

United States District Court  
For the Northern District of California

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

RICHARD F. FISHER,  
  
Plaintiff,  
  
v.  
  
CITY OF PITTSBURG, et al.,  
  
Defendants.

No. C 05-2774 CW (PR)  
  
ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT  
AND REFERRING CASE TO PRO  
SE PRISONER SETTLEMENT  
PROGRAM  
  
(Docket no. 66)

INTRODUCTION

On April 1, 2005, Plaintiff Richard F. Fisher was driving a vehicle with no rear license plate and a broken rear tail light. He was pursued and eventually apprehended by City of Pittsburg Police Sergeants Semas and Calia as well as Officers R.L. Thompson, L. Galer and Del Greco. What occurred during the course of the pursuit, apprehension and arrest of Plaintiff is the subject matter of this lawsuit.

On July 6, 2005, Plaintiff, a state prisoner currently incarcerated at Avenal State Prison, filed a pro se civil rights action against Defendants City of Pittsburg, City of Pittsburg Police Department, Del Greco, Thompson and Galer. Plaintiff raises the following claims: (1) excessive force in effectuating an arrest; (2) racial discrimination; and (3) municipal liability. (Verified Compl. at 2.)

In an Order dated January 25, 2006, the Court found Plaintiff alleged a cognizable excessive force claim against Defendants Thompson, Galer and Del Greco as well as a cognizable municipal liability claim against the City of Pittsburg and the City of Pittsburg Police Department. (Jan. 25, 2006 Order at 2-3.) The

1 Court also granted Plaintiff leave to add a Doe Defendant described  
2 as "the police sergeant whom he alleges was involved."<sup>1</sup> (Id. at  
3 3.)

4 On May 30, 2007, the Court referred this case to Magistrate  
5 Judge Elizabeth Laporte for discovery purposes.

6 On September 17, 2007, the Court referred this case to  
7 Magistrate Judge Nandor Vadas for settlement purposes. Magistrate  
8 Judge Vadas filed a report informing the Court that the case did  
9 not settle.

10 On January 31, 2008, Defendants City of Pittsburg, City of  
11 Pittsburg Police Department, Thompson and Galer filed a motion for  
12 summary judgment on the grounds that no triable issue of material  
13 fact exists, and they are entitled to judgment as a matter of law.<sup>2</sup>  
14 Plaintiff did not file an opposition.<sup>3</sup>

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16 <sup>1</sup> The Court instructed Plaintiff to promulgate discovery in  
17 order to identify this Doe Defendant. The Court notes that the  
18 record includes an excerpt from Plaintiff's November 20, 2007  
19 deposition, which states that Plaintiff has learned that Sergeants  
20 Semas and Calia were present at his arrest and apprehension.  
21 (Pl.'s Dep. 38:13, Nov. 20, 2007.) However, as of the date of this  
22 Order, Plaintiff has not identified either sergeant as the Doe  
23 Defendant in this action. If Plaintiff wishes to name this Doe  
24 Defendant, he shall file a motion making such a request as directed  
25 below.

26 <sup>2</sup> Defendant Del Greco did not join the other defendants in  
27 their motion for summary judgment.

28 <sup>3</sup> Plaintiff's opposition was due on August 22, 2008, after the  
Court granted him two prior extensions. He was advised pursuant to  
Rand v. Rowland, 154 F.3d 952 (9th Cir. 1998) (en banc), that to  
prevent summary judgment in favor of Defendants, he "must set out  
specific facts in declarations, depositions, answers to  
interrogatories, or authenticated documents, as provided in Rule  
56(e), that contradict the facts shown in the defendant's  
declarations and documents and show that there is a genuine issue  
of material fact for trial." (Jan. 25, 2006 Order at 5 (quoting  
Rand, 154 F.3d at 962-63). Plaintiff was also warned: "If you do  
not submit your own evidence in opposition, summary judgment, if  
appropriate, may be entered against you." Id.

