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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

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12 JUAN ESPINOZA,

13 Plaintiff,

14 v.

15 CITY OF TRACY, CHIEF OF POLICE
16 GARY HAMPTON, R. LEON CHURCHILL,
17 JR. AND DOES 1 through 40,
18 inclusive

Defendants.

Civ. No. 15-751 WBS KJN

MEMORANDUM AND ORDER RE:
SUMMARY JUDGMENT

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21 Plaintiff Juan Espinoza filed this action against the
22 City of Tracy ("the City") and City Manager R. Leon Churchill
23 alleging unconstitutional discharge and retaliation under 42
24 U.S.C. § 1983.¹ (First Am. Compl. (Docket No. 33).) The City
25 and Churchill (collectively "defendants") are the only remaining
26 defendants. Defendants now move for summary judgment. (Defs.'

27 _____
28 ¹ Plaintiff dismissed defendant Gary Hampton, the City
Chief of Police, from this action. (Docket No. 24.)

1 Mot. (Docket No. 67).)

2 I. Factual and Procedural History

3 Plaintiff worked for the City of Tracy's police
4 department from 1995 to July 29, 2013 (Dep. of Juan Espinoza Vol.
5 I ("Espinoza Dep. I") at 18:20-19:8); Ex. 43 ("Supp. Responses to
6 Requests for Admissions") at 3.) In 2005, plaintiff was promoted
7 from lieutenant to police captain. (Espinoza Dep. I at 24:20-
8 21.)

9 In 2009, the City initiated two separate internal
10 investigations against plaintiff. (Id. at 142:8-145:3; Decl. of
11 Gary Hampton Ex. A ("Hampton Decl.") ¶ 26.) One investigation,
12 which involved the failure to report an in-custody death, found
13 that the allegations against plaintiff were unfounded. (Hampton
14 Decl. ¶ 26.) The other investigation found that the allegations
15 against plaintiff were not sustained. (Id. ¶ 61.) Plaintiff was
16 not disciplined based upon the outcome of either investigation.
17 (Id.)

18 In March 2011, plaintiff filed a state court action
19 against the City, Churchill, and other City officials alleging
20 that they violated various provisions of the California Public
21 Safety Offices Procedural Bill of Rights Act ("PBRA") by
22 investigating him, keeping his investigations open for more than
23 one year, and subjecting him to adverse employment action. (Ex.
24 34 ("2011 Compl."); Ex. 35 ("2011 First Am. Compl.").)

25 From August 15, 2011 through March 31, 2016, Gary
26 Hampton served as the Chief of Police for the City. (Hampton
27 Decl. ¶ 3.) In 2012, Hampton assigned plaintiff, as the senior
28 Captain, to lead the special operations division. (Id. ¶ 29.)

1 In this role, plaintiff oversaw the professional standards unit,
2 which conducts Internal Affair investigations into complaints
3 against police officers. (Id. ¶ 31.) Additionally, plaintiff
4 served as lead investigator for an investigation of two "rank and
5 file" officers, an officer and a sergeant. (Id. ¶¶ 21, 34, 48;
6 Churchill Decl. ¶ 10a.) As lead investigator, plaintiff had the
7 authority to determine whether an investigative search into a
8 City-issued smart phone was warranted and make a recommendation
9 to Hampton. (Hampton Decl. ¶ 34.) Hampton never received any
10 recommendation from plaintiff regarding either of the two
11 officers that plaintiff investigated. (Id.)

12 On April 3, 2013, plaintiff filed a Motion to
13 Disqualify Defense Counsel from the ongoing state court
14 litigation and attached to his motion a declaration disclosing
15 the names of two police officers and information about an
16 Internal Affairs investigation into those officers. (Decl. of
17 Arlin Kachalia Ex. D ("Kachalia Decl.") ¶ 11; Ex. 38 ("Decl. of
18 Espinoza in Support of Mot. to Disqualify Defense Counsel").)

