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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KIM EDWARD ROGERS,
Plaintiff,
v.
M. RICHARD, CHP Captain Commander,
et al.,
Defendants.

No. 2:17-cv-00149-JAM -GGH

FINDINGS AND RECOMMENDATIONS

BACKGROUND

A hearing was held on the first motion to dismiss on October 5, 2017, ECF No. 38. The Magistrate Judge advised the parties that Findings and Recommendations would be issued expeditiously, and they were filed 4 business days later. These Findings and Recommendations recommended:

1. This case proceed, as further limited below, only on the 42 U.S.C. 2000d (Title VI) claims and the 42 U.S.C. section 1983 claims recommended for retention; all other federal and state claims should be dismissed;
2. Motion to Dismiss the Section 2000d and Section 1983 claims pertinent to the September 11, 2013 incident, be GRANTED based upon the statute of limitations;
3. Defendants’ Motion to Dismiss the Section 2000d and Section 1983 claims, as relating to the November 14, 2015 incident, should be DENIED as brought within the statute of

1 limitations by tolling provisions found in California Government Code 945.3; the same Denial
2 should be applied to the February 5, 2016 claims even without tolling consideration;

3 4. Defendant's Motion to Dismiss the plaintiff's state law claims, should be
4 GRANTED for failure to file state administrative claims as required by the California Tort
5 Claims Act;

6 5. Defendants' Motion to Dismiss the California Highway Patrol from the action as a
7 state agency with Eleventh Amendment sovereign immunity from suit be DENIED with respect
8 to section 2000d claims, and GRANTED with respect to Section 1983 claims;

9 6. Defendants' Motion to Dismiss the individual California Highway Patrol
10 defendants be DENIED insofar as they are sued in their individual capacity for section 2000d
11 and 1983 claims whereas insofar as they are sued in their official capacity, only the present
12 Commissioner of the California Highway Patrol should be named for section 1983 purposes;

13 7. Defendants' Motion to Dismiss the entire First Amended Complaint under Federal
14 Rule of Civil Procedure 8 should be GRANTED as plaintiff must plead the specific involvement
15 of each individual defendant with respect to the Section 2000d and Section 1983 claims and
16 plaintiff should be granted leave to amend in this respect;

17 8. The class action allegations of First Amended Complaint should be STRICKEN
18 without prejudice due to no attorney representation of alleged class members. ECF No. 4

19 Unfortunately, plaintiff did not even await these Findings and Recommendations, much
20 less a district judge adoption order, but on the same day the Findings etc. were issued, plaintiff
21 filed his Second Amended Complaint. While plaintiff understood from the hearing the gist of
22 what the Findings etc. would encompass, some miscues were repeated in the Second Amended
23 Complaint. On December 20, 2017, in ECF No. 56, the District Judge adopted in full those
24 Findings. Thus, these Findings will repeat the rulings on plaintiff's repeated mistakes and the law
25 of the case will be enforced.

26 Defendants responded with another motion to dismiss filed on January 8, 2018 which it

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1 set for hearing on February 15, 2018. ECF No. 57.¹ On February 7, 2018 the court vacated the
2 calendar and took this matter under submission. With respect to the statute of limitations,
3 defendants have essentially repeated their first Motion to Dismiss with respect to the Second
4 Amended Complaint, except that they have limited it to the Section 2000d claim. However,
5 defendants have also properly noted that there are insufficient charging allegations brought
6 against most of the individual defendants. These Findings and Recommendations will hopefully
7 resolve the pleading stage once and for all, and law of the case will play a primary role in this
8 adjudication. If these Findings are adopted, there will be no further amendments to the pleadings
9 permitted, and it will be recommended that an answer be filed.