1 For the reasons discussed below, Defendants' motion for  
2 summary judgment is GRANTED in part and DENIED in part.

3 BACKGROUND

4 At approximately 2:38 p.m. on April 1, 2005, Defendant  
5 Thompson was driving a fully marked City of Pittsburg Police  
6 Department vehicle when he observed a 1985 Toyota driven by  
7 Plaintiff turn onto Polaris Drive. (Thompson Decl., Ex. A,  
8 Thompson Incident Report at 4.) Plaintiff's vehicle had no rear  
9 license plate and a broken rear tail light on the passenger side.  
10 (Id.) Plaintiff was accompanied by two passengers, Mr. Pena and  
11 Ms. Serrano. (Thompson Decl. ¶ 4.) When Defendant Thompson  
12 attempted to effectuate a traffic stop on Plaintiff's vehicle,  
13 Plaintiff drove away. (Id.) Defendant Thompson immediately  
14 informed dispatch that he was in pursuit of Plaintiff's vehicle.  
15 (Thompson Decl., Ex. A, Thompson Incident Report at 4.)

16 Defendant Galer was the first one who responded to help  
17 Defendant Thompson, and together they pursued Plaintiff's vehicle  
18 for approximately three miles. (Id. at 5.) Plaintiff stopped his  
19 vehicle on Solari Street and fled on foot. (Id.) The two  
20 passengers remained inside the vehicle. (Id.) Defendant Galer  
21 continued to pursue Plaintiff while Defendant Thompson remained  
22 with the two passengers. (Galer Decl. ¶ 3; Thompson Decl. ¶ 5.)  
23 Defendant Thompson alleges that he did not have any contact with  
24 Plaintiff until they arrived at the police station. (Thompson  
25 Decl. ¶ 5.)

26 Sergeants Semas and Calia as well as Defendant Del Greco also  
27 responded to help Defendant Thompson. (Thompson Decl., Ex. A, Del  
28 Greco Continuation/Supplementary Report at 1.) They proceeded to

1 the backyard of 405 Central Avenue to assist Defendant Galer in  
2 apprehending Plaintiff. (Id.) Plaintiff attempted to hide beneath  
3 a trailer. (Id.) Defendant Galer reached for Plaintiff's belt and  
4 pulled him from beneath the trailer. (Id. at 2.) Defendant Galer  
5 alleges that Plaintiff resisted his efforts. (Galer Decl. ¶ 5.)  
6 Defendant Galer claims that "this was the only physical contact  
7 [he] had with Mr. Fisher." (Id.) Plaintiff was handcuffed and  
8 taken into custody. (Thompson Decl., Ex. A, Del Greco  
9 Continuation/Supplementary Report at 2.) Defendants Thompson and  
10 Galer deny punching, kicking or kneeing Plaintiff. (Galer Decl.  
11 ¶ 4; Thompson Decl. ¶ 4.) They also claim they did not see any  
12 other officers punch, kick or knee Plaintiff. (Id.)

13 In contrast, Plaintiff alleges that after he was handcuffed,  
14 he was kicked, punched and elbowed by Defendants Galer and Del  
15 Greco as well as Sergeant Semas and Calia. (Rooney Decl. In Supp.  
16 of Mot. for Summ. J., Ex. A, Pl.'s Dep. (hereinafter Pl.'s Dep.)  
17 63:18-20.) Plaintiff testified that Defendant Thompson remained at  
18 Plaintiff's vehicle with both passengers throughout the beating.  
19 (Id. at 38:14-20.)

20 According to Plaintiff, he "almost passed out" because he was  
21 kicked in the face by one of the officers while he was on the  
22 ground and handcuffed. (Id. at 63:1-5.) When the officers stood  
23 him upright, Plaintiff claims they elbowed, kneed and punched his  
24 back, neck and head. (Id. at 63:7-64:3.)

25 When questioned as to Defendant Galer's involvement, Plaintiff  
26 testified that Officer Galer used excessive force "by beating [him]  
27 after [he] was handcuffed." (Id. at 70:19-20.) When asked what  
28 specific "blow" Defendant Galer delivered, Plaintiff stated, "I

1 can't really say which one blow that he gave me, but he was there  
2 and he did participate in this. That's the best I can give you."  
3 (Id. at 70:11-13.)

4 Plaintiff stated that it was either Defendant Del Greco or  
5 Sergeant Calia who "punched him" in the "side of [his] head."<sup>4</sup>  
6 (Id. at 71:5-13.) However, when asked whether his testimony was  
7 that "Officer Del Greco punched [Plaintiff] on the side of [his]  
8 head," Plaintiff answered, "Yes." (Id. at 71:19-22.)

