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

JOE RASCON,	)	No. CV-F-08-1394 OWW/GSA
	)	
	)	MEMORANDUM DECISION AND
Plaintiff,	)	ORDER DENYING DEFENDANTS'
	)	MOTION TO DISMISS (Doc. 8)
vs.	)	
	)	
CATALINA RODRIGUEZ, et al.,	)	
	)	
Defendants.	)	
	)	

Plaintiff Joe Rascon has filed a Complaint for Damages against Catalina Rodriguez, Jonathan Long and David Wilkin, peace officers with the Fresno Police Department; Larry Hustedde, a sergeant with the Fresno Police Department; and Mark Salazar, a lieutenant with the Fresno Police Department.

Plaintiff's Complaint alleges the following facts:

9. On January 25, 2008, Plaintiff stopped at the Moonlite Restaurant located at 2731 West Clinton Avenue, Fresno, California, where he was served and consumed two non-alcoholic beverages.

10. At approximately 5:20 p.m. as Plaintiff

1 exited the restaurant, he observed a Fresno  
2 police officer sitting in a patrol car with  
3 its overhead lights activated, parked in the  
4 middle of the restaurant parking lot. The  
5 patrol car was located in a position  
6 partially behind and at a distance from  
7 Plaintiff's pickup, which was parked in a  
8 space immediately adjacent the building in a  
9 row with other parked vehicles.

10  
11 11. Plaintiff visually scanned the parking  
12 lot to determine if there was a vehicle that  
13 was the subject of the patrol car's presence  
14 at that location but there was no other  
15 vehicle not in a parking space and Plaintiff  
16 did not identify any person who appeared to  
17 be involved with the police officer. The  
18 officer appeared to be completing paperwork  
19 inside the patrol car.

20  
21 12. Plaintiff entered his pickup, started  
22 the engine and turned on its lights.  
23 Plaintiff then engaged in a cell phone  
24 conversation for approximately one minute.  
25 After completing that conversation, Plaintiff  
26 looked back and determined the patrol car was  
still in the same location with the officer  
in the driver's seat. Plaintiff exited his  
vehicle, went to the rear of the cab, waved  
at the officer but did not make any eye  
contact nor speak to the officer.

17  
18 13. Plaintiff got back into the pickup and  
19 started maneuvering the vehicle out of the  
20 parking space. When the rear end of  
21 Plaintiff's pickup passed in front of the  
22 patrol car, the officer, Defendant Rodriguez,  
23 appeared to the left and rear of the pickup's  
24 driver's side door. Defendant Rodriguez then  
25 yelled at Plaintiff that he was interfering  
26 with her traffic stop, to get out of his  
vehicle and accused Plaintiff of having been  
drinking.

23  
24 14. Plaintiff exited his vehicle as ordered  
25 and told Defendant Rodriguez that he had not  
26 been interfering and was merely backing out  
so he could leave; he further advised  
Defendant Rodriguez that he had not been  
aware she was conducting a stop.

1 15. At that time, a second patrol car  
2 arrived with two officers in it. One of the  
3 officers, Defendant Wilkin, asked Defendant  
4 Rodriguez what was happening and she said  
5 that Plaintiff had been interfering. Both  
6 officers in the second patrol car then exited  
7 their vehicle. Defendant Wilkin requested  
8 Plaintiff's driver's license, which Plaintiff  
9 provided. Defendant Wilkin took the license  
10 and walked back to the patrol car. Defendant  
11 Rodriguez then walked over to a car parked to  
12 the left of Plaintiff's pickup and contacted  
13 its driver.

14 16. After the two officers walked away,  
15 Defendant Long started talking to Plaintiff  
16 in a disrespectful manner and pointing his  
17 right index finger repeatedly in Plaintiff's  
18 face. Plaintiff stated that Defendant Long  
19 needed to stop addressing Plaintiff in such a  
20 rude and disrespectful manner; that  
21 Defendants did not have legal cause to detain  
22 Plaintiff.

23 17. Defendant Wilkin returned and said to  
24 Plaintiff 'You need to shut your mouth;  
25 you're pissing me off.' Defendant Wilkin  
26 then leaned over Plaintiff's body, audibly  
sniffed and said he smelled alcohol.  
Defendant Wilkin stated Plaintiff was under  
arrest for interfering and operating a motor  
vehicle while under the influence of alcohol.  
Plaintiff was handcuffed and walked by  
Defendant Wilkin to the patrol car.

18 18. At the patrol car, Defendant Wilkin  
19 searched Plaintiff and retrieved his wallet  
20 and thereby observed Plaintiff's Fresno  
21 County Sheriff's badge and identification.  
22 Defendant Wilkin asked Plaintiff why he had  
23 not said he was a cop. Defendant Wilkin put  
24 Plaintiff in the rear of his caged patrol  
25 car.

26 19. Approximately ten minutes later,  
Defendant Hustedde arrived and spoke with the  
Defendant Officers. With Plaintiff in the  
rear of the patrol car, Defendant Hustedde  
questioned Plaintiff three separate times  
regarding the facts of the allegations of  
interfering with Defendant Rodriguez's

1 traffic stop. Defendant Hustedde questioned  
2 Plaintiff about the consumption of any  
3 alcoholic beverage. Defendant Hustedde  
4 stated there had been no violation of law.  
5 Defendant Hustedde stated he had to summon  
6 his lieutenant to determine whether to book  
7 Plaintiff into jail.