19 On or about April 1 through April 3, 2013, Hampton
20 received information that plaintiff had disclosed to an
21 unauthorized third party confidential personnel information
22 regarding the Internal Affairs investigation into the two police
23 officers. (Hampton Decl. ¶ 36.) In addition, Hampton received
24 information that plaintiff also disclosed emails containing
25 confidential attorney-client communications between the Tracy
26 Policy Department and its outside employment counsel and the
27 City's strategy relating to the two police officers' appeals of
28 their discipline decisions. (Id.)

1 Furthermore, Hampton understood that once the
2 declaration was filed in the state court, it became accessible to
3 the public and a public record. (Id. ¶ 37.) Therefore, Chief
4 Hampton opened an investigation into plaintiff's misconduct as
5 plaintiff had potentially breached his duty to maintain the
6 confidentiality of personnel information, and had violated
7 various sections of the Tracy Police Department Policy Manual.
8 (Id. ¶ 38.) On April 4, 2013 Hampton followed standard practice
9 and placed plaintiff on paid administrative leave pending an
10 investigation into plaintiff's conduct. (Id. ¶ 39-40.) Hampton
11 retained a third-party outside investigator, Oliver Lee Drummond,
12 to investigate plaintiff's disclosure of confidential
13 information. (See id. ¶ 44.)

14 On April 10, 2013, Hampton received information that
15 plaintiff had asked Tracy Police Detective Edgar Campbell how to
16 remove photographs from his iPhone, and Campbell showed plaintiff
17 how to use the Department's "Cellebrite" forensics equipment for
18 this purpose. (Id. ¶ 49) Plaintiff took the equipment into his
19 office, and returned the equipment to Campbell on the same day.
20 (Id.)

21 On May 16, 2013, Mr. Drummond sent a letter to Ms.
22 Alison Berry Wilkinson, plaintiff's counsel during the
23 administrative investigation, notifying her that he would be
24 investigating the matter on behalf of the Tracy Police
25 Department. (Id. ¶¶ 52, 53; Ex. 16 ("Drummond Letter").) As
26 part of the investigation, Hampton decided to search the City-
27 issued and owned iPhone and computer that plaintiff had been
28 using to perform his work duties, because he had information that

1 plaintiff used his phone to email confidential information to a
2 third party. (Hampton Decl. ¶ 45.) Thus, Hampton authorized the
3 search to determine the extent of plaintiff's unauthorized
4 disclosure of confidential information. (Id.) The investigation
5 and the search revealed that plaintiff had used his iPhone to
6 send sexually explicit photographic images to employees who
7 worked in separate local police departments, and to share
8 restricted internal Tracy Police Department documents and
9 information with his attorney in the pending state litigation
10 against the City. (Hampton Decl. ¶ 51; Ex. 22 ("Drummond
11 Investigation Report") at 2.)

12 On June 24, 2013, Hampton sent plaintiff a letter
13 notifying him that the Department had scheduled an investigative
14 interview for July 17, 2018, and informing him of each of the
15 alleged policy violations the Department was investigating.
16 (Hampton Decl. ¶ 54; Ex. 17 ("June 24 Letter").) On July 9,
17 2013, Hampton issued plaintiff a second letter notifying him that
18 the investigative interview was rescheduled to July 30, 2018.
19 (Hampton Decl. ¶ 54; Ex. 9 ("July 9 Letter")." On July 26, 2013,
20 plaintiff's attorney informed Chief Hampton that plaintiff had
21 submitted his retirement papers, and on July 29, 2013, plaintiff
22 retired. (Hampton Decl. ¶¶ 57, 58; Ex 20 ("July 26 Email").)
23 Although plaintiff had already announced his retirement, Hampton
24 still offered him the opportunity to participate in the pending
25 Internal Affairs investigation. (Hampton Decl. ¶ 59; July 26
26 Email; Ex. 21 ("July 29 Retirement Letter").)