9 Plaintiff's injuries included "a two inch laceration of R.  
10 cheek, contusions of the eye (R), back, facial area, knee (L),  
11 wrist (R&L), and neck." (Rooney Decl. In Supp. of Mot. to Compel,  
12 Ex. D, Pl.'s Interrogs. at 1.) Plaintiff states, "All contusions  
13 had a duration of approximately ten (10) days, and facial  
14 laceration approximately four (4) weeks." (Id.) Plaintiff claims  
15 that he "continues to have pain" in his "knee, foot, face, neck and  
16 wrists" at the time he filed his answer to Defendants' special  
17 interrogatories, which was more than a year after the alleged  
18 beating. (Id.)

#### 19 DISCUSSION

##### 20 I. Legal Standard For Summary Judgment

21 Summary judgment is properly granted when no genuine and  
22 disputed issues of material fact remain and when, viewing the  
23 evidence most favorably to the non-moving party, the movant is  
24 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.  
25 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);  
26 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.

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27  
28 <sup>4</sup> As mentioned above, Plaintiff has not moved to add Sergeant  
Calia as a defendant in this action.

1 1987).

2 The moving party bears the burden of showing that there is no  
3 material factual dispute. Therefore, the Court must regard as true  
4 the opposing party's evidence, if supported by affidavits or other  
5 evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815  
6 F.2d at 1289. The Court must draw all reasonable inferences in  
7 favor of the party against whom summary judgment is sought.  
8 Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S.  
9 574, 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952  
10 F.2d 1551, 1558 (9th Cir. 1991). A verified complaint may be used  
11 as an opposing affidavit under Rule 56, as long as it is based on  
12 personal knowledge and sets forth specific facts admissible in  
13 evidence. Schroeder v. McDonald, 55 F.3d 454, 460 & nn.10-11 (9th  
14 Cir. 1995).

15 Material facts which would preclude entry of summary judgment  
16 are those which, under applicable substantive law, may affect the  
17 outcome of the case. The substantive law will identify which facts  
18 are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
19 (1986).

20 Where the moving party does not bear the burden of proof on an  
21 issue at trial, the moving party may discharge its burden of  
22 production by either of two methods:

23 The moving party may produce evidence negating an  
24 essential element of the nonmoving party's case, or,  
25 after suitable discovery, the moving party may show that  
26 the nonmoving party does not have enough evidence of an  
27 essential element of its claim or defense to carry its  
28 ultimate burden of persuasion at trial.

26 Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Companies, Inc., 210  
27 F.3d 1099, 1106 (9th Cir. 2000).

28 If the moving party discharges its burden by showing an

1 absence of evidence to support an essential element of a claim or  
2 defense, it is not required to produce evidence showing the absence  
3 of a material fact on such issues, or to support its motion with  
4 evidence negating the non-moving party's claim. Id.; see also  
5 Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990); Bhan v.  
6 NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If the  
7 moving party shows an absence of evidence to support the non-moving  
8 party's case, the burden then shifts to the non-moving party to  
9 produce "specific evidence, through affidavits or admissible  
10 discovery material, to show that the dispute exists." Bhan, 929  
11 F.2d at 1409.

12 If the moving party discharges its burden by negating an  
13 essential element of the non-moving party's claim or defense, it  
14 must produce affirmative evidence of such negation. Nissan, 210  
15 F.3d at 1105. If the moving party produces such evidence, the  
16 burden then shifts to the non-moving party to produce specific  
17 evidence to show that a dispute of material fact exists. Id.

18 If the moving party does not meet its initial burden of  
19 production by either method, the non-moving party is under no  
20 obligation to offer any evidence in support of its opposition. Id.  
21 This is true even though the non-moving party bears the ultimate  
22 burden of persuasion at trial. Id. at 1107.

## 23 II. Evidence Considered

24 A district court may only consider admissible evidence in  
25 ruling on a motion for summary judgment. See Fed. R. Civ. P.  
26 56(e); Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002).

27 In support of their motion for summary judgment, Defendants  
28 have submitted declarations by Defendants Thompson and Galer as

1 well as their attorney, Owen T. Rooney (docket nos. 67, 68, 69).  
2 Attached to the declarations are the following: Plaintiff's  
3 deposition; the City of Pittsburg Police Department Incident Report  
4 in Case no. C05-2551; and Defendants Thompson's and Del Greco's  
5 Continuation/Supplementary Reports in Case no. C05-2551.

