

1
2
3
4
5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF CALIFORNIA

7
8 JAMES LEWIS, et al.,
9 Plaintiffs,
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 JAMES LEWIS
(Doc. 75)

14
15 I. INTRODUCTION.

16 James Lewis ("Plaintiff") proceeds with an action against the
17 City of Fresno ("the City"), Jerry Dyer ("Dyer"), Robert Nevarez
18 ("Nevarez"), John Romo ("Romo"), Greg Garner ("Garner"), Anthony
19 Martinez ("Martinez"), and multiple Doe defendants. Plaintiff
20 filed a first amended complaint ("FAC") on September 23, 2009.
21 (Doc. 45).

22 The City, Dyer, Nevarez, and Romo filed a motion for summary
23 judgment against Plaintiff on May 10, 2011. (Doc. 75). Plaintiff
24 filed opposition to the motion for summary judgment on June 6,
25 2011. (Doc. 81).

26 II. FACTUAL BACKGROUND.

27 Plaintiff has been employed as a peace officer with the Fresno
28 Police Department ("Department") since 1986. In 2006, Plaintiff

1 held the rank of sergeant with the Department.

2 In January 2006, John Romo ("Romo") was a sergeant with the
3 Department and was the supervising officer for the Department's
4 Duty Office. Romo issued a memorandum on January 21, 2006
5 prohibiting personnel from outside the Duty Office from reviewing
6 records relevant to overtime assignments.

7 On February 21, 2006, Plaintiff complained to Captain Lydia
8 Carrasco that he believed Romo was assigning overtime in a
9 disparate manner and discriminating against Plaintiff. Plaintiff
10 further complained that Romo was restricting Plaintiff's access to
11 information regarding overtime assignments.

12 On March 1, 2006, the Fresno Police Officer's Association
13 ("FPOA") issued a memorandum stating that it would pursue an
14 informal grievance against Romo on Plaintiff's behalf for alleged
15 disparate treatment in violation of the Department's Standing
16 Orders 2.4.8 and 2.5.1. On May 19, 2006, the Department issued a
17 response to the FPOA memorandum in which the Department agreed to
18 form a committee to draft a recommendation for a new overtime
19 policy. Plaintiff was assigned to serve on the committee.

20 On July 8, 2006, Plaintiff went to the Duty Office to view
21 records related to overtime assignments and to obtain a copy of the
22 January 21, 2006 Romo memorandum. Plaintiff instructed Duty
23 Officer Barajas that Romo's memorandum was void and ordered Barajas
24 to permit him to view the overtime records. Barajas complied.
25 Plaintiff was subsequently investigated by Internal Affairs for
26 alleged violations of Department policy related to giving
27 conflicting orders and disciplined.

28 ///

1 2505, 91 L. Ed. 2d 202 (1986)). "A non-movant's bald assertions or
2 a mere scintilla of evidence in his favor are both insufficient to
3 withstand summary judgment." *FTC v. Stefanichik*, 559 F.3d 924, 929
4 (9th Cir. 2009). "[A] non-movant must show a genuine issue of
5 material fact by presenting affirmative evidence from which a jury
6 could find in his favor." *Id.* (emphasis in original). "[S]ummary
7 judgment will not lie if [a] dispute about a material fact is
8 'genuine,' that is, if the evidence is such that a reasonable jury
9 could return a verdict for the nonmoving party." *Anderson*, 477
10 U.S. at 248. In determining whether a genuine dispute exists, a
11 district court does not make credibility determinations; rather,
12 the "evidence of the non-movant is to be believed, and all
13 justifiable inferences are to be drawn in his favor." *Id.* at 255.

14 **IV. DISCUSSION.**

15 **A. FEHA Claim**

16 California's Fair Employment and Housing Act ("FEHA") affords
17 California employees broad protection against discrimination,
18 harassment, and retaliation on any of a wide range of impermissible
19 bases. *McDonald v. Antelope Valley Community College Dist.*, 45
20 Cal. 4th 88, 105 (Cal. 2008). The FAC asserts two FEHA claims: (1)
21 a racial discrimination claim based on disparate assignment of
22 overtime hours; and (2) a retaliation claim based on the
23 Department's disciplinary action against Plaintiff for his July 8,
24 2006 conduct.

