, that approach is improper.

Plaintiff must serve his discovery requests on 17 | defendants. See Fed. R. Civ. P. 30-36.”). Plaintiff's motion to compel is denied. 18 Accordingly, it is ORDERED that: 19 1. Defendants' motion to compel and modify the scheduling order, ECF No. 43, is 20 | GRANTED.

The discovery deadline, for the limited purpose of allowing defendants to depose 21 | plaintiff is set for 90 days from the date of this order, and the deadline to file dispositive motions 22 | is 90 days from the date of the new discovery deadline. 23 2. Plaintiff's motion to compel, ECF No. 44, is DENIED. IT IS SO ORDERED. 25 (q oy — Dated: _ August 4, 2025 ow—— 26 JEREMY D.,

PETERSON UNITED STATES MAGISTRATE JUDGE 28 &