6 Plaintiff verified his original complaint filed on July 6,  
7 2005 by signing it under penalty of perjury; therefore, the Court  
8 will refer to it as his "verified complaint."

9 Also in the record is Plaintiff's "Answer to the Special  
10 Interrogatories of Defendants," which was signed by Plaintiff under  
11 the penalty of perjury.<sup>5</sup> In this document, Plaintiff lists the  
12 injuries he received as a result of the allegations contained in  
13 his verified complaint.

14 Therefore, the Court will treat Plaintiff's verified complaint  
15 and his answer to Defendants' special interrogatories as opposing  
16 affidavits under Rule 56 of the Federal Rules of Civil Procedure.

17 III. Fourth Amendment Claim

18 Plaintiff claims that Defendants Thompson and Galer used  
19 excessive force in apprehending him on April, 1, 2005. The Court  
20 previously determined that this claim is cognizable under the  
21 Fourth Amendment.

22 A. Applicable Legal Standard

23 The Fourth Amendment proscribes "unreasonable searches and  
24 seizures." U.S. Const. amend. IV; Franklin v. Foxworth, 31 F.3d

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25  
26 <sup>5</sup> Plaintiff's "Answer to the Special Interrogatories of  
27 Defendants" was attached as Exhibit D of the declaration filed by  
28 Defendants' attorney in support of the motion to compel further  
answers to interrogatories (docket no. 29).



1 873, 875 (9th Cir. 1994). The reasonableness of a search or  
2 seizure depends "on how it is carried out." Tennessee v. Garner,  
3 471 U.S. 1, 7-8 (1985) (emphasis in original). The reasonableness  
4 test established in Graham v. Connor, 490 U.S. 386 (1989), applies  
5 to cases involving police use of excessive force in making stops or  
6 arrests, and to the manner in which the police conduct any search  
7 or seizure. See Franklin, 31 F.3d at 876.

8 Determining whether the force used to effect a particular  
9 seizure is reasonable requires a careful balancing of the nature  
10 and quality of the intrusion on the individual's Fourth Amendment  
11 interests against the countervailing governmental interests at  
12 stake. Graham, 490 U.S. at 396.

13 The United States Supreme Court listed several factors to  
14 determine the reasonableness of the use of force under the Fourth  
15 Amendment: (1) severity of the crime at issue, (2) whether the  
16 suspect posed an immediate threat to the safety of the officers or  
17 others, (3) whether the suspect was actively resisting arrest or  
18 attempting to evade arrest by flight, and (4) whether the totality  
19 of the circumstances justified a particular sort of seizure.  
20 Graham, 490 U.S. at 396. These factors are not exclusive, however,  
21 and the totality of the particular circumstances of each case must  
22 be considered. Fikes v. Cleghorn, 47 F.3d 1011, 1014 (9th Cir.  
23 1995). Furthermore, the reasonableness of a "particular use of  
24 force must be judged from the perspective of a reasonable officer  
25 on the scene, rather than with the 20/20 vision of hindsight."  
26 Graham, 490 U.S. at 396.

27 Police officers are not required to use the least intrusive  
28 degree of force possible; they are required only to act within a

1 reasonable range of conduct. See Forrester v. City of San Diego,  
2 25 F.3d 804, 806-07 (9th Cir. 1994), cert. denied, 513 U.S. 1152  
3 (1995) (use of minimal and controlled force in manner designed to  
4 limit injuries reasonable); see also Scott v. Henrich, 39 F.3d 912,  
5 915 (9th Cir. 1994) (requiring officers to find and choose least  
6 intrusive alternative would require them to exercise superhuman  
7 judgment), cert. denied, 515 U.S. 1159 (1995).

8 A defendant is entitled to summary judgment on a Fourth  
9 Amendment use of force claim where there is no genuine issue for  
10 trial because the record taken as a whole would not lead a rational  
11 trier of fact to find for the plaintiff. See Henderson v. City of  
12 Simi Valley, 305 F.3d 1052, 1061 (9th Cir. 2002). Similarly,  
13 summary judgment will be available if the district court concludes,  
14 after resolving all factual disputes in favor of the plaintiff,  
15 that the officer's use of force was objectively reasonable under  
16 the circumstances. See Johnson v. Woodard, 340 F.3d 787, 792-93  
17 (9th Cir. 2003).