27 Plaintiff filed his initial Complaint in the instant
28 action on April 6, 2015, and the court dismissed plaintiff's

1 Complaint without prejudice. (Compl. (Docket No. 1); November 15
2 Order (Docket No. 32).) Plaintiff filed a First Amended
3 Complaint ("FAC") under 42 U.S.C. § 1983 alleging the City and
4 Churchill violated plaintiff's "First, Fourth, and/or Fourteenth
5 Amendment[]" rights against him," by "discrimin[ing]" against
6 him, "retaliati[ng]" against him, denying him "due process," and
7 denying him "Equal Protection of the law." (FAC ¶¶ 49-50, 56-57
8 (Docket No. 33).) Plaintiff also added two new claims for
9 conspiring to violate plaintiff's constitutional rights in
10 violation of 42 U.S.C. § 1985, and for infringing upon
11 plaintiff's rights to make and enforce contracts in violation of
12 42 U.S.C. § 1985. (FAC ¶¶ 60-68.) The Court denied defendant's
13 Motion to Dismiss plaintiff's 42 U.S.C. § 1983 causes of action,
14 but granted defendants' Motion to Dismiss plaintiff's causes of
15 action under § 42 U.S.C. §§ 1981 and 1985. The court now
16 considers defendants' Motion for Summary Judgment on plaintiff's
17 remaining causes of action under 42 U.S.C. § 1983. Plaintiff's
18 counsel asked for an extension to file an opposition, it was
19 granted, but notwithstanding several unanswered email and
20 telephonic inquiries by the clerk to plaintiff's counsel, he
21 filed no opposition or other response to defendants' motion.

22 II. Legal Standard

23 Summary judgment is proper "if the movant shows that
24 there is no genuine dispute as to any material fact and the
25 movant is entitled to judgment as a matter of law." Fed. R. Civ.
26 P. 56(a). A material fact is one that could affect the outcome
27 of the suit, and a genuine issue is one that could permit a
28 reasonable jury to enter a verdict in the non-moving party's

1 favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
2 (1986). "[W]here the operative facts are substantially
3 undisputed, and the heart of the controversy is the legal effect
4 of such facts, such a dispute effectively becomes a question of
5 law that can, quite properly, be decided on summary judgment."
6 Joyce v. Renaissance Design Inc., Civ. No. 99-07995 LGB (EX),
7 2000 WL 34335721, at *2 (C.D. Cal. May 3, 2000); see also
8 Braxton-Secret v. A.H. Robins Co., 769 F.2d 528, 531 (9th Cir.
9 1985) ("[W]here the palpable facts are substantially undisputed,
10 [the controverted] issues can become questions of law which may
11 be properly decided by summary judgment.").

12 "Even when a summary judgment motion is unopposed, a
13 district court must determine whether summary judgment is
14 appropriate--that is, whether the moving party has shown itself
15 to be entitled to judgment as a matter of law." McClintock v.
16 Colosimo, Civ. No. 2:13-264 TLN DB, 2017 WL 1198653, at *1 (E.D.
17 Cal. Mar. 31, 2017) (citations and internal quotations omitted.)
18 "A court 'need not sua sponte review all of the evidentiary
19 materials on file at the time the motion is granted, but must
20 ensure that the motion itself is supported by evidentiary
21 materials.'" Leramo v. Premier Anesthesia Med. Grp., Civ. No.
22 09-2083 LJO JTL, 2011 WL 2680837, at *8 (E.D. Cal. July 8, 2011)
23 (quoting United States v. One Piece of Real Prop., 363 F.3d 1099,
24 1101 (11th Cir. 2004)).

25 III. Discussion

26 Defendants argue that any claims that rely on acts that
27 occurred before April 6, 2013 are time-barred. However,
28 defendants do not clearly summarize or analyze which claims they

1 believe are time-barred. Because the court concludes that
2 plaintiff is not entitled to recover on the merits of any of his
3 claims, the court does not address the statute of limitations.