25 **1. Statute of Limitations**

26 Employees who believe they have been discriminated against
27 generally have one year in which to file an administrative
28 complaint with California's Department of Fair Employment and

1 Housing ("DFEH"), the agency charged with administering
2 California's Fair Employment and Housing Act ("FEHA"). *McDonald*,
3 45 Cal. 4th at 105 (citing Cal. Gov. Code 12960(d)). Exhaustion of
4 FEHA's administrative remedy is mandatory; an employee may not
5 proceed in court with a FEHA claim without first obtaining a
6 right-to-sue letter from the DFEH. *Id.*

7 The governing statute of limitations for FEHA's administrative
8 process provides in part:

9 No [DFEH] complaint may be filed after the expiration of
10 one year from the date upon which the alleged unlawful
11 practice or refusal to cooperate occurred" It then
12 identifies four exceptions: (1) a 90-day extension in
13 instances of delayed discovery of the unlawful practice;
14 (2) a one-year extension in certain instances of delayed
15 discovery of the identity of the actual employer; (3) a
16 one-to-three-year extension for Ralph Hate Crimes Act
(Civ. Code, § 51.7) violations in cases of delayed
discovery of the perpetrator's identity; and (4) an
extension to one year after an aggrieved party achieves
the age of majority if the misconduct occurred while the
party was a minor (§ 12960, subd. (d)(1)-(4)). We discern
in this provision no basis for limiting the application
of equitable tolling.

17 *Id.* at 106-07.

18 Defendants contend that Plaintiff failed to file his DFEH
19 complaint within the one year proscribed by section 12960(d).
20 Defendants note that paragraph 17 of the FAC alleges that Plaintiff
21 first raised concerns to Captain Lydia Carassco about Romo's
22 disparate assignment of overtime and restrictions on overtime
23 information on February 21, 2006. It is undisputed that Plaintiff
24 did not file his DFEH complaint until May 21, 2007, one year and
25 three months later.

26 Plaintiff contends that his DFEH complaint was timely under
27 the continuing violation doctrine. Under California's continuing
28 violation doctrine, an employer is liable for actions that take

1 place outside the limitations period if these actions are
2 sufficiently linked to unlawful conduct that occurred within the
3 limitations period. *E.g., Yanowitz v. L'Oreal USA, Inc.*, 36 Cal.
4 4th 1028, 1057 (Cal. Ct. App. 2005). The continuing violation
5 doctrine applies where alleged discrimination is based on a
6 temporally related and continuous course of conduct; "discrete
7 discriminatory acts are not actionable if time-barred, even when
8 they are related to acts alleged in timely filed charges." *Id.* at
9 1058, 1057.

10 Plaintiff contends that the discriminatory conduct he
11 complains of continued until May 2007, although Plaintiff does not
12 specifically identify any discriminatory conduct related to the
13 assignment of overtime and access to overtime records occurring
14 after 2006. Nevertheless, a key event underlying the
15 discrimination claim alleged in Plaintiff's DFEH complaint is
16 enforcement of the Romo memo against Plaintiff during his visit to
17 the duty office on July 8, 2006. The July 8 incident is undeniably
18 part of the continuous course of conduct underlying Plaintiff's
19 DFEH complaint, because an important component of Plaintiff's
20 discrimination claim is that access to overtime information was
21 restricted in order to facilitate the discriminatory assignment of
22 overtime hours. Plaintiff's DFEH complaint was timely under the
23 continuing violation doctrine, as it was filed within one year of
24 the July 8, 2006 incident-- an occurrence that was part of a
25 continuous course of conduct allegedly designed to perpetuate the

1 discrimination Plaintiff complains of.¹

2 Finally, as noted in the Memorandum Decision denying
3 Defendant's motion to dismiss, FEHA's limitations period is
4 equitably tolled "while the employee and employer pursue resolution
5 of any grievance through an internal administrative procedure."
6 *McDonald*, 45 Cal. 4th at 108. Plaintiff is entitled to equitable
7 tolling for the time period during which he was pursuing his
8 petition for writ of mandamus concerning the disciplinary action
9 taken against him. Plaintiff is also entitled to tolling for the
10 time period during which he was pursuing an his grievance through
11 the FPOA. *McDonald*, 45 Cal. 4th at 108 (tolling applied for period
12 in which informal grievance was pursued with employer).
13 Defendants' motion to dismiss Plaintiffs' FEHA claims as time
14 barred is DENIED.

15 **2. Discrimination Claim**

16 FEHA makes it an "unlawful employment practice" for any
17 employer "because of the race...to discriminate against the person in
18 compensation or in terms, conditions, or privileges of employment."
19 Cal. Gov. Code, § 12940(a). The elements of a FEHA claim for
20 employment discrimination are (1) the employee's membership in a

21
22 ¹ Plaintiff also contends he did not have reason to know of the alleged
23 discrimination until commencement of the Internal Affairs investigation.
24 Plaintiff maintains that the Internal Affairs investigation first put Plaintiff
25 on notice that he had been treated differently from other sergeants who had
26 attempted to view the duty logs and back orders; Plaintiff does not explain why
27 he believed this disparate treatment was motivated by racial discrimination.
28 None of the evidence cited by Plaintiff in his Separate Statement or Response to
Defendant's separate statement concerning facts revealed in the Internal Affairs
investigation suggest that racial animus motivated the conduct complained of.
(Exhibits 9, 11, and 27 to Church Decl.). Rather, Plaintiff's argument is based
on his representation that, when he learned he was treated differently from other
sergeants who had requested access to overtime information, he believed it was
because he was African American.