18 B. Analysis

19 1. Defendant Thompson

20 Plaintiff fails to state facts to support his excessive force  
21 claim against Defendant Thompson. At his deposition, Plaintiff  
22 stated, "I finally looked and seen who was around me because I was  
23 being dealt with physically, then I kind of looked and seen that  
24 they -- them four, Galer, Calia, Semis,<sup>6</sup> and Greco were there. I  
25 didn't see Thompson. I don't know where he was." (Pl.'s Dep.  
26 38:10-15.) When Plaintiff was asked which officer stayed back at  
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28 <sup>6</sup> In Plaintiff's deposition, Sergeant Semas's name is misspelled as "Semis."

1 the car with Mr. Pena and Ms. Serrano, Plaintiff answered,  
2 "Thompson." (Id. 38:19-20.)

3 Although Defendant Thompson was involved in the initial  
4 pursuit of Plaintiff's vehicle, Plaintiff fails to raise a genuine  
5 issue of fact regarding Defendant Thompson's use of force against  
6 him, an element essential to his excessive force claim.  
7 Accordingly, Defendant Thompson is entitled to summary judgment on  
8 the excessive force claim as a matter of law. See Celotex Corp.,  
9 477 U.S. at 323.

10 2. Defendant Galer

11 Defendant Galer admits to using some force against Plaintiff  
12 when he resisted by failing to come out from under the trailer.  
13 (Galer Decl. ¶ 5.) Defendant Galer claims that he grabbed  
14 Plaintiff's belt with his left hand and pulled Plaintiff out.  
15 (Id.) Defendant Galer denies having any other physical contact  
16 with Plaintiff. (Id.) While Plaintiff may not have been  
17 conducting himself in a manner that posed an immediate threat to  
18 Defendants or others, he was actively fleeing from Defendants in an  
19 attempt to evade arrest. See Graham, 490 U.S. at 396 (whether the  
20 suspect was attempting to evade arrest by flight is one of the  
21 factors to determine the reasonableness of the use of force under  
22 the Fourth Amendment); see also Johnson, 340 F.3d at 792-93  
23 (finding deputy sheriff's pulling and twisting of armed bank  
24 robbery suspect to extract him from the back seat of his car and  
25 take him into custody following a high-speed car chase and crash  
26 objectively reasonable as a matter of law). Defendant Galer was  
27 not required to use the least intrusive degree of force possible;  
28 he was required only to act within a reasonable range of conduct.

1 See Forrester, 25 F.3d at 806-07. Plaintiff presents no evidence  
2 that, by reason of his physical condition, or any other  
3 circumstance, the technique in question posed an unreasonable risk  
4 of harm to him. Therefore, the undisputed facts show that the  
5 force used by Defendant Galer to pull Plaintiff from underneath the  
6 trailer was objectively reasonable.

7 Plaintiff also alleges that Defendant Galer, along with three  
8 other officers, used excessive force by punching, kicking, kneeling  
9 and elbowing him after he was handcuffed. The force applied by the  
10 officers must be balanced against the need for that force. See  
11 Drummond v. City of Anaheim, 343 F.3d 1052, 1058-60 (9th Cir.  
12 2003). The Court finds that the use of force in this manner  
13 against a suspect who has been handcuffed would not be objectively  
14 reasonable as a matter of law. See id. (finding that once suspect  
15 handcuffed on ground without offering resistance, two officers who  
16 knelt on him and pressed their weight against his torso and neck  
17 despite his pleas for air used excessive force). Defendant Galer  
18 argues that he is entitled to summary judgment because Plaintiff  
19 failed to identify the specific blow that he delivered. Plaintiff  
20 claims that four different officers used excessive force against  
21 him from different angles, that he suffered injuries from the blows  
22 he received, and that he was losing consciousness during the  
23 beating. Under these circumstances, it is possible that Plaintiff  
24 would be not be able to attribute specific blows to each officer.  
25 Although Defendant Galer denies participating in the beating,  
26 Plaintiff has testified otherwise. (Pl.'s Dep. at 71:11-20.)  
27 Thus, Plaintiff has created a genuine issue of fact as to whether  
28 Defendant Galer used excessive force against him after he was

1 handcuffed.