10 Plaintiff's Motion for a Preliminary Injunction will be adjudicated separately.

11 *DISCUSSION*

12 A. *Law of the Case*

13 Under the "law of the case" doctrine "a court is generally precluded from reconsidering an
14 issue that has already been decided by the same court or a higher court in the identical case."
15 *Quoting Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir 1993); *U.S. v. Alexander*, 106 F.3d 874, 876
16 (9th Cir. 1997). Though the doctrine is not a limitation on the court's power, it is a guide to
17 discretion, *Arizona v. California*, 460 U.S. 605, 618 (1983), and the court may exercise its
18 discretion to abrogate the law of the case only under circumstance where the first decision was
19 clearly erroneous, a change in the law has occurred, substantially different evidence is offered,
20 other circumstances exist, or a manifest injustice would otherwise result. *Alexander, supra*, 106
21 F.3d at 877. Unless one of these conditions is met, failure to apply the doctrine constitutes an
22 abuse of discretion. *Thomas v. Bible, supra*, 983 F.2d at 155. *See also United States v. Phillips*,
23 367 F.3d 847, 856 (9th Cir. 2004); *Coleman v. Brown*, 2017 WL 4511064 *10 (E.D.Cal. 2017).

24 In a case such as the instant one where a decision has been rendered that decision "should
25 continue to govern the same issues in subsequent stages of the same case." *United States v. Park*
26 *Place Associates, Ltd.*, 563 F.3d 907, 925 (9th Cir. 2009); *see also United States v. Almazan-*

27 ¹ Defendants had also earlier filed a motion to dismiss the Second Amended Complaint prior to
28 adoption of the Findings and Recommendations which hearing date was vacated. After adoption,
the presently pending Motion to Dismiss was filed.

1 Becerra, 537 F.3d 1094, 1096-1097 (9th Cir. 2008). In this way “[t]he doctrine serves to advance
2 the ‘principle that in order to maintain consistency during the course of a single lawsuit,
3 reconsideration of legal questions previously decided should be avoided.’” SAS v. Sawabeh
4 Information Services Co., 2015 WL 12763541 (C.D.Cal. 2015) *quoting* United States v. Houser,
5 804 F.2d 565, 567 (9th Cir. 1986); *see also* Messenger v. Anderson, 225 U.S. 436, 444 (1912).

6 B. *Claims and Defendants Not Appropriate for the Second Amended Complaint*

7 The previous Findings and Recommendation, adopted by the District Court, clearly held
8 that the 2013 incident was barred by the pertinent statute of limitations. ECF No. 43 at 3. There
9 is no reason given to divert from this ruling. Thus, although the 2013 incident may be used as
10 evidence of a pattern and practice, if there is indeed one, it may not be a claim. The 2013 claim
11 should be finally dismissed.²

12 Defendant, Joseph Farrow, a former Commissioner of the California Highway Patrol, is
13 sued in his official capacity only. However, there is no official capacity for a person no longer
14 employed with the agency, i.e., he would be powerless to effectuate an injunction if one were to
15 be issued. This defendant should be finally dismissed.

16 Defendant, Michael Richard, former head of the South Park Office, and sued in his
17 official capacity only is also an ex-employee. As such, he should be dismissed as an unnecessary
18 defendant.

19 Plaintiff perfunctorily lists again the Omnibus Crime Control and Safe Streets Act as a
20 basis for a claim. After plaintiff indicated at hearing that he was not pursuing any type of claim
21 pursuant to the Omnibus Safe Streets Act, the claim was dismissed. It should remain so.

22 C. *Defendants’ Motion to Dismiss*

23 Defendants again move to dismiss the section 2000d³ claim (but not the section 1983

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25 ² It is not entirely clear that plaintiff meant to replead the 2013 incident. Although he did list that
26 incident as a grounds for his Second Amended Complaint, ECF No. 42, Section III A, plaintiff
27 does not further allege that incident as a ground for his action. Rather; he mentions it as just an
evidentiary backdrop. In any event, the claim itself should be dismissed as barred by the statute
of limitations.

28 ³ For reasons that are unclear, plaintiff deleted the California Highway Patrol as a defendant,
which would have been an appropriate defendant for the 2000d claim. Nevertheless, the Acting

1 claim) based on the statute of limitations. Dismissal on this ground was denied in the previous
2 round of motions, with respect to the 2014 and 2016 claims. There is no sufficient cause under
3 the law of the case doctrine to review it again here.