1 classification protected by the statute; (2) discriminatory animus
2 on the part of the employer toward members of that classification;
3 (3) an action by the employer adverse to the employee's interests;
4 (4) a causal link between the discriminatory animus and the adverse
5 action; (5) damage to the employee, and (6) a causal link between
6 the adverse action and the damage. *Mamou v. Trendwest Resorts,*
7 *Inc.*, 165 Cal. App. 4th 686, 713 (Cal. Ct. App. 2008).

8 FEHA's discrimination provision addresses only explicit
9 changes in the "terms, conditions, or privileges of employment."
10 *Roby v. McKesson Corp.*, 47 Cal. 4th 686, 706 (Cal. 2010) (citing
11 (§ 12940(a)). In the case of an institutional or corporate
12 employer, the institution or corporation itself must have taken
13 some official action with respect to the employee, such as hiring,
14 firing, failing to promote, adverse job assignment, significant
15 change in compensation or benefits, or official disciplinary
16 action. *Id.*

17 Plaintiff's discrimination claim under FEHA is predicated on
18 three actions taken against him that he contends were racially
19 motivated: (1) denial of overtime opportunities to Plaintiff; (2)
20 denial of access to overtime records to Plaintiff; and (3)
21 disciplinary action taken against Plaintiff for his conduct on July
22 8, 2006. (FAC at 8-9). The FAC also recounts sporadic incidents
23 of alleged racism occurring prior to 2006, but none of these
24 incidents are related to Romo or other actors involved in the
25 conduct giving rise to the claims asserted in the FAC.²

26
27 ² For example, Plaintiff alleges that: (1) in 2001, Chief Dyer was photographed
28 holding a noose; (2) in the 1990's, an officer displayed a Hitler poster in his
office and the Department responded with a memo cautioning against
"inappropriate" items at work but did not treat the incident as a "race or hate

1 Defendants contend that Plaintiff's FEHA claim is subject to
2 summary judgment because Plaintiff presents no evidence that the
3 conduct he complains of was motivated by racial animus. Plaintiff
4 contends that the fact that he was treated differently than
5 similarly-situated officers provides circumstantial evidence of
6 racial discrimination.

7 **a. Overtime Assignments and Access to Records**

8 Defendants submit that Romo's overtime assignments were
9 motivated by his personal friendships with the patrol sergeants who
10 received preferential treatment. (Defendants Statement of
11 Undisputed Material Fact ("DMUF") No. 3). Plaintiff disputes
12 Defendants' contention. Plaintiff avers that he was treated
13 differently from non-African American sergeants at the department,
14 and that such treatment is based on racism. Specifically,
15 Plaintiff contends that non-African American sergeants were allowed
16 to access overtime records notwithstanding Romo's memorandum, while
17 Plaintiff was not, causing Plaintiff to "conclude that Romo was
18 racially biased against him." (Doc. 81, Plaintiff's Response to
19 DMUF No. 3). Plaintiff cites the following evidence in support of
20 his contention that Romo's actions were racially motivated:

21 _____
22 crime"; (3) an African American officer was tested for steroids while at the
23 Police Academy, but other officers capable of bench-pressing 500 lbs. have not
24 been tested; (4) one unit within the department was, at one time, almost entirely
25 comprised of Hispanic officers; (5) an African American officer involved in a
26 shooting was required to return to patrol, whereas white officers were not; (6)
27 the Department started a program to recruit Southeast Asian officers, but not
28 African Americans; (7) Chief Dyer has referred to African American's as "those
people"; (8) higher ranking African American officers are not treated with the
same respect as their peers; and (9) there are positions which no African
American has held at the Department such as homicide sergeant, SWAT sergeant, and
motors sergeant. (Opposition at 6-7). These allegations relate to whether a
racially hostile work environment existed and whether policy makers had notice
of racial animus in the workplace that was permitted to operate.

1 Church Declaration,
2 **Exhibit 1**, 02/21/06 Lewis email to FPOA;
3 **Exhibit 7**, Snow RT 27:12-22, 29:15-24, 30:3-31:5 33:3-11,
4 45:15-19, 55:1-7;
5 **Exhibit 9**, Lewis RT 89:17-94:1
6 **Exhibit 11**, Lewis IA RT 22:3-15; 24:5-19; 32:25-33:25
7 **Exhibit 27**, 03/01/06 Informal Grievance

8 (Id.).

9 Exhibit 1 to Ms. Church's declaration is an email from
10 Plaintiff to Lydia Carrasco sent on February 21, 2006. In his
11 February 21 email to Carrasco, Plaintiff complained that Sergeant
12 Hodge was receiving special treatment in obtaining overtime hours
13 due to his relationship with Romo; it provides no evidence that
14 Romo's conduct was racially motivated, only that he received
15 special treatment and was not African-American.