2 Therefore, the Court finds that Defendant Galer is not  
3 entitled to summary judgment on the excessive force claim as a  
4 matter of law.

5 IV. Qualified Immunity

6 Defendant Galer argues, in the alternative, that summary  
7 judgment is warranted because, as a government official, he is  
8 entitled to qualified immunity from Plaintiff's excessive force  
9 claim.

10 A. Standard of Review

11 The inquiries for qualified immunity and excessive force are  
12 distinct. Saucier v. Katz, 533 U.S. 194, 204 (2001).

13 The qualified immunity doctrine acknowledges that reasonable  
14 mistakes can be made as to the legal constraints on particular  
15 police conduct. Id. It is sometimes difficult for an officer to  
16 determine how the relevant legal doctrine applies to the factual  
17 situation the officer confronts. Id. An officer might correctly  
18 perceive all of the relevant facts but have a mistaken  
19 understanding as to whether a particular amount of force is legal  
20 in those circumstances. If the officer's mistake as to what the  
21 law requires is reasonable, however, the officer is entitled to the  
22 immunity defense. Id.

23 Graham does not always give a clear answer as to whether a  
24 particular application of force will be deemed excessive by the  
25 courts. Id. This is the nature of a test which must accommodate  
26 limitless factual circumstances. Id. Qualified immunity operates  
27 in excessive force cases, then, to protect officers from the  
28 sometimes "'hazy border between excessive and acceptable force.'"

1 Id. at 206 (citation omitted).

2       When government officials assert the defense of qualified  
3 immunity in an excessive force case brought under § 1983, a court's  
4 analysis must proceed in the following manner: first, the court  
5 must determine as a threshold question whether the plaintiff has  
6 shown the deprivation of a constitutional right, and then the court  
7 must determine whether the right violated was clearly established  
8 under Saucier. Deorle v. Rutherford, 272 F.3d 1272, 1278-79 (9th  
9 Cir. 2001) (citing Saucier, 533 U.S. at 201). If the court  
10 determines that the plaintiff has not shown the deprivation of a  
11 constitutional right (e.g., the force used was objectively  
12 reasonable as a matter of law), it need not go further. See  
13 Johnson, 340 F.3d at 791-94.

14       B. Analysis

15       Applying the first prong of Saucier, determining whether there  
16 was a constitutional violation, the Court has found that, viewing  
17 the evidence in the light most favorable to Plaintiff, the force  
18 used against him after he was handcuffed did amount to a Fourth  
19 Amendment violation. Applying the second prong of Saucier, the  
20 Court must determine whether the right violated was clearly  
21 established under Saucier. Deorle, 272 F.3d at 1278-79 (citing  
22 Saucier, 533 U.S. at 201). "The relevant, dispositive inquiry in  
23 determining whether a right is clearly established is whether it  
24 would be clear to a reasonable officer that his conduct was  
25 unlawful in the situation he confronted." Saucier, 533 U.S. at  
26 201-02 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).  
27 It is not disputed that, at the time of Defendant Galer's actions,  
28 the use of excessive force by a law enforcement officer in

1 effectuating an arrest was a violation of the Fourth Amendment. A  
2 reasonable officer could not have believed that the amount of force  
3 allegedly used -- kicking, punching, elbowing and kneeling a suspect  
4 that has been handcuffed -- was lawful in light of clearly  
5 established law and the information that Defendant Galer possessed  
6 at the time of the incident. See Saucier, 533 U.S. at 205.

7 Therefore, under Saucier, Defendant Galer is not entitled to  
8 qualified immunity as a matter of law with respect to Plaintiff's  
9 claim of excessive force used against him after he was handcuffed.

10 V. Municipal Liability Claim

11 Plaintiff alleges that the City of Pittsburg Police Department  
12 and the City of Pittsburg are responsible for his injuries because  
13 of their hiring practices. (Verified Compl. at 3.) Plaintiff  
14 states he would like the Court to "look into . . . the City of  
15 Pittsburg for hiring officers like these." (Id.) Defendants  
16 contend that Plaintiff has not satisfied the requirements for suing  
17 a municipality because Plaintiff has not alleged any type of  
18 violation of departmental policy, practice or custom.