4 A. First Amendment Retaliation

5 1. Retaliation for Filing State Action

6 Plaintiff alleges that defendants violated his First
7 Amendment Rights by denying him a promotion and placing him on
8 administrative leave in retaliation for filing the state action.
9 (FAC ¶¶ 39, 58.) However, plaintiff cannot establish that he
10 engaged in protected speech for the same reasons discussed in the
11 November 11, 2016 Order granting defendants' Motion to Dismiss.
12 To state a First Amendment claim in the public employment
13 context, a public employee must allege that he "spoke on a matter
14 of public concern." Karl v. City of Mountlake Terrace, 678 F.3d
15 1062, 1068 (9th Cir. 2012). However, the subject matter of
16 plaintiff's state court litigation concerns issues that amount to
17 "individual personnel disputes and grievances," and thus they do
18 not constitute protected speech under the First Amendment. See
19 Desrochers v. City of San Bernardino, 572 F.3d 703, 710 (9th Cir.
20 2009) ("[S]peech that deals with individual personnel disputes
21 and grievances and that would be of no relevance to the public's
22 evaluation of the performance of governmental agencies is
23 generally not of public concern.").

24 2. Retaliation for Association with David Helm

25 Plaintiff also alleges that defendants violated his
26 First Amendment Rights by retaliating against him for his
27 association with David Helm. (FAC ¶¶ 39, 58.)

28 Prior to working for the Tracy Police Department,

1 plaintiff worked as a police officer for the City of Hayward with
2 fellow officer David Helm. (Dep. of David Helm Vol. I ("Helm Dep.
3 I") at 21:16-21; Espinoza Dep. I at 214:13-23.). Plaintiff
4 alleges that in 2011, Helm made requests for records under the
5 California Public Records Act and lodged formal and informal
6 complaints about a pattern of retaliation at the Tracy Police
7 Department. (FAC ¶ 38(c).) Plaintiff further alleges that he
8 and Helm were close, and during the state court litigation he was
9 questioned about his relationship with Helm. (Id.)

10 The constitutionally protected "freedom of association"
11 protects both "expressive association" and "intimate
12 association." See City of Dallas v. Stanglin, 490 U.S. 19, 24-25
13 (1989). As to expressive association, the First Amendment
14 protects the "right to associate for the purpose of engaging in
15 those activities protected by the First Amendment--speech,
16 assembly, petition for the redress of grievances, and the
17 exercise of religion." Roberts v. U.S. Jaycees, 468 U.S. 609
18 (1984). As to "intimate associations, the First Amendment
19 "protects those relationships . . . that presuppose deep
20 attachments and commitments to the necessarily few other
21 individuals with whom one shares not only a special community of
22 thoughts, experiences, and beliefs but also distinctly personal
23 aspects of one's life." Bd. of Dirs. of Rotary Int'l v. Rotary
24 Club of Duarte, 481 U.S. 537, 545 (1987).

25 Here, plaintiff presents no evidence to establish
26 either an intimate or expressive association protected by the
27 First Amendment. The mere fact that both plaintiff and Helm
28 worked together at the Hayward Police Department, without more,

1 does not constitute a protected association under the First
2 Amendment. See Vieira v. Presley, 988 F.2d 850, 852 (8th Cir.
3 1993) (finding failure to state First Amendment association claim
4 where plaintiff "does not allege any expressive purpose to his
5 associations with friends and acquaintances," and "does not
6 allege a close, intimate relationship," but merely "characterizes
7 [plaintiff's] associates as friends and acquaintances.");
8 Cummings v. DeKalb Cty., 24 F.3d 1349, 1354 (11th Cir.
9 1994) (granting summary judgment where plaintiffs "neither alleged
10 in their complaint nor presented any evidence to establish the
11 existence at any time of an association between any of the
12 plaintiffs and [their co-worker] which is entitled to special
13 constitutional protection.") Thus, plaintiff cannot establish
14 that the First Amendment protects his right to associate with
15 David Helms.