16 Exhibit 7 to Ms. Church's declaration consists of excerpts
17 from the deposition of Sergeant Garry Snow. Nothing in Snow's
18 deposition testimony supports an inference that Plaintiff was
19 treated differently on account of his race. To the contrary,
20 Snow's deposition indicates that other sergeants were also denied
21 access to overtime records, and that Snow believed Plaintiff was
22 singled out for disciplinary action after the June 8, 2006 incident
23 because Plaintiff caused the Department to scrutinize Romo's
24 overtime allocation practices.

25 Exhibit 9 to Ms Church's declaration consists of excerpts from
26 Plaintiff's deposition. In response to a question from Defense
27 counsel asking Plaintiff to explain why he felt there were "racial
28 concerns" raised by information disclosed during the Internal
Affairs investigation, Plaintiff responded that he inferred from
the "essence and the tones" of certain written communications
attached to the Internal Affairs report regarding the June 8, 2006

1 incident that there was "some animosity or something going on."
2 (Doc. 81-6, Ex. 9 at 89-90). Plaintiff also stated in his
3 deposition that Romo's memorandum restricting access to overtime
4 records was not enforced against other "similarly-situated
5 sergeants." Plaintiff's deposition does not specifically identify
6 acts of racial discrimination by Romo.

7 Exhibit 11 to Ms. Church's declaration contains excerpts from
8 statements made during the Internal Affairs interview. The
9 portions of Exhibit 11 cited by Plaintiff to oppose DUMF No. 3
10 recount Snow's statements that Plaintiff was being treated
11 differently than other sergeants. However, nothing Snow said in
12 the Internal Affairs interview mentions or supports an inference of
13 racial animus. To the contrary, Snow's statements reveal that, in
14 his mind "the only reason" for Romo's disparate treatment of
15 Plaintiff with respect to accessing overtime records was "a
16 personnel issue that somebody is upset because they've been
17 challenged the way [sic] business was done on overtime." (Doc. 81-
18 6, Ex. 11 at 22).

19 Exhibit 27 to Ms. Church's declaration is the informal
20 grievance form Plaintiff filed on February 21, 2006 regarding
21 Romo's assignment of overtime. The grievance does not allege
22 racial discrimination, and nothing alleged in the grievance
23 supports an inference that Romo's alleged misconduct was racially
24 motivated.

25 Plaintiff has no direct evidence that Romo's overtime
26 assignments were motivated by racial animus. Although Plaintiff
27 lacks direct evidence of discriminatory intent, he may rely on the
28 *McDonnell Douglas* framework to overcome summary judgment. See,

1 e.g., *Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317, 354 (Cal.
2 2000).

3 California has adopted the three-stage burden-shifting
4 test established by the United States Supreme Court for
5 trying claims of discrimination...This so-called
6 McDonnell Douglas test reflects the principle that direct
7 evidence of intentional discrimination is rare, and that
8 such claims must usually be proved circumstantially.
9 Thus, by successive steps of increasingly narrow focus,
10 the test allows discrimination to be inferred from facts
11 that create a reasonable likelihood of bias and are not
12 satisfactorily explained.

13 ...[T]he McDonnell Douglas test places on the plaintiff
14 the initial burden to establish a prima facie case of
15 discrimination. This step is designed to eliminate at
16 the outset the most patently meritless claims, as where
17 the plaintiff is not a member of the protected class or
18 was clearly unqualified, or where the job he sought was
19 withdrawn and never filled. While the plaintiff's prima
20 facie burden is "not onerous," he must at least show "
21 'actions taken by the employer from which one can infer,
22 if such actions remain unexplained, that it is more
23 likely than not that such actions were "based on a
24 [prohibited] discriminatory criterion."

25 ...Generally, the plaintiff must provide evidence that
26 (1) he was a member of a protected class, (2) he was
27 qualified for the position he sought or was performing
28 competently in the position he held, (3) he suffered an
adverse employment action, such as termination, demotion,
or denial of an available job, and (4) *some other
circumstance suggests discriminatory motive.*

19 *Id.* (citations omitted, emphasis added).

20 Plaintiff satisfies the first element of the *McDonald Douglas*
21 framework, as he is African American and a member of a protected
22 class. Plaintiff also satisfies the adverse action element, as it
23 is undisputed he was denied access to overtime opportunities.
24 Plaintiff presents no evidence to establish Romo's overtime
25 assignments were motivated by racial discrimination, however.