19 A. Standard of Review

20 A municipality can be sued as a "person" under 42 U.S.C.  
21 § 1983 if "execution of a government's policy or custom, whether  
22 made by its lawmakers or by those whose edicts or acts may fairly  
23 be said to represent official policy, inflicts the injury . . . ."  
24 Monell v. Dept. of Social Services, 436 U.S. 658, 690 (1978). In  
25 order to sue a municipal employee for failure to protect  
26 constitutional rights the plaintiff must satisfy four elements:  
27 (1) that the plaintiff possessed a constitutional right, of which  
28 he was deprived; (2) that the municipality had a policy; (3) that

1 the policy amounts to deliberate indifference to the plaintiff's  
2 constitutional right; and (4) that the municipal policy is a moving  
3 force behind the constitutional violation. Oviatt v. Pearce, 954  
4 F.2d 1470, 1474 (9th Cir. 1992).

5 An actionable municipal policy can be established through  
6 evidence of a facially unconstitutional policy, or through an  
7 isolated act of a policy maker if the single act amounts to  
8 deliberate indifference to a substantial risk that a violation of  
9 federal law will result. Pembaur v. Cincinnati, 475 U.S. 469, 480  
10 (1986). However, a single incident of an officers' alleged use of  
11 excessive force against a plaintiff is insufficient to generate a  
12 genuine issue as to whether the municipality has a policy of  
13 allowing such force. See McDade v. West, 223 F.3d 1135, 1142 (9th  
14 Cir. 2000) (proof of random acts or isolated incidents of  
15 unconstitutional action by a non-policymaking employee are  
16 insufficient to establish the existence of a municipal policy or  
17 custom).

18 B. Analysis

19 Plaintiff has not presented any evidence of an  
20 unconstitutional policy. While Plaintiff challenges their hiring  
21 practices, he has failed to demonstrate that Defendants City of  
22 Pittsburg and City of Pittsburg Police Department maintained a  
23 policy that resulted in the violation of his constitutional rights.  
24 Thus, Plaintiff has failed to provide evidence supporting his  
25 municipal liability claim. Accordingly, Defendants City of  
26 Pittsburg and City of Pittsburg Police Department are entitled to  
27 summary judgment on the municipal liability claim as a matter of  
28 law. See Celotex Corp., 477 U.S. at 323.



1 VI. Equal Protection Claim

2 Plaintiff claims he was "beaten by the Pittsburg Police  
3 Department for no reason other than of [his] race, color or creed."  
4 (Verified Compl. at 2.) Defendants Thompson and Galer contend that  
5 Plaintiff's vehicle was stopped because it had no rear license  
6 plate and a broken tail light. (Thompson Decl., Ex. A, Thompson  
7 Incident Report at 4.) Defendants Thompson and Galer claim they  
8 did not notice Plaintiff's ethnicity at the time they attempted to  
9 effectuate the traffic stop and could not identify Plaintiff's  
10 ethnicity until after Plaintiff stopped his vehicle. (Thompson  
11 Decl. ¶ 3; Galer Decl. ¶ 3.) As mentioned above, Defendants  
12 Thompson and Galer also deny any involvement in Plaintiff's alleged  
13 beating. (Thompson Decl. ¶ 4; Galer Decl. ¶ 4.)

14 A. Standard of Review

15 Proof of racially discriminatory intent or purpose is required  
16 to make out a racial discrimination claim; the Equal Protection  
17 Clause of the Fourteenth Amendment is not violated by unintentional  
18 conduct which has a disparate impact on minorities. See Washington  
19 v. Davis, 426 U.S. 229, 239-40 (1976). Discriminatory intent may  
20 be proved by direct or circumstantial evidence. See Lowe v. City  
21 of Monrovia, 775 F.2d 998, 1011 (9th Cir. 1985), amended on other  
22 grounds, 784 F.2d 1407 (9th Cir. 1986). Where a plaintiff relies  
23 solely upon instances of allegedly disparate treatment, he must  
24 establish a "clear pattern, unexplainable on grounds other than  
25 race." Arlington Heights v. Metro. Hous. Corp., 429 U.S. 252, 266  
26 (1977).