4 Defendants again move to dismiss individual defendants sued in their individual capacities
5 as being inappropriately sued on account of insufficient charging allegations. The First Amended
6 Complaint was dismissed with leave to amend for the purpose, *inter alia*, to facilitate making
7 sufficient allegations against the individual defendants. Defendants Kent, Thompson, Nichols,
8 Williams, Vasilou (investigator), Koon and Bertola are simply named as officers who appeared
9 for one reason or another *after* the alleged racially profiled traffic stops.⁴ Plaintiff believes that
10 these defendants should have done something to remedy the alleged unconstitutional stop, and
11 racial profiling is the gist of the entire Second Amended Complaint. While in some situations it
12 is true that state actor defendants can be held liable for simply allowing an unconstitutional action
13 to take place while they view it, Cunningham v. Gates, 229 F.3d. 1271, 1289-90 (9th Cir. 2000),
14 the undersigned is unaware of any case which constitutionally mandates after-incident-appearing
15 defendants, even if supervisors, to remedy what took place before they appeared at the scene, e.g.,
16 perform some type of on-the-spot adjudication about the propriety of the traffic stop, and release
17 the person stopped without charges. See also, Nicholson v. Delgadillo, 2014 WL 1612624 *6 (D.
18 Idaho 2014). These named defendants should be dismissed.

19 The situation is different for defendants Fish and Matthews. Plaintiff alleges that he was
20 not violating the law when stopped by these CHP officers. He believes, therefore, that an
21 inference can be drawn that the stop must have been based on racial profiling, and alleges that it
22 was the policy of the CHP to racially profile based on his experience in South Sacramento. Short
23 of providing exhibits, admissions, statistics, and witness statements -- all of the things discovery
24 might uncover -- the undersigned is unsure of what defendants expect sufficient allegations to be.
25 If racial profiling occurred, it will seldom be accompanied by a direct admission by the officer

26 CHP Commissioner, sued in his official capacity is, for the purposes of injunctive relief, one and
27 the same as the CHP.

28 ⁴ Not all of these defendants have been served. However, these defendants can be dismissed on
the same grounds as the served defendants.

1 involved such as “Yeah, I stopped you because you are African American.” Discrimination suits
2 generally involve much more of a hidden, inferred intent situation which must be assessed in light
3 of all the facts and circumstances.

4 Nor can pointing the court to the CHP manual, which prohibits racial profiling, dispose of
5 the case as a matter of law. ECF No. 58, 59. Even assuming that judicial notice could be taken of
6 this outside-the-pleadings document at the motion to dismiss stage, the court cannot find as a
7 matter of law that all officers religiously follow the manual, or that the manual itself obliterates
8 any unstated policy about racial profiling. If all that were required to dismiss a racial profiling
9 case was a statement in a manual providing the directive—don’t do it—no racial profiling case
10 would ever leave the pleading stage.

11 Yes, racial profiling allegations are easy to make, and it takes a great deal of time and
12 resources to disprove them. That is our litigation system.

13 However, defendants’ counsel avers in the motion to dismiss that Christopher Matthews
14 has not been served, and more importantly, Sgt. Matthews is deceased. The undersigned does not
15 find that a suggestion of death should have been filed as Sgt. Matthews was never served. Unless
16 plaintiff can provide proof to the contrary in any objections that might be filed, Sgt. Matthews
17 should be dismissed.

18 Finally, defendants argue in tandem that no preliminary injunction should issue, and that
19 injunctive relief generally is inappropriate for the case. The matter of a preliminary injunction
20 will be separately adjudicated. Whether injunctive relief is generally appropriate can await later
21 developments in the case. The Acting CHP Commissioner, Warren Stanley, in his official
22 capacity, should remain in the case.

23 *CONCLUSION*

24 In light of the foregoing IT IS HEREBY RECOMMENDED that:

- 25 1. Any Omnibus Crime Control and Safe Streets Act claim should be finally
26 dismissed;
- 27 2. Any claim based on the alleged 2013 racial profiling stop should be finally
28 dismissed;