8  
9 20. Plaintiff requested a PAZ test to  
10 determine his blood alcohol but Defendant  
11 Hustedde stated the lieutenant had refused to  
12 permit this. Plaintiff is informed and  
13 believes the referenced lieutenant was  
14 Defendant Salazar.

15  
16 21. Approximately thirty minutes after  
17 Plaintiff had been arrested, Defendant  
18 Salazar arrived and spoke with the Defendant  
19 Officers, Defendant Hustedde and others.  
20 After Defendant Salazar had been on the scene  
21 approximately twenty minutes, Plaintiff was  
22 released with no charges. Defendant Salazar  
23 also refused to have a PAZ test administered.

24  
25 The First Claim for Relief is for violation of 42 U.S.C. §  
26 1983 and alleges that, in detaining and arresting Plaintiff,  
27 Defendants violated Plaintiff's right to equal protection and to  
28 be free from unreasonable search and seizure. The First Claim  
29 for Relief alleges:

30  
31 25. That Defendants, and each of them, in  
32 all of their mutual and respective acts and  
33 omissions in connection with Plaintiff's  
34 detention and arrest, knew that Plaintiff had  
35 violated no law and that their aforesaid  
36 actions were without probable cause and in  
37 violation of Plaintiff's aforesaid  
38 Constitutional rights and that the violation  
39 of these rights was knowing, willful and  
40 malicious and with reckless disregard for  
41 Plaintiff's rights.

42  
43 26. Plaintiff believes that Defendants, and  
44 each of them, in all of their mutual and  
45 respective acts and omissions in connection  
46 with Plaintiff's detention and arrest, were  
47 motivated by the fact that Plaintiff is

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Hispanic.

The Second Claim for Relief is for conspiracy in violation of 42 U.S.C. § 1985 and alleges:

29. In perpetrating, allowing, and ratifying the aforesaid acts and omissions, Defendants Rodriguez, Long and Wilkin, and each of them, conspired to and did interfere with and deny Plaintiff the exercise of his civil rights to be free from unlawful search and seizure.

30. In perpetrating, allowing and ratifying the aforesaid acts and omissions of Defendants Rodriguez, Long and Wilkin, and each of them, Defendants Hustedde and Salazar refused to prevent the violation of Plaintiff's rights and the injuries and losses arising therefrom.

The Third Claim for Relief is for negligence pursuant to 42 U.S.C. § 1986 and alleges:

35. Defendants Rodriguez [sic] and Hustedde, individually had knowledge of the aforesaid acts and omissions of Defendants Wilkin, Long and Salazar [sic], and each of them.

36. Defendants Rodriguez [sic] and Hustedde, individually, had the power to prevent or aid in preventing the commission of these wrongs, but each of said Defendants neglected or refused to do so.

37. In perpetrating, allowing and ratifying the aforesaid acts and omissions, Defendants Rodriguez [sic] and Hustedde, and each of them, neglected to prevent the violation of Plaintiff's rights and the injuries and losses arising therefrom.

Defendants move to dismiss the Complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure.

A. Governing Standards.

1 A motion to dismiss under Rule 12(b)(6) tests the  
2 sufficiency of the complaint. *Novarro v. Black*, 250 F.3d 729,  
3 732 (9<sup>th</sup> Cir.2001). "A district court should grant a motion to  
4 dismiss if plaintiffs have not pled 'enough facts to state a  
5 claim to relief that is plausible on its face.'" *Williams ex rel.*  
6 *Tabiu v. Gerber Products Co.*, 523 F.3d 934, 938 (9<sup>th</sup> Cir.2008),  
7 quoting *Bell Atlantic Corp. v. Twombly*, \_\_\_ U.S. \_\_\_, 127 S.Ct.  
8 1955, 1974 (2007). "'Factual allegations must be enough to raise  
9 a right to relief above the speculative level.'" *Id.* "While a  
10 complaint attacked by a Rule 12(b)(6) motion to dismiss does not  
11 need detailed factual allegations, a plaintiff's obligation to  
12 provide the 'grounds' of his 'entitlement to relief' requires  
13 more than labels and conclusions, and a formulaic recitation of  
14 the elements of a cause of action will not do." *Bell Atlantic*,  
15 *id.* at 1964-1965. Dismissal of a claim under Rule 12(b)(6) is  
16 appropriate only where "it appears beyond doubt that the  
17 plaintiff can prove no set of facts in support of his claim which  
18 would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-  
19 46 (1957). Dismissal is warranted under Rule 12(b)(6) where the  
20 complaint lacks a cognizable legal theory or where the complaint  
21 presents a cognizable legal theory yet fails to plead essential  
22 facts under that theory. *Robertson v. Dean Witter Reynolds*,  
23 *Inc.*, 749 F.2d 530, 534 (9<sup>th</sup> Cir.1984). In reviewing a motion to  
24 dismiss under Rule 12(b)(6), the court must assume the truth of  
25 all factual allegations and must construe all inferences from  
26 them in the light most favorable to the nonmoving party.

1 *Thompson v. Davis*, 295 F.3d 890, 895 (9<sup>th</sup> Cir.2002). However,  
2 legal conclusions need not be taken as true merely because they  
3 are cast in the form of factual allegations. *Ileto v. Glock,*  
4 *Inc.*, 349 F.3d 1191, 1200 (9<sup>th</sup> Cir.2003).