27 B. Analysis

28 Plaintiff's conclusory allegations that he was arrested and

1 beaten because of his race are not supported by any factual  
2 evidence. See Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988)  
3 (conclusory allegations insufficient to defeat summary judgment).  
4 Defendant Thompson and Galer claim that the traffic stop was  
5 initiated in response to Plaintiff driving a vehicle in violation  
6 of the Vehicle Code and not because of his race. Plaintiff has  
7 provided no factual evidence to support his claim that the alleged  
8 beating was racially motivated. Thus, the record shows that there  
9 is no genuine issue of material fact as to Plaintiff's Equal  
10 Protection claim. Accordingly, Defendants Thompson and Galer are  
11 entitled to summary judgment on the racial discrimination claim as  
12 a matter of law. See Celotex Corp., 477 U.S. at 323.

13 CONCLUSION

14 For the foregoing reasons,

15 1. Defendants' motion for summary judgment is GRANTED in  
16 PART and DENIED in PART (docket no. 66). Summary judgment is  
17 DENIED as to Plaintiff's excessive force claim against Defendant  
18 Galer and GRANTED as to Plaintiff's excessive force claim against  
19 Defendant Thompson, his equal protection claim against Defendants  
20 Thompson and Galer, and his municipal liability claim against  
21 Defendants City of Pittsburg and City of Pittsburg Police  
22 Department.

23 2. If Plaintiff wishes to name the Doe Defendant,  
24 specifically the "police sergeant" involved in the April 1, 2005  
25 incident, and add him as a defendant in this action, Plaintiff  
26 shall file a motion making such a request no later than thirty (30)  
27 days from the date of this Order. If Plaintiff fails to do so  
28 within the thirty-day period, Plaintiff's excessive force claim

1 against the Doe Defendant will be dismissed without prejudice.

2 3. Unless this case can be settled it will have to be tried.

3 4. The Northern District of California has established a Pro  
4 Se Prisoner Settlement Program. Certain prisoner civil rights  
5 cases may be referred to a neutral magistrate judge for prisoner  
6 settlement proceedings. This case has previously been referred to  
7 Magistrate Judge Vadas for a settlement conference, and the Court  
8 finds that another referral is in order now that Plaintiff's  
9 excessive force claim has survived summary judgment. Thus, this  
10 case is again REFERRED to Magistrate Judge Vadas for a settlement  
11 conference. The conference may be conducted at Avenal State  
12 Prison, and Defendants and/or their representative shall attend in  
13 person, or may contact Magistrate Judge Vadas to seek permission to  
14 attend by videoconferencing, if available, or by telephone.

15 The conference shall take place within sixty (60) days of the  
16 date of this Order, or as soon thereafter as is convenient to the  
17 magistrate judge's calendar. Magistrate Judge Vadas shall  
18 coordinate a time and date for the conference with all interested  
19 parties and/or their representatives and, within ten (10) days  
20 after the conclusion of the conference, file with the Court a  
21 report regarding the conference.

22 The Clerk of the Court shall provide a copy of this Order, and  
23 copies of documents from the court file that are not accessible  
24 electronically, to Magistrate Judge Vadas.

25 5. The Clerk of the Court shall send a copy of this Order to  
26 Plaintiff.

27 6. The Clerk shall prepare an Order for Pretrial  
28 Preparation, setting the case for a pretrial conference and a five

1 day jury trial.

2 7. This Order terminates Docket no. 66.

3 IT IS SO ORDERED.

4 Dated: 9/24/08



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CLAUDIA WILKEN  
United States District Judge

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1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA

4 FISHER,

5 Plaintiff,

6 v.

7 CITY OF PITTSBURG CALIFORNIA ET AL et  
al,

8 Defendant.

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Case Number: CV05-02774 CW

**CERTIFICATE OF SERVICE**

9  
10 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District  
Court, Northern District of California.

11 That on September 24, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said  
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said  
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle  
located in the Clerk's office.

14  
15 Peter Pratt Edrington  
Timothy Patrick Murphy  
Owen Thomas Rooney  
16 Edrington Schirmer & Murphy  
2300 Contra Costa Boulevard, Suite 450  
17 Pleasant Hill, CA 94523

18 Richard F. Fisher T-83070  
CA State Prison-Avenal  
19 140-1-0-5-L  
P.O. Box 9  
20 Avenal, CA 93204

21 Magistrate Judge Nandor Vadas  
22 P.O. Box 1306  
Eureka, CA 95502

23  
24 Dated: September 24, 2008

25 Richard W. Wieking, Clerk  
By: Sheilah Cahill, Deputy Clerk