26 Plaintiff bases his claim of racial discrimination on alleged
27 disparate treatment. As an initial matter, the extent to which
28

1 Plaintiff was treated differently from similarly-situated sergeants
2 is unclear. It is undisputed that other patrol sergeants,
3 including non-African American officers, were injured by, and
4 complained about, Romo's disparate assignment of overtime. There
5 is no evidence that Plaintiff was treated more harshly than these
6 other disadvantaged officers with respect to the amount of overtime
7 they were assigned. Plaintiff contends that Romo's memo was only
8 "consistently enforced" against him, while other sergeants were
9 permitted access to overtime records notwithstanding the Romo memo.
10 Plaintiff's evidence does not establish how many times the Romo
11 memo was enforced against him as opposed to other officers.

12 According to the FAC, Plaintiff sent an email to Captain
13 Carrasco on February 21, 2006 complaining that Romo's memo "was
14 expired and that its continued enforcement was limited to
15 Plaintiff." (FAC at 4). The only other allegation in the FAC
16 concerning enforcement of the Romo memo against Plaintiff concerns
17 the July 8, 2006 incident in which Plaintiff was ultimately granted
18 access to the overtime records. Based on the allegations of the
19 FAC and the arguments and evidence advanced by Plaintiff in
20 opposition to summary judgment, it appears Plaintiff only attempted
21 to access records on two occasions after the issuance of Romo's
22 memo and was only denied access once. The record demonstrates that
23 other officers were also denied access to overtime records pursuant
24 to Romo's memo. (Doc. 75-7, Mana Dep. RT at 51); (Doc. 75-13,
25 Barajas Dec. at 2).

26 Assuming *arguendo* that Plaintiff was treated differently from
27 some of his peers, there is no evidence such disparate treatment
28 was racially motivated. Barajas, the officer working in the duty

1 office during Plaintiff's July 8, 2006 visit, has submitted a
2 statement under penalty of perjury which indicates that his attempt
3 to enforce the Romo memorandum during the July 8 incident was not
4 based on racial discrimination, and that he has never observed any
5 duty office policies discriminating against officers on the basis
6 of race or ethnicity. (Doc. 75-13, Barajas Dec. at 2). Barajas'
7 statement belies Plaintiff's speculative contention that Romo's
8 memorandum was selectively enforced against him, only, on the basis
9 of his race. Plaintiff's supposition that enforcement of Romo's
10 memorandum against him was based on racially discriminatory motives
11 is not supported by evidence that gives rise to an inference of
12 race-based discrimination.

13 Although intent is ordinarily a question of fact for the jury,
14 and although "very little" evidence is required to create a triable
15 issue of fact as to an employer's motive, Plaintiff does not
16 present any evidence that either Romo's overtime assignments or
17 enforcement of the Romo memorandum were racially motivated.
18 Rather, the most plausible interpretation of the evidence is that
19 Romo favored "other sergeants." It must be inferred that the
20 others were not African-American. Without more, the fact that
21 Plaintiff was allegedly treated differently from some select
22 officers does not create a triable issue of fact regarding
23 discriminatory intent. As one district court has reasoned:

24 Although courts have found that "proof of discriminatory
25 motive . . . can in some situations be inferred from the
26 mere fact of differences in treatment," *International
27 Brotherhood of Teamsters v. United States*, 431 U.S. 324,
28 335 n.15, 52 L. Ed. 2d 396, 97 S. Ct. 1843. (1977); see
also *Sischo-Nownejad v. Merced Community College Dist.*,
934 F.2d 1104, 1112 (9th Cir. 1991) (quoting same),
Plaintiff has neither demonstrated that he was treated
differently from those similarly situated nor provided

1 corroborating evidence of discrimination that, in
2 previous cases, has supported the inference that a
3 defendant acted from discriminatory motives. See, e.g.,
4 *Freeman*, [125 F.3d 723, 738 n.6 (9th Cir. 1997)] (noting
5 that abusive epithets may be evidence of intentional
6 discrimination); *Sischo-Nownejad*, 934 F.2d at 1112 ("The
7 fact that stereotyped remarks were made by [Plaintiff's]
8 superiors at the same time they were subjecting her to
9 less favorable working conditions is sufficient to raise
10 an inference of discriminatory intent."). In this case,
11 there is no evidence of discriminatory treatment or
12 discriminatory motive.

13 *Sutton v. Stewart*, 22 F. Supp. 2d 1097, 1108 (D. Arizona 1998)
14 (emphasis added).

15 In essence, the only evidence Plaintiff offers in support of
16 his contention that Romo's actions were racially motivated is the
17 fact is that Plaintiff is an African American and was treated
18 differently from some non-African American officers; this evidence
19 is insufficient absent any corroborating evidence of racial animus
20 or otherwise suggesting discriminatory intent.³ See, e.g., *id.* To
21 hold otherwise would be to countenance a standard under which any
22 disparate action taken against a member of a protected class is
23 presumed discriminatory because of the complaining party's race.
24 Plaintiff's opposition to the motion for summary judgment presents
25 no direct evidence of discriminatory motive and does not satisfy
26 the McDonald Douglas framework for establishing a triable issue of
27 fact. Defendants motion for summary judgment on Plaintiff's FEHA
28 claim for racial discrimination is GRANTED with respect to
assignment of overtime hours and access to overtime records.