5 Immunities and other affirmative defenses may be upheld on a  
6 motion to dismiss only when they are established on the face of  
7 the complaint. See *Morley v. Walker*, 175 F.3d 756, 759 (9<sup>th</sup>  
8 Cir.1999); *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9<sup>th</sup>  
9 Cir. 1980) When ruling on a motion to dismiss, the court may  
10 consider the facts alleged in the complaint, documents attached  
11 to the complaint, documents relied upon but not attached to the  
12 complaint when authenticity is not contested, and matters of  
13 which the court takes judicial notice. *Parrino v. FHP, Inc.*, 146  
14 F.3d 699, 705-706 (9<sup>th</sup> Cir.1988).

15 B. FIRST CLAIM FOR RELIEF.

16 Defendants move to dismiss the First Claim for Relief on the  
17 grounds that Plaintiff has failed to state a claim for denial of  
18 equal protection under Section 1983; Plaintiff has failed to  
19 adequately allege personal participation by all Defendants; and  
20 Defendants Rodriguez, Hustedde and Salazar are entitled to  
21 qualified immunity.

22 1. Denial of Equal Protection.

23 "To state a claim under 42 U.S.C. § 1983 for a violation of  
24 the Equal Protection Clause of the Fourteenth Amendment a  
25 plaintiff must show that the defendants acted with an intent or  
26 purpose to discriminate against the plaintiff based on his

1 membership in a protected class.'" *Neveu v. City of Fresno*, 392  
2 F.Supp.2d 1159, 1179 (E.D.Cal.2005), quoting *Lee v. City of Los*  
3 *Angeles*, 250 F.3d 668, 686 (9<sup>th</sup> Cir.2001); see also *Moua v. City*  
4 *of Chico*, 324 F.Supp.2d 1132, 1137 (E.D.Cal.2004):

5 In order to make out an equal protection  
6 violation, plaintiffs must prove four  
7 elements: (1) the municipal defendants  
8 treated them differently from others  
9 similarly situated; (2) this unequal  
10 treatment was based on an impermissible  
11 classification; (3) the municipal defendants  
12 acted with discriminatory intent in applying  
13 this classification; and (4) plaintiffs  
14 suffered injury as a result of the  
15 discriminatory classification.

16 Defendants contend that the Complaint's conclusory  
17 allegation that Plaintiff's detention and arrest were motivated  
18 by the fact that Plaintiff is Hispanic does not state a claim  
19 because there are no allegations which support his being treated  
20 differently from other similarly situated persons or that  
21 Defendants acted with an intent or purpose to discriminate  
22 against Plaintiff based on his national origin.

23 Plaintiff responds that the factual allegations in the  
24 Complaint imply that Defendants' actions were based on  
25 Plaintiff's location outside a restaurant, his attempt to leave  
26 the parking lot, and his physical appearance. Plaintiff alleges  
that he had not consumed any alcohol, negating any inference that  
he smelled of alcohol or was under the influence of alcohol.  
Plaintiff asserts that Defendant Rodriguez did not appear to  
Plaintiff to be involved in a traffic stop with which Plaintiff  
could have interfered and refers to the allegations that

1 Defendants Rodriguez, Wilkin and Long were rude and disrespectful  
2 in their comments to Plaintiff. Plaintiff contends that "[f]rom  
3 these facts and his personal knowledge of the conduct and  
4 attitude of Defendants," his treatment by Defendants was racially  
5 motivated. Plaintiff further notes that intent and motivation  
6 "are almost always conclusory allegations not susceptible to  
7 factual allegations in a complaint" and argues that the factual  
8 allegations sufficiently support an inference of unlawful racial  
9 motive to withstand the motion to dismiss on this ground.

10 Defendants' motion to dismiss on this ground is DENIED.

11 2. Personal Participation.

12 Defendants move to dismiss the First Claim for Relief on the  
13 ground that their respective personal participation in the  
14 alleged constitutional violations is not adequately pleaded.

15 "A supervisor is only liable for constitutional violations  
16 of his subordinates if the supervisor participated in or directed  
17 the violations, or knew of the violations and failed to act to  
18 prevent them. There is no respondeat superior liability under  
19 section 1983." *Taylor v. List*, 840 F.2d 1040, 1045 (9<sup>th</sup>  
20 Cir.1989). As explained in *Blankenhorn v. City of Orange*, 485  
21 F.3d 463, 481 n.12 (9<sup>th</sup> Cir.2007):

22 An officer's liability under section 1983 is  
23 predicated on his 'integral participation' in  
24 the alleged violation. *Chuman v. Wright*, 76  
25 F.3d 292, 294-95 (9<sup>th</sup> Cir.1996). "[I]ntegral  
26 participation' does not require that each  
officer's actions themselves rise to the  
level of a constitutional violation.' *Boyd*,  
374 F.3d at 780. But it does require some  
fundamental involvement in the conduct that

1                   allegedly caused the violation. See *id.*

2                   a. Catalina Rodriguez.

3                   Defendants argue that the facts alleged against Defendant  
4 Rodriguez do not state a claim, asserting that the Complaint  
5 alleges that Rodriguez yelled at Plaintiff that he was  
6 interfering with her traffic stop, ordered him to get out of his  
7 vehicle, and accused Plaintiff of having been drinking. At that  
8 point Defendants Wilkin and Long arrived and Rodriguez walked  
9 over to another vehicle and talked to its driver. Defendants  
10 argue that there are no allegations of any personal participation  
11 by Rodriguez in Plaintiff's arrest and the claim for violation of  
12 the Fourth Amendment should be dismissed against her.

13                  Plaintiff responds that Rodriguez falsely accused him of  
14 interfering with her traffic stop and with drinking. When  
15 Defendant Wilkin placed Plaintiff under arrest, Rodriguez  
16 acquiesced by failing to tell Wilkin the truth and that no field  
17 sobriety test had been conducted. Plaintiff asserts that  
18 Rodriguez failed to act as a reasonable law enforcement officer  
19 to stop an unlawful arrest.

20                  Defendants argue that merely apprising other officers of her  
21 assessment of the situation does not rise to the level of  
22 participation in a constitutional violation. Defendant Rodriguez  
23 did not detain or arrest Plaintiff and her presence at the scene  
24 at the time of his arrest does not implicate her in the  
25 allegations of unlawful arrest.

26                  Defendants' contention ignores that Rodriguez was the

1 initial and motivating force for Plaintiff's detention and  
2 allegedly gave false information about Plaintiff to cause the  
3 detention and arrest.

4 Defendants' motion to dismiss as to Defendant Rodriguez is  
5 DENIED.

6 b. Larry Hustedde.

7 Defendants assert that the allegations against Defendant  
8 Hustedde do not infer his personal participation in the alleged  
9 violations of Plaintiff's Equal Protection or Fourth Amendment  
10 rights. The Complaint alleges that Defendant Hustedde arrived on  
11 the scene after Plaintiff had been arrested and placed in the  
12 back of the patrol car. Defendant Hustedde questioned Plaintiff  
13 and then contacted his supervisor, Defendant Salazar. Shortly  
14 after Defendant Salazar arrived, Plaintiff was released.

15 Plaintiff responds that Defendant Hustedde acknowledged to  
16 Plaintiff that no violation of the law had occurred and refused  
17 to conduct a PAZ test, thereby inferentially demonstrating his  
18 awareness that Plaintiff was not under the influence and his  
19 acquiescence in and perpetuation of an allegedly false accusation  
20 and arrest. Plaintiff asserts that Defendant Hustedde continued  
21 Plaintiff's unlawful detention by not releasing him and "by  
22 passing it on to Lt. Salazar," thereby failing to act as a  
23 reasonable law enforcement officer to stop an unlawful arrest.

24 Defendants argue that Sergeant Hustedde's attempt to gather  
25 information prior to Plaintiff's release does not establish his  
26 "integral participation" in Plaintiff's detention or arrest.

1 Defendants' motion to dismiss as to Defendant Hustedde is  
2 DENIED. Defendants' contentions raise factual issues to be  
3 resolved by summary judgment or trial.

4 c. Mark Salazar.

5 The Complaint alleges that, approximately thirty minutes  
6 after Plaintiff was arrested, Defendant Salazar arrived at the  
7 scene at the request of Defendant Hustedde. Defendant Salazar  
8 spoke with the officers at the scene for approximately twenty  
9 minutes and then ordered Plaintiff released. Defendants contend  
10 there are no facts to support Defendant Salazar's personal  
11 participation in the alleged violations of Plaintiff's  
12 constitutional rights.

13 Plaintiff responds that the Complaint alleges that Defendant  
14 Salazar refused him the PAZ test before he arrived on the scene,  
15 implying that Defendant Salazar did not believe Plaintiff was  
16 under the influence of alcohol and did not want to know the  
17 truth, but did not immediately order him to be released and  
18 unjustifiably prolonged the unlawful detention and arrest after  
19 Defendant Hustedde had determined no law had been violated.

20 Plaintiff further argues that the fact that a sergeant and a  
21 lieutenant were called to the scene "gives rise to the  
22 implication that Defendants were aware the arrest was unlawful  
23 and were trying to extricate themselves." Plaintiff contends  
24 that each defendant contributed to the total circumstances and  
25 each should be held accountable.

26 That Defendant Salazar took some time to gather information

1 to assess the situation does not establish his integral  
2 participation in Plaintiff's detention and arrest. However,  
3 there is no legal justification for his refusal of the PAZ test  
4 while Plaintiff was endeavoring to exonerate himself. The extent  
5 to which he knew or should have known that the Defendants  
6 Rodriguez, Long and Wilkin were falsifying the alleged probable  
7 cause for arrest and continuing an unlawful arrest merits  
8 discovery.

9 Defendants' motion to dismiss on this ground is DENIED.

10 3. Qualified Immunity.

11 Defendants Rodriguez, Hustedde and Salazar move to dismiss  
12 the First Claim for Relief on the ground of qualified immunity  
13 with regard to Plaintiff's claims of detention and arrest in  
14 violation of the Fourth Amendment.

15 Qualified immunity serves to shield government officials  
16 "from liability for civil damages insofar as their conduct does  
17 not violate clearly established statutory or constitutional  
18 rights of which a reasonable person would have known." *Harlow v.*  
19 *Fitzgerald*, 457 U.S. 800, 818 (1982). The Supreme Court has set  
20 forth a two-pronged inquiry to resolve all qualified immunity  
21 claims. First, "taken in the light most favorable to the party  
22 asserting the injury, do the facts alleged show the officers'  
23 conduct violated a constitutional right?" *Saucier v. Katz*, 533  
24 U.S. 194, 201 (2001). If the court determines that the conduct  
25 did not violate a constitutional right, the inquiry is over and  
26 the officer is entitled to qualified immunity. However, if the

1 court determines that the conduct did violate a constitutional  
2 right, *Saucier's* second prong requires the court to determine  
3 whether, at the time of the violation, the constitutional right  
4 was "clearly established." *Id.* "The relevant, dispositive  
5 inquiry in determining whether a right is clearly established is  
6 whether it would be clear to a reasonable officer that his  
7 conduct was unlawful in the situation he confronted." *Id.* at  
8 202. This inquiry is wholly objective and is undertaken in light  
9 of the specific factual circumstances of the case. *Id.* at 201.  
10 Even if the violated right is clearly established, *Saucier*  
11 recognized that, in certain situations, it may be difficult for a  
12 police officer to determine how to apply the relevant legal  
13 doctrine to the particular circumstances he faces. If an officer  
14 makes a mistake in applying the relevant legal doctrine, he is  
15 not precluded from claiming qualified immunity so long as the  
16 mistake is reasonable. If "the officer's mistake as to what the  
17 law requires is reasonable, ... the officer is entitled to the  
18 immunity defense." *Id.* at 205. In *Brosseau v. Haugan*, 543 U.S.  
19 194 (2004), the Supreme Court reiterated:

20 Qualified immunity shields an officer from  
21 suit when she makes a decision that, even if  
22 constitutionally deficient, reasonably  
23 misapprehends the law governing the  
24 circumstances she confronted. *Saucier v.*  
25 *Katz*, 533 U.S., at 206 (qualified immunity  
26 operates "to protect officers from the  
sometimes "hazy border between excessive and  
acceptable force"). Because the focus is on  
whether the officer had fair notice that her  
conduct was unlawful, reasonableness is  
judged against the backdrop of the law at the  
time of the conduct. If the law at that time

1 did not clearly establish that the officer's  
2 conduct would violate the Constitution, the  
3 officer should not be subject to liability  
4 or, indeed, even the burdens of litigation.

5 It is important to emphasize that this  
6 inquiry 'must be undertaken in light of the  
7 specific context of the case, not as a broad  
8 general proposition.' *Id.*, at 201. As we  
9 previously said in this very context:

10 '[T]here is no doubt that *Graham v.*  
11 *Connor, supra*, clearly establishes  
12 the general proposition that use of  
13 force is contrary to the Fourth  
14 Amendment if it is excessive under  
15 objective standards of  
16 reasonableness. Yet, that is not  
17 enough. Rather, we emphasized in  
18 *Anderson [v. Creighton]* "that the  
19 right the official is alleged to  
20 have violated must have been  
21 'clearly established' in a more  
22 particularized, and hence more  
23 relevant, sense: The contours of  
24 the right must be sufficiently  
25 clear that a reasonable officer  
26 would understand that what he is  
doing violates that right.' ...  
The relevant, dispositive inquiry  
in determining whether a right is  
clearly established is whether it  
would be clear to a reasonable  
officer that his conduct was  
unlawful in the situation he  
confronted.' ...

The Court of Appeals acknowledged this  
statement of law, but then proceeded to find  
fair warning in the general tests set out in  
*Graham* and *Garner* ... In so doing, it was  
mistaken. *Graham* and *Garner*, following the  
lead of the Fourth Amendment's text, are cast  
at a high level of generality. See *Graham v.*  
*Connor, supra*, at 396 ('[T]he test of  
reasonableness under the Fourth Amendment is  
not capable of precise definition or  
mechanical application'). Of course, in an  
obvious case, these standards can 'clearly  
establish' the answer, even without a body of  
relevant case law.'

1 543 U.S. at 198-199. However, as explained in *Wilkins v. City of*  
2 *Oakland*, 350 F.3d 949, 956 (9<sup>th</sup> Cir.2003), cert. denied sub nom.  
3 *Scarrot v. Wilkins*, 543 U.S. 811 (2004):

4           Where the officers' entitlement to qualified  
5 immunity depends on the resolution of  
6 disputed issues of fact in their favor, and  
7 against the non-moving party, summary  
8 judgment is not appropriate. See *Saucier*,  
9 533 U.S. at 216 ... (Ginsberg, J.,  
10 concurring) ('Of course, if an excessive force  
11 claim turns on which of two conflicting  
12 stories best captures what happened on the  
13 street, *Graham* will not permit summary  
14 judgment in favor of the defendant  
15 official.').

16           Probable cause to arrest exists if, "under the totality of  
17 the circumstances known to the arresting officers, a prudent  
18 person would have concluded that there was a fair probability  
19 that [the plaintiff] had committed a crime. *Beier v. City of*  
20 *Lewiston*, 354 F.2d 1058, 1065 (9<sup>th</sup> Cir.2004). The proper inquiry  
21 where an officer is claiming qualified immunity for a false  
22 arrest claim is "whether a reasonable officer could have believed  
23 that probable cause existed to arrest the plaintiff." *Franklin*  
24 *v. Fox*, 312 F.3d 423, 437 (9<sup>th</sup> Cir.2002). Qualified immunity  
25 does not depend on whether probable cause actually existed.

26           a. Defendant Rodriguez.

          Defendants argue that it was not unreasonable for Defendant  
Rodriguez to ask Plaintiff to exit his vehicle and then allow  
Defendants Wilkin and Long to take over as she was already  
engaged in another traffic stop; that it was not unreasonable for  
Defendant Hustedde, who arrived after Plaintiff was arrested, to

1 question Plaintiff and then call Defendant Salazar; and that it  
2 was not unreasonable for Defendant Salazar, who arrived thirty  
3 minutes after Plaintiff's arrest, to speak with the officers and  
4 then order Plaintiff released. This totally partisan analysis  
5 accepts the credibility of the Defendants and ignores the  
6 allegations of the Complaint.

7 Plaintiff responds that Defendants' invocation of qualified  
8 immunity fails to address the question of national origin  
9 discrimination. Although Defendant Rodriguez could lawfully ask  
10 Plaintiff to exit his vehicle and turn it over to further  
11 investigation, Plaintiff contends, if she did so because  
12 Plaintiff was Hispanic, her conduct was unlawful and no officer  
13 could reasonably believe "that is a lawful basis." Moreover, she  
14 is alleged to have falsely accused Plaintiff of interfering with  
15 her unrelated investigation and she did not conduct any sobriety  
16 evaluation.

17 "Although a defendant's subjective intent is usually not  
18 relevant to the qualified immunity defense, his mental state *is*  
19 relevant when ... it is an element of the alleged constitutional  
20 violation." *Clement v. Gomez*, 298 F.3d 898, 903 (9<sup>th</sup> Cir.2002),  
21 *citing Jeffers v. Gomez*, 267 F.3d 895, 911 (9<sup>th</sup> Cir.2001).

22 Plaintiff argues that he has not had the opportunity to obtain  
23 evidence of motive and should be allowed to do so: "Defendant  
24 Rodriguez will need to be able to articulate a lawful basis for  
25 her acts and her omissions consistent with the facts and  
26 circumstances."

1 Defendants reply that Plaintiff is "attempting to implicate  
2 her in a Fourth Amendment violation" and that Defendant  
3 Rodriguez's subjective intent is irrelevant:

4 It would not be unreasonable for Rodriguez to  
5 ask Plaintiff to exit the vehicle and then  
6 allow Officers Wilkin and Long to take over  
7 as she was already engaged in another traffic  
8 stop. Nor would it be clear to Rodriguez or  
9 any other reasonable officer that doing so  
10 would be unlawful.

11 The analysis is complicated because the First Claim for  
12 Relief alleges both a violation of the Fourth Amendment and a  
13 violation of the Equal Protection Clause. Subjective motivation  
14 is irrelevant to a violation of the Fourth Amendment but is  
15 relevant to a violation of the Equal Protection Clause.  
16 Defendants seek qualified immunity solely on the alleged  
17 violation of the Fourth Amendment. Here, the Complaint alleges  
18 that Defendant Rodriguez falsely accused Plaintiff of interfering  
19 with a non-existent traffic stop and with being under the  
20 influence of alcohol, when he alleges he was not. It is  
21 inferrable that Defendant Rodriguez advised Defendants Long and  
22 Wilkin of these allegedly false accusations, thereby causing them  
23 to place Plaintiff under arrest. Because the facts have not been  
24 developed, there is a dispute as to Defendant Rodriguez's  
25 actions. There can be no question that using false accusations  
26 to effect an arrest violates a clearly established constitutional  
right under the Fourth Amendment of which a reasonable officer  
would have known, i.e., the right to be free from arrest when  
there is no probable cause. With regard to the alleged violation

1 of equal protection, evidence of subjective motivation is a part  
2 of any determination of qualified immunity for the alleged  
3 violation of equal protection. This decision cannot be made as a  
4 matter of law.

5 Defendants' motion to dismiss on qualified immunity grounds  
6 as to Defendant Rodriguez is DENIED.

7 b. Defendant Hustedde.

8 With regard to Defendant Hustedde, Plaintiff contends that  
9 he expressly ratified Plaintiff's wrongful arrest by failing to  
10 release Plaintiff once Defendant Hustedde acknowledged that  
11 Plaintiff had not violated the law:

12 Having reached this conclusion, Defendant  
13 Hustedde could not reasonably believe Rascon  
14 could lawfully continue to be held ...  
Rascon's's continued unlawful detention was  
directly attributable to Defendant Hustedde.

15 Defendants cite *Martiszus v. Washington County*, 325  
16 F.Supp.2d 1160, 1165 (D.Or.2004) as authority that ratification  
17 requires a policymaker's approval of a subordinate's decision.  
18 Defendants assert that Plaintiff does not allege that Sergeant  
19 Hustedde was a policymaker. *Martiszus* is not controlling.  
20 *Martiszus* discusses the imposition of municipal liability under  
21 *Monell*.

22 Defendants argue that, "[n]otwithstanding the first question  
23 of whether Sgt. Hustedde calling his superior to the scene before  
24 he [sic] released Rascon rises to the level of a Fourth Amendment  
25 violation, the question is whether it would it [sic] be clear to  
26 Sgt. Hustedde that doing so was unlawful under the circumstances

1 facing him.”