16 Accordingly, the court will grant summary judgment on
17 plaintiff's First Amendment retaliation claim.

18 B. Fourteenth Amendment Due Process

19 1. Paid Administrative Leave

20 Plaintiff's due process claim is vague and difficult to
21 decipher; however, plaintiff appears to allege that defendants
22 violated his due process rights by placing him on paid
23 administrative leave. (FAC ¶¶ 3, 21, 30).

24 The "essential principle of due process is that a
25 deprivation of life, liberty, or property 'be preceded by notice
26 and opportunity for hearing appropriate to the nature of the
27 case.'" Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542
28 (1985) (quoting Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S.

1 306, 313 (1950)). "[A] public employee with a property interest
2 in his continued employment must be provided with 'oral or
3 written notice of the charges against him, an explanation of the
4 employer's evidence, and an opportunity to present his side of
5 the story." Walls v. Cent. Contra Costa Transit Auth., 653 F.3d
6 963, 968 (9th Cir. 2011) (quoting Cleveland Bd. Of Educ., 470
7 U.S. at 546). The hearing for termination of public employment
8 "need not be elaborate." Id. So long as the "individual [has]
9 the opportunity to be heard before he is deprived" of his job,
10 the employer has satisfied the "root" requirement of due process.
11 Id.

12 Here, defendants concede that plaintiff had a property
13 interest in his job as a police officer. See Nunez v. City of
14 Los Angeles, 147 F.3d 867, 871 (9th Cir. 1998) ("[O]ne's actual
15 job as a tenured civil servant is property.") However, a public
16 employee suspended with pay has not been deprived of a property
17 interest. See Pitts v. Bd. of Educ. of U.S.D. 305, 869 F.2d 555,
18 556 (10th Cir. 1989) (internal citation omitted) ("While
19 suspension of a public employee without pay may infringe upon a
20 property right, the two-day suspension with pay did not deprive
21 [plaintiff] of any measurable property interest."); Piscottano v.
22 Murphy, 511 F.3d 247, 288 (2d Cir. 2007) (holding that being
23 placed on paid administrative leave pending Loudermill hearing
24 did not implicate property interest); Davis v. Dallas Indep. Sch.
25 Dist., 448 F. App'x 485, 495 (5th Cir. 2011) ("Placement on paid
26 administrative leave does not constitute deprivation of a
27 property interest.")

28 Moreover, plaintiff presents no evidence that the

1 deprivation occurred without due process. To the contrary, Chief
2 Hampton notified plaintiff in writing that he was being placed on
3 paid administrative leave pending the investigation, and
4 plaintiff was given the opportunity to participate in an
5 investigative interview. (Hampton Decl. ¶¶ 41, 54; Ex. 13
6 ("Letter from Hampton to Plaintiff."). Furthermore, that the
7 City placed plaintiff on leave before providing him a hearing is
8 not itself a violation of due process. See Abel v. City of
9 Algona, 348 F. App'x 313, 315 (9th Cir. 2009) (declining to find
10 "due process right to a hearing before [police officers] are put
11 on leave"); Dias v. Elique, 436 F.3d 1125, 1132 (9th Cir. 2006)
12 (same).

13 2. Promotion

14 Plaintiff also alleges that defendants violated his due
15 process rights by denying him the right to a promotion to work as
16 interim or acting Chief. (FAC ¶¶ 3, 21, 30). However, the Ninth
17 Circuit has held that "expectancy in a promotion [is not] a
18 property interest" unless it is guaranteed "from an independent
19 source such as state law." Nunez v. City of Los Angeles, 147
20 F.3d 867, 871 (9th Cir. 1998). As previously discussed in the
21 court's November 15, 2016 Order dismissing plaintiff's initial
22 Complaint, the failure to promote plaintiff even though he was
23 the most senior of command officers in violation of "past
24 practice" insufficient to establish a property interest under
25 Ninth Circuit precedent. See Nunez, 147 F.3d at 873. Plaintiff
26 cites no statute, regulation, or contractual term entitling him
27 to a promotion once he became the most senior officer.

28 Accordingly, the court will grant summary judgment