///

///

³ There is no nexus between the sporadic incidents of racism Plaintiff alleges, such as an officer displaying a Hitler poster in the 1990's, and Romo's conduct.

1 **b. Disciplinary Action**

2 The FAC alleges that "the Department's initiation and
3 prosecution of disciplinary action related to Plaintiff's July 8,
4 2006 conduct was...racially motivated." (FAC at 8). It is
5 undisputed that the Deputy Chief of Police for the Department,
6 Robert Nevarez, authorized the Internal Affairs investigation and
7 ensuing disciplinary action against Plaintiff after receiving a
8 complaint regarding Lewis' conduct during the July 8, 2006
9 incident. (Doc. 75-12, Nevarez Decl. at 1). Nevarez directed the
10 Commander of the Southwest District, Captain Greg Garner, to
11 conduct the Internal Affairs investigation. Plaintiff presents no
12 evidence that either Nevarez or Garner's actions was motivated by
13 racial animus.

14 Plaintiff contends that Romo and Lt. Brogdon "instigated" the
15 Internal Affairs investigation against him. Plaintiff cites
16 Exhibits 4, 7, and 21 to Ms. Church's declaration in support of
17 this contention. (Doc. 81-1, Plaintiff's Response to DUMF No. 15).
18 Exhibit 4 is a Memorandum to Captain Garner from Anthony Martinez
19 which indicates that Brogdon forwarded an email to Martinez from
20 Barajas documenting the July 8, 2006 incident. At the end of the
21 Memorandum, Martinez recommended that Plaintiff "be interviewed for
22 potential violation of Department policy." Exhibit 7 provides
23 excerpts of the deposition testimony of Snow. In the portions of
24 Snow's deposition cited by Plaintiff, Snow recounts his belief that
25 Romo had caused a complaint to be filed regarding the July 8, 2006
26 incident because he was upset Plaintiff made his initial overtime
27 grievance against Romo. Snow's testimony does not provide the
28 foundation for Snow's belief. Finally, Exhibit 21 is an email

1 exchange between Romo and Barajas regarding the July 8 incident.

2 Exhibits 4, 7, and 21 do not suggest that Romo and Brogdon
3 instigated Nevarez's decision to authorize the Internal Affairs
4 Investigation. To the contrary, these exhibits only reflect that
5 Romo and Brogdon followed the chain of command by informing
6 Martinez of the July 8 incident. Martinez then relayed the facts
7 to Garner. Garner, in turn, notified Nevarez, who made the
8 ultimate decision to initiate the Internal Affairs investigation.

9 There is no evidence that Romo was motivated by racial animus.
10 Nor does Plaintiff present any evidence that Brogdon was motivated
11 by racial discrimination. Even assuming *arguendo* Romo and Brodgdon
12 harbored racial animus when they reported the July 8 incident to
13 Martinez, there is no sufficient causal link between any animus
14 harbored by Romo and Brogdon and Nevarez's ultimate decision to
15 order the Internal Affairs investigation. Although California
16 recognizes the "cat's paw" doctrine, pursuant to which the
17 innocence of a decision maker does not bar discrimination claims if
18 the decision maker acted as a mere conduit of another's prejudice,
19 *see, e.g., Reid v. Google, Inc.*, 50 Cal. 4th 512, 542 (Cal. Ct.
20 App. 2010), the cat's paw doctrine applies where the party accused
21 of discrimination was a "direct and important participant" in the
22 decision making process, *see DeJung v. Superior Court*, 169 Cal.
23 App. 4th 533, 552 (Cal. Ct. App. 2008); *accord Reeves v. Safeway*
24 *Stores, Inc.*, 121 Cal. App. 4th 95, 116 n.14 (Cal. Ct. App.
25 2004) ("Imputation of retaliatory animus will be justified by any
26 set of facts that would permit a jury to find that an intermediary,
27 for whatever reasons, simply carried out the will of the actuator,
28 rather than breaking the chain of causation by taking a truly

1 independent action"). There is no evidence that Romo or Brodgon
2 were involved at all in Nevarez's decision; they merely reported
3 the incident, and the information worked its way up the chain of
4 command to Nevarez. The most likely explanation is that Romo was
5 irritated about being called to account and made complaints about
6 his accuser, either defensively or to direct attention from his
7 conduct by playing "the blame game." It was not racially motivated.