2 The officers at the scene, Defendants Wilkin and Long,  
3 arrested Plaintiff. For reasons based on his own observations,  
4 Defendant Hustedde did not agree with their assessment. It is  
5 necessary that discovery be conducted to determine the basis for  
6 Defendant Hustedde’s alleged violation of Plaintiff’s rights  
7 against unlawful arrest by seeking advice from his superior  
8 officer.

9 Defendants’ motion to dismiss on qualified immunity grounds  
10 as to Defendant Hustedde is DENIED.

11 c. Defendant Salazar.

12 With regard to Defendant Salazar, Plaintiff asserts that  
13 circumstances indicate that Defendant Salazar had been briefed  
14 before he arrived on the scene because Defendant Hustedde told  
15 Plaintiff that a lieutenant had denied Plaintiff’s request for a  
16 PAZ test. Plaintiff contends that, because Defendant Hustedde  
17 had already concluded that Plaintiff had not violated any law,  
18 “it is unclear why Salazar had to respond to the scene and why he  
19 did not just order him released.” Plaintiff asserts that when  
20 Defendant Salazar did arrive, he did not immediately order  
21 Plaintiff released, although he continued the refusal to conduct  
22 a PAZ test requested by Plaintiff.

23 Defendants reply that the fact Defendant Salazar took the  
24 time to assess the situation does not implicate him in the  
25 alleged Fourth Amendment violation: “He was not there when the  
26 events transpired so its stands to reason he would want to gather

1 information before taking action."

2 Although Defendant Salazar was not present when Plaintiff  
3 was detained and arrested and did not agree with the assessment  
4 by Defendants Rodriguez, Long and Wilkin, it is necessary to  
5 conduct discovery to determine why Defendant Salazar did not  
6 immediately order Plaintiff's release, knowing that Defendant  
7 Hustedde had decided no law had been violated.

8 Defendants' motion to dismiss on qualified immunity grounds  
9 as to Defendant Salazar is DENIED.

10 C. SECOND CLAIM FOR RELIEF.

11 Defendants move to dismiss the Second Claim for Relief for  
12 conspiracy in violation of Section 1985(3) on the ground that the  
13 allegation of conspiracy is not adequately pleaded.

14 In order to state a claim upon which relief can be granted  
15 under Section 1985(3), a plaintiff must allege the following four  
16 elements:

- 17 (1) a conspiracy; (2) for the purpose of  
18 depriving, either directly or indirectly, any  
19 person or class of persons of the equal  
20 protection of the laws, or of equal  
21 privileges and immunities under the laws; and  
22 (3) an act in furtherance of this conspiracy;  
23 (4) whereby a person is either injured in his  
24 person or property or deprived of any right  
25 or privilege of a citizen of the United  
26 States.

*United Bhd. of Carpenters v. Scott*, 463 U.S. 825, 828-829 (1983).

23 The second of these four elements requires that in addition to  
24 identifying a legally protected right, that the Amended Complaint  
25 allege that the conspiracy was motivated by "some racial, or  
26

1 perhaps otherwise class-based, invidiously discriminatory animus  
2 behind the conspirators' action." *Trerice v. Pedersen*, 769 F.2d  
3 1398, 1402 (9<sup>th</sup> Cir. 1985). "A claim under this section must  
4 allege facts to support the allegation that defendants conspired  
5 together. A mere allegation of conspiracy without factual  
6 specificity is insufficient." *Karim-Panahi v. Los Angeles Police*  
7 *Dept.*, 839 F.2d 621, 626 (9<sup>th</sup> Cir. 1988). In *Holgate v. Baldwin*,  
8 425 F.3d 671, 676 (9<sup>th</sup> Cir.2005), the Ninth Circuit explained:

9           The complaint also failed to allege evidence  
10           of a conspiracy and an act in furtherance of  
11           that conspiracy, which are required elements  
12           of a § 1985(3) action ... It is alleged that  
13           Newell and others conspired to violate the  
14           Holgate's civil rights, but it did not allege  
15           that a specific act was committed in  
16           furtherance of this conspiracy ... While Rule  
17           8(a)(2) does not require plaintiffs to lay  
18           out in detail the facts upon which their  
19           claims are based, it does require plaintiffs  
20           to provide 'a short and plain statement of  
21           the claim' to give the defendants fair notice  
22           of what the claim is and the grounds upon  
23           which it is based.

24           Defendants argue that the Complaint fails to allege that  
25           Defendants agreed among themselves to deprive Plaintiff of equal  
26           protection of the laws and fails to allege any facts to support  
27           his conclusion that Plaintiff's detention and arrest were  
28           motivated by Plaintiff's national origin.

29           Plaintiff responds that he is not alleging that Defendants  
30           "started out with a conspiracy." Rather, once Defendants knew of  
31           Plaintiff's status as a law enforcement officer, "they began with  
32           the unity of purpose to avoid being held accountable for their  
33           wrongful acts." Plaintiff asserts:

1 The wrongful act was violating Plaintiff's  
2 Constitutional right to be free from  
3 unreasonable search and seizure because he is  
4 Hispanic. When Defendant Wilkin put  
5 Plaintiff under arrest for DUI, without  
6 conducting a field sobriety test or any  
7 evidence to support the arrest, Defendants  
8 Rodriguez and Long became responsible for  
9 failing to act.

