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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF CALIFORNIA

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8 JAMES LEWIS,
9 Plaintiff,
10
11 v.
12 CITY OF FRESNO, et al.,
13 Defendants.

1:08-cv-01062-OWW-GSA
MEMORANDUM DECISION RE:
DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT AGAINST RON MANNING
(Doc. 76)

14
15 I. INTRODUCTION.

16 Ron Manning ("Plaintiff") proceeds with this action pursuant
17 to 42 U.S.C. 1983 and California Government Code §12900.

18 Defendants filed a motion for summary judgment on May 10,
19 2011. (Doc. 76). Plaintiff filed opposition on June 6, 2011.
20 (Doc. 83). Defendants filed a reply on June 13, 2011. (Doc. 94)

21 II. FACTUAL BACKGROUND.

22 Plaintiff is an African American police officer employed by
23 the Fresno Police Department ("Department").

24 On the evening of October 27, 2007, Plaintiff was arrested for
25 driving under the influence of alcohol. Officer Brian Phelps
26 employed a twist lock to force Plaintiff to sit on the curb after
27 Plaintiff verbally objected to Phelps's command to sit on the curb.
28 Plaintiff requested that his wife be permitted to drive home the

1 vehicle Plaintiff was driving, but both Phelps and the supervising
2 sergeant on the scene, Eric Eide, refused his request and caused
3 the vehicle to be towed. Phelps prepared a police report
4 concerning Plaintiff's arrest which stated that his initial stop of
5 Plaintiff's vehicle was for having no front license plate.

6 Plaintiff appeared for a hearing before the Department of
7 Motor Vehicles in connection with the suspension of Plaintiff's
8 driver's license. At the hearing, Phelps testified that he stopped
9 Plaintiff's vehicle for making an unsafe lane change, and that he
10 suspected Plaintiff was attempting to avoid a DUI checkpoint.
11 Phelps also testified that he had no information about the front
12 license plate violation until after he stopped Plaintiff's vehicle.
13 The hearing officer concluded that there was no probable cause for
14 officer Phelp's initial stop of Plaintiff's vehicle.

15 As a result of his DUI arrest, Plaintiff was subjected to an
16 Internal Affairs investigation ("IA investigation") pursuant to
17 Department policy. Investigating sergeant Mindy Medina-Casto
18 ("Casto") interviewed Plaintiff and Phelps in connection with the
19 IA investigation. Phelps told Casto that Plaintiff had been
20 uncooperative and unprofessional at the jail. Casto contacted jail
21 personnel and was unable to confirm Phelps statement. Plaintiff
22 advised Casto of the DMV hearing officer's finding of lack of
23 probable cause, and Casto advised that such a finding had no import
24 on the IA investigation. A recommendation that Plaintiff be
25 suspended for 120 hours issued.

26 At a disciplinary hearing before Deputy Chief Roger Enmark on
27 May 7, 2008, Plaintiff advised Enmark that Phelps had contradicted
28 his report during the DMV hearing.

1 Plaintiff was prosecuted criminally for driving under the
2 influence. The Fresno County Superior Court granted Plaintiff's
3 motion pursuant to California Penal Code section 1538.5,¹ and on
4 June 8, 2009, the District Attorney dismissed the charges against
5 Manning. Manning advised the Department of the dismissal.

6 On May 22, 2008, Department Chief Jerry Dyer signed an Order
7 of Suspension imposing 120 hours of suspension without pay on
8 Plaintiff based on Enmark's recommendation.

9 **III. LEGAL STANDARD.**

10 Summary judgment/adjudication is appropriate when "the
11 pleadings, the discovery and disclosure materials on file, and any
12 affidavits show that there is no genuine issue as to any material
13 fact and that the movant is entitled to judgment as a matter of
14 law." Fed. R. Civ. P. 56(c). The movant "always bears the initial
15 responsibility of informing the district court of the basis for its
16 motion, and identifying those portions of the pleadings,
17 depositions, answers to interrogatories, and admissions on file,
18 together with the affidavits, if any, which it believes demonstrate
19 the absence of a genuine issue of material fact." *Celotex Corp. v.*
20 *Catrett*, 477 U.S. 317, 323 (1986) (internal quotation marks
21 omitted).

22 Where the movant will have the burden of proof on an issue at
23 trial, it must "affirmatively demonstrate that no reasonable trier
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25 ¹ Section 1538.5 provides, in pertinent part: "A defendant may move for the
26 return of property or to suppress as evidence any tangible or intangible thing
27 obtained as a result of a search or seizure on either of the following grounds:
28 (A) The search or seizure without a warrant was unreasonable."

1 of fact could find other than for the moving party." *Soremekun v.*
2 *Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). With
3 respect to an issue as to which the non-moving party will have the
4 burden of proof, the movant "can prevail merely by pointing out
5 that there is an absence of evidence to support the nonmoving
6 party's case." *Soremekun*, 509 F.3d at 984.

7 When a motion for summary judgment is properly made and
8 supported, the non-movant cannot defeat the motion by resting upon
9 the allegations or denials of its own pleading, rather the
10 "non-moving party must set forth, by affidavit or as otherwise
11 provided in Rule 56, 'specific facts showing that there is a
12 genuine issue for trial.'" *Soremekun*, 509 F.3d at 984. (quoting
13 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). "A
14 non-movant's bald assertions or a mere scintilla of evidence in his
15 favor are both insufficient to withstand summary judgment." *FTC v.*
16 *Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009). "[A] non-movant must
17 show a genuine issue of material fact by presenting affirmative
18 evidence from which a jury could find in his favor." *Id.* (emphasis
19 in original). "[S]ummary judgment will not lie if [a] dispute about
20 a material fact is 'genuine,' that is, if the evidence is such that
21 a reasonable jury could return a verdict for the nonmoving party."
22 *Anderson*, 477 U.S. at 248. In determining whether a genuine dispute
23 exists, a district court does not make credibility determinations;
24 rather, the "evidence of the non-movant is to be believed, and all
25 justifiable inferences are to be drawn in his favor." *Id.* at 255.

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1 **IV. DISCUSSION.**

2 **A. FEHA Claims**

3 California's Fair Employment and Housing Act ("FEHA") makes it
4 an "unlawful employment practice" for any employer "because of the
5 race...to discriminate against the person in compensation or in
6 terms, conditions, or privileges of employment." Cal. Gov. Code, §
7 12940(a). The elements of a FEHA claim for employment
8 discrimination are (1) the employee's membership in a
9 classification protected by the statute; (2) discriminatory animus
10 on the part of the employer toward members of that classification;
11 (3) an action by the employer adverse to the employee's interests;
12 (4) a causal link between the discriminatory animus and the adverse
13 action; (5) damage to the employee, and (6) a causal link between
14 the adverse action and the damage. *Mamou v. Trendwest Resorts,*
15 *Inc.*, 165 Cal. App. 4th 686, 713 (Cal. Ct. App. 2008).

16 FEHA's discrimination provision addresses only explicit
17 changes in the "terms, conditions, or privileges of employment."
18 *Roby v. McKesson Corp.*, 47 Cal. 4th 686, 706 (Cal. 2010) (citing
19 (§ 12940(a)). In the case of an institutional or corporate
20 employer, the institution or corporation itself must have taken
21 some official action with respect to the employee, such as hiring,
22 firing, failing to promote, adverse job assignment, significant
23 change in compensation or benefits, or official disciplinary
24 action. *Id.*

25 The Complaint alleges, *inter alia*, that the disciplinary
26 action taken against him in connection with his DUI arrest was
27 motivated by racial discrimination. In support of his contention,
28 Plaintiff provides evidence that he was disciplined more harshly

1 than all but two other officers investigated for DUI's between 2005
2 and 2010. (Doc. 83-3, Plaintiff's Statement of Undisputed Fact
3 30).

4 Defendants offer only the following argument in support of
5 their motion for summary judgment on Plaintiff's FEHA claim:

6 The City may defeat a FEHA claim by producing evidence of
7 a nondiscriminatory reason for its actions. *Flait v.*
8 *North American Watch Corp.*, 3 Cal.App.4th 467, 479
9 (1992). Here, it is undisputed that Manning was never
10 demoted, suspended, fined or terminated in the last five
11 years, except for the suspension at issue. (Dec. of
12 Hains, ¶3). Moreover, as established, the City had a
13 legitimate reason to issue a suspension based on
14 Manning's conduct on October 27, 2007.

15 (Doc. 76, MSJ at 16). Defendants argument is not dispositive, as
16 Plaintiff's claim is that he received overly-harsh discipline
17 because of his race. The fact that it was appropriate, if it was,
18 to take some measure of disciplinary action against Plaintiff does
19 not preclude a finding that Plaintiff was discriminated against;
20 the operative inquiry is whether Plaintiff was subjected to excess
21 discipline motivated by racial animus. Defendants' conclusory
22 argument is insufficient to carry their burden imposed by Rule 56.
23 Questions of fact exist concerning whether Plaintiff was
24 disciplined more harshly than non-African American's cited for
25 similar conduct, and if so, whether such discipline was motivated
26 by racial discrimination. Defendants motion for summary judgment
27 on Plaintiff's FEHA claim is DENIED.

28 **B. Section 1983 Claim**

Section 1983 requires a claimant to prove "(1) that a person
acting under color of state law (2) committed an act that deprived
the claimant of some right, privilege or immunity protected by the

1 Constitution or laws of the United States." *E.g., White v. Roper,*
2 901 F.2d 1501, 1503 (9th Cir. 1990) (footnote omitted). The
3 Complaint alleges violation of Plaintiff's rights under the
4 Fourteenth and Fourth Amendments.

5 **1. Fourth Amendment Claim**

6 The Fourth Amendment to the United States Constitution
7 prohibits unreasonable seizures. The reasonableness of a
8 particular seizure requires balancing of the nature and quality of
9 the seizure against the governmental interest at stake. *See, e.g.,*
10 *Liberal v. Estrada,* 632 F.3d 1064, 1079 (9th Cir. 2011).

11 **a. Reasonableness of Phelp's Traffic Stop**

12 Traffic stops are investigatory stops that must be based on
13 reasonable suspicion that a traffic law violation occurred. *E.g.,*
14 *id.* at 1077; *United States v. Willis,* 431 F.3d 709, 714 (9th Cir.
15 2005). Reasonable suspicion consists of "specific, articulable
16 facts which, together with objective and reasonable inferences,
17 form the basis for suspecting that the particular person detained
18 is engaged in criminal activity.'" *Easyriders Freedom F.I.G.H.T.*
19 *v. Hannigan,* 92 F.3d 1486, 1496 (9th Cir. 1996). A "gloss on this
20 rule prohibits reasonable suspicion from being based on broad
21 profiles which cast suspicion on entire categories of people
22 without any individualized suspicion of the particular person to be
23 stopped." *United States v. Rodriguez-Sanchez,* 23 F.3d 1488, 1492
24 (9th Cir. 1994).

25 Defendants contend that Phelp's initial stop of Plaintiff was
26 justified by reasonable suspicion to believe that Plaintiff had
27 made an unsafe lane change. Defendants' statement of undisputed
28 fact number two provides:

1 Officer Phelps believed that Manning made an abrupt lane
2 change without signaling in proximity of the DUI
 checkpoint

3 The credibility of Phelp's version of events is a matter for the
4 jury. Phelps has given conflicting explanations of the basis for
5 his traffic stop of Plaintiff. Phelps's police report indicates
6 Plaintiff was pulled over because his vehicle did not have a front
7 license plate. Phelps testified at the DMV hearing, however, that
8 he pulled Plaintiff over for making an abrupt lane change. Both a
9 DMV hearing officer and the Superior Court expressed doubts about
10 Phelp's explanation, and the Superior Court suppressed the State's
11 evidence due to its rejection of Phelp's version of events.²

12 The factual dispute regarding the credibility and basis for
13 Phelp's traffic stop of Plaintiff precludes summary judgment. This
14 factual dispute also precludes the grant of qualified immunity.
15 Clearly establish federal law requires traffic stops to be based on
16 reasonable suspicion. *E.g., Liberal*, 632 F.3d at 1077 ("It has
17 been settled law since the 1970's that in order for a police
18 officer to initiate an investigatory stop of a motorist, there must
19 at least exist reasonable suspicion that the motorist is engaging
20 in illegal activity") (citation omitted). Summary judgment is
21 DENIED on the issue of the reasonableness of Phelp's traffic stop
22 of Plaintiff.

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26 ² Plaintiff asserts res judicata concerning the reasonableness of Phelp's traffic
27 stop, but the Superior Courts order is not before the court. Further, Plaintiff
28 represents that the court found that the traffic stop was not supported by
 probable cause-this is the incorrect constitutional standard, however, as traffic
 stops require only reasonable suspicion.

1 **b. Reasonableness of Plaintiff's Arrest**

2 Warrantless arrests require probable cause. *E.g., United*
3 *States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007). "Probable
4 cause to arrest exists when officers have knowledge or reasonably
5 trustworthy information sufficient to lead a person of reasonable
6 caution to believe that an offense has been or is being committed
7 by the person being arrested." *Id.* Plaintiff cannot seriously
8 dispute that probable cause existed to effect his arrest once
9 Phelp's initiated the traffic stop. It is undisputed that
10 Plaintiff admitted he had been drinking and blew a .08 blood
11 alcohol level, the statutory minimum for presumptive blood alcohol
12 content, in a breath test before he was arrested. Objective
13 probable cause therefor existed to believe Plaintiff was driving
14 under the influence. Summary judgment on the issue of probable
15 cause to arrest Plaintiff is GRANTED.

16 **2. Fourteenth Amendment Claim**

17 The Complaint appears to allege a Fourteenth Amendment claim
18 based on alleged discriminatory treatment of Plaintiff during his
19 arrest. Plaintiff complains that he was booked instead of merely
20 cited for the DUI, and that his wife was not permitted to drive the
21 vehicle home; Plaintiff alleges other non-African American officers
22 have received such accommodations when suspected of driving under
23 the influence. Plaintiff does not refer to specific instances or
24 conditions of release of vehicles to responsible parties in DUI
25 cases. Disparate treatment of non-African American officers may
26 support an inference of discrimination if Plaintiff has such
27 foundational evidence and knowledge that any Defendant was involved
28 in the instances Plaintiff refers to in which other officers were

1 given citations for DUI and not arrested. The foundation includes
2 that the "comparable" situations Plaintiff describes were under the
3 influence to the same degree Plaintiff was during his arrest.
4 Summary judgment is DENIED on Plaintiff's Fourteenth Amendment
5 claim subject to a foundational evidentiary showing of comparable
6 incidents.

7 **3. Monell Claim**

8 As to Plaintiff's claim that his traffic stop was not
9 supported by reasonable suspicion, he has not offered evidence that
10 the Department has a discriminatory "driving while black" policy or
11 practice of conducting unreasonable traffic stops of African
12 Americans, or that any other basis for Monell liability exists in
13 connection with Plaintiff's traffic stop. Summary judgment is
14 GRANTED to the City as to the Monell claim on the civil rights
15 action.

16 **ORDER**

17 For the reasons stated, IT IS ORDERED:

- 18 1) Summary judgment on the issue of existence of probable
19 cause to arrest Plaintiff is GRANTED;
- 20 2) Summary judgment on the issue of existence of reasonable
21 suspicion to effect a traffic stop of Plaintiff is DENIED;
- 22 3) Summary judgment on Plaintiff's Fourteenth Amendment claim
23 is DENIED subject to a Fed. R. Evid. 104 foundation;
- 24 4) Summary judgment on Plaintiff's FEHA claims is DENIED;
- 25 5) The City's motion for summary judgment on the Monell claim
26 is GRANTED; and
- 27 6) Defendants shall submit a form of order consistent with
28 this memorandum decision within five (5) days of electronic

1 service of this decision.

2 IT IS SO ORDERED.

3 **Dated: July 13, 2011**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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