8 Plaintiff also advances the conclusory assertion that
9 "similarly situated non-African American officers would not have
10 been subject to an IA investigation for the same conduct" for which
11 Plaintiff was disciplined. Plaintiff provides no evidence in
12 support of this contention. Plaintiff alleges that "Snow visited
13 the Duty office on a regular basis and was not denied access and
14 Romo...did not seek disciplinary action [against Snow]." (Doc. 81-
15 1, Plaintiff's Response to DUMF No. 17). However, unlike
16 Plaintiff, Snow did not issue any conflicting orders and was not
17 "similarly situated." Plaintiff was not disciplined for accessing
18 overtime records but rather for issuing an order to Barajas that
19 conflicted with Romo's order.⁴ Plaintiff points to no similarly-
20 situated officer who was not disciplined for engaging in the
21 conduct for which Plaintiff was disciplined.

22 There is no evidence that the Department's initiation and
23 prosecution of disciplinary action related to Plaintiff's July 8,
24

25 ⁴ Whether Plaintiff's order conflicted with a valid, extant order from Romo is
26 disputed, but immaterial. Plaintiff contends Romo's memo had expired and was no
27 longer a valid order. Even assuming Plaintiff's position is correct, Plaintiff
28 was not similarly situated to officers granted access to the overtime records,
such as Snow, because those officers had not issued an arguably conflicting
order, which prompted the investigation and disciplinary action against
Plaintiff.

1 2006 conduct was racially motivated. Summary judgment on
2 Plaintiff's FEHA claim arising out of the disciplinary action is
3 GRANTED.

4 **3. Retaliation Claim**

5 In order to establish a prima facie case of retaliation under
6 FEHA, a plaintiff must show (1) he or she engaged in a "protected
7 activity," (2) the employer subjected the employee to an adverse
8 employment action, and (3) a causal link existed between the
9 protected activity and the employer's action. *Yanowitz*, 36 Cal.
10 4th at 1142. Plaintiff contends that the Internal Affairs
11 investigation and subsequent disciplinary action taken against him
12 were in retaliation for his February 21, 2006 email to Carrasco and
13 his filing of the March 1, 2006 informal grievance. (Opposition at
14 12). However, Plaintiff represents that his March 1, 2006
15 "grievance was based upon a violation of policy; not race."
16 (Opposition at 15).

17 According to Plaintiff's opposition, he first began to believe
18 that the disparate treatment regarding overtime assignments and
19 access to overtime records was racially motivated during the
20 Internal Affairs investigation, which was not initiated until
21 August 2006, several months *after* his email to Carrasco and his
22 filing of the informal grievance. Plaintiff's judicial admissions
23 that both his email to Carrasco and informal grievance were based
24 on violations of Department policy, not race, establish that
25 neither constituted protected activities under FEHA. In order to
26 constitute protected activity, Plaintiffs' conduct "must have
27 alerted his employer to his belief that discrimination, not merely
28 unfair personnel treatment, had occurred." *Mayfield v. Sara Lee*

1 Corp., 2005 U.S. Dist. LEXIS 42458 *23 (N.D. Cal. 2005) (citing
2 *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1412 (9th Cir. 1987)
3 (finding employee complaint regarding scheduling change not
4 protected activity) and *Barber v. CSX Distrib. Servs.*, 68 F.3d 694,
5 701-702 (3rd Cir. 1995) (finding employee complaint regarding
6 promotion decision not protected activity)); accord *Lanagan v.*
7 *Santa Cruz County Metro Transit Dist.*, 2010 U.S. Dist. LEXIS 43413
8 * 16 (N.D. Cal. 2010) (report of co-employee's negligence "not
9 protected activity [under FEHA] because it has nothing to do with
10 the FEHA's prohibitions"); *Timmons v. UPS*, 2007 U.S. Dist. LEXIS
11 57761 * 18 n. 10 (E.D. Cal. 2007) *reversed in part on other grounds*
12 *by* 310 Fed. Appx. 973 (9th Cir. 2009) ("alleged retaliation for
13 safety concerns [plaintiff] raised...not protected activity under
14 FEHA or ADA, as those statutes do not protect such whistleblowing
15 activity").⁵

16 As neither Plaintiff's email to Carrasco nor his informal
17 grievance were protected activities under FEHA, summary judgment on
18 Plaintiff's claim for retaliation arising out of these activities
19 must be GRANTED.⁶

20 **B. Federal Claims**

21 The FAC asserts claims under 42 U.S.C. §§ 1981, 1983, and
22 1985. The factual basis for Plaintiff's section 1981 claim is
23 identical to the factual basis for his FEHA claim. (FAC at 9-10).

24
25 ⁵ The factual history section of Plaintiff's opposition alleges additional
26 retaliatory acts that occurred in 2009 and 2010. (Opposition at 4-5). The FAC
does not allege any FEHA claims based on these allegations.

27 ⁶ The court does not condone the conduct Plaintiff complains of or the treatment
28 he was subjected to. However, no whistle-blower action is alleged. See Cal.
Lab. Code § 1102.5.