10 Normally, that failure to act would go  
11 officially unnoticed and unpunished but  
12 Plaintiff's position in law enforcement made  
13 that less likely. Plaintiff was initially  
14 subjected to the bullying that crossed the  
15 line into unlawfulness because he is  
16 Hispanic; he would not have been treated in  
17 that manner under those circumstances had he  
18 been Caucasian. Once Defendant Officers had  
19 Rascon's badge, they all knew they had gone  
20 too far and that Rascon knew it as well. So  
21 they called their sergeant.

22 Unfortunately, calling the sergeant did not  
23 cure the problem. Sgt. Hustedde knew the  
24 officers had intentionally violated Rascon's  
25 rights and that his detention and arrest was  
26 illegal. Defendant Hustedde admitted Rascon  
had violated no law yet did not release him.  
Hustedde perpetuated the underlying violation  
and in so doing, becomes an accomplice after  
the fact. Like his subordinates, Hustedde  
called for help because it was obvious the  
[sic] Rascon's rights had been violated. In  
other words, like the Defendant Officers,  
Hustedde is hoping Lt. Salazar would find a  
way out. Despite nearly half an hour of  
discussions at the scene, Salazar could not  
find a way and ultimately, to his credit,  
released Plaintiff. Plaintiff is sure the  
defense will have other explanations for the  
events, however, at this stage, the facts  
must be construed in the light most favorable  
to Plaintiff. Plaintiff can construe the  
facts, as above indicated, in a manner which  
supports his contentions of racial  
discrimination, harassment and conspiracy.

27 Accepting as true that Plaintiff's race caused his disparate  
28 treatment, detention and arrest, Plaintiff's allegations that the

1 Defendants conspired and combined to falsely arrest and continue  
2 to unlawfully detain Plaintiff due to his ethnicity is sufficient  
3 for a Section 1985(3) conspiracy.

4 Defendants' motion to dismiss on this ground is DENIED.

5 D. THIRD CLAIM FOR RELIEF.

6 Defendants Rodriguez, Hustedde and Salazar move to dismiss  
7 the Third Claim for Relief on the ground that Plaintiff has  
8 failed to allege compliance with the California Government Tort  
9 Claims Act.

10 As Plaintiff points out, however, the Third Claim for Relief  
11 is based on 42 U.S.C. § 1986:

12 Every person who, having knowledge that any  
13 of the wrongs conspired to be done, and  
14 mentioned in section 1985 of this title, are  
15 about to be committed, and having power to  
16 prevent or aid in preventing the commission  
17 of the same, neglects or refused so to do, is  
18 such wrongful act be committed, shall be  
19 liable to the party injured ... for all  
20 damages caused by such wrongful act, which  
21 such person by reasonable diligence could  
22 have prevented ....

18 The California Government Tort Claims Act does not apply to  
19 actions brought under the federal civil rights acts. See  
20 *Williams v. Horvath*, 16 Cal.3d 834 (1976).

21 Defendants' motion to dismiss the Third Claim for Relief on  
22 this ground is DENIED.

23 Defendants Rodriguez, Hustedde and Salazar move to dismiss  
24 the Third Claim for Relief on the ground that insufficient facts  
25 are alleged to support a claim of breach of statutory duty.  
26 Defendants assert that Defendant Rodriguez asked Plaintiff to

1 exit his vehicle and than turned the investigation over to  
2 Defendants Long and Wilkin because Defendant Rodriguez was  
3 involved in another traffic stop; that Defendant Hustedde arrived  
4 after Plaintiff's detention and arrest and, after questioning the  
5 officers and Plaintiff, summoned Defendant Salazar; Defendant  
6 Salazar arrived on the scene at the request of Defendant Hustedde  
7 and, after questioning the officers and Plaintiff, released  
8 Plaintiff.

9 This ignores that Defendant Rodriguez was the catalyst by  
10 falsely reporting to fellow officers that Plaintiff had  
11 interfered with her work.

12 Plaintiff responds that the breach of statutory duty is the  
13 failure or refusal to prevent the commission of the alleged  
14 conspiracy:

15 Defendant Rodriguez was in a position to  
16 prevent Defendant Wilkin from arresting  
17 Plaintiff when there was no probable cause;  
18 Defendant Hustedde was in a position to stop  
19 the conspiracy from proceeding by stopping  
the continued detention very soon after  
Rascon was placed in the patrol car; and,  
Defendant Salazar could have stopped it when  
Hustedde brief [sic] him.

20 Defendants reply that, because the Complaint fails to  
21 adequately allege a claim for conspiracy in violation of Section  
22 1985(3), Plaintiff's Section 1986 claim necessarily fails. See  
23 *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1040 (9<sup>th</sup> Cir.1990),  
24 *cert. denied*, 502 U.S. 957 (1991).

25 Because Plaintiff has adequately alleged a Section 1985(3)  
26 conspiracy against the moving Defendants, the motion to dismiss

1 on this ground is DENIED.

2 CONCLUSION

3 For the reasons stated:

4 1. Defendants' motion to dismiss is DENIED;

5 2. Defendants shall file an Answer to the Complaint within  
6 20 days of the filing date of this Memorandum Decision and Order.

7 IT IS SO ORDERED.

8 Dated: January 20, 2009

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE

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