1 The factual basis for Plaintiff's section 1985 claim is identical
2 to the basis for his FEHA retaliation claim. (FAC at 12-13). The
3 factual basis for Plaintiff's section 1983 claim is almost
4 identical to the basis for his FEHA retaliation claim, however, the
5 section 1983 claim asserts the additional allegation that Plaintiff
6 was subjected to a hostile work environment. (FAC at 11-12).

7 **1. 1981 Claim**

8 Plaintiff's section 1981 claim is predicated on Plaintiff's
9 allegation that: (1) Romo's disparate assignment of overtime and
10 restricting of access to overtime records was racially motivated;
11 and (2) the initiation and prosecution of disciplinary action
12 related to Plaintiff's July 8, 2006 conduct was retaliatory and
13 racially motivated.

14 The same summary judgment test applies in both the section
15 1981 and FEHA contexts. *E.g., Lawson v. Reynolds Indus.*, 264 Fed.
16 Appx. 546, 549 n.2 (9th Cir. 2008) (unpublished) (citing *Manatt v.*
17 *Bank of Am., NA*, 339 F.3d 792, 801 (9th Cir. 2003) (§ 1981) and
18 *Winarto v. Toshiba Am. Elecs. Components, Inc.*, 274 F.3d 1276, 1284
19 (9th Cir. 2001) (FEHA)). Because the factual basis for Plaintiff's
20 section 1981 claim is the same as the basis for his FEHA
21 discrimination claim, Defendant's motion for summary judgment on
22 Plaintiff's section 1981 claim is GRANTED for the same reasons
23 stated above. See, e.g., *Peralta v. City & County of San*
24 *Francisco*, 2011 U.S. App. LEXIS 8383 *2 (9th Cir. 2011)
25 (unpublished) (noting that summary judgment was appropriate on both
26 FEHA claims and section 1981 claims where Plaintiff failed to
27 establish a prima facie case of discrimination).

1 **2. Section 1985 Claim**

2 To establish a § 1985(3) conspiracy claim, the plaintiff must
3 show: "(1) the existence of a conspiracy to deprive the plaintiff
4 of the equal protection of the laws; (2) an act in furtherance of
5 the conspiracy; and (3) a resulting injury." *Scott v. Ross*, 140
6 F.3d 1275, 1284 (9th Cir. 1998); accord *Hernandez v. City of*
7 *Vancouver*, 277 Fed. Appx. 666, 671 (9th Cir. 2009) (unpublished)
8 (citing *Scott*).

9 The FAC alleges that "Dyer, Garner, Martinez, Nevarez, and
10 Romo conspired to...deny Plaintiff the exercise of his civil rights
11 to be free from discrimination." (FAC at 12). The FAC further
12 alleges that the "Department's initiation and prosecution of
13 disciplinary action related to Plaintiff's July 8, 2006 conduct was
14 retaliatory and racially motivated and was done in furtherance of
15 the conspiracy of and by Defendants." (Id.). For reasons
16 discussed above, Plaintiff presents no evidence that the
17 disciplinary action he complains of was racially motivated.
18 Plaintiff's own judicial admissions foreclose any retaliation claim
19 based on the theory that the disciplinary action Plaintiff
20 complains of was retaliation for objecting to racial
21 discrimination. The actions Plaintiff alleges he was retaliated
22 against for do not implicate any constitutional right. Summary
23 judgment on Plaintiff's section 1985 claim is GRANTED.

24 **3. Section 1983 Claim**

25 Plaintiff's section 1983 claim alleges that "the IA unit was
26 used to retaliate against officers who complained of discrimination
27 or other unlawful conduct within the Department." (FAC at 11).
28 For reasons discussed above, Plaintiff's judicial admissions

1 establish that the alleged retaliation Plaintiff complains of was
2 not based on Plaintiff's objection to any racial discrimination.
3 Plaintiff's section 1983 claim also appears to allege that the
4 retaliatory acts complained of created a "racially hostile work
5 environment." (FAC at 11). To the extent the FAC seeks to assert
6 a hostile work environment claim based on retaliation for objecting
7 to racial discrimination, for the reasons stated above, no such
8 retaliation is shown. Nor is there is any evidence in the record
9 that suggests Plaintiff was subjected to conduct sever and
10 pervasive enough to alter the conditions of employment. See, e.g.,
11 *Manatt v. Bank of Am.*, 339 F.3d 792, 799 (9th Cir. 2003). Summary
12 judgment on Plaintiff's section 1983 claim is GRANTED.

13 **ORDER**

14 For the reasons stated, IT IS ORDERED:

- 15 1) Summary judgment on Plaintiff's FEHA claims is GRANTED;
16 2) Summary judgment on Plaintiff's federal claims is GRANTED;
17 and
18 3) Defendants shall submit a form of order consistent with
19 this memorandum decision within five (5) days of electronic
20 service of this decision.

21
22 IT IS SO ORDERED.

23 **Dated: July 13, 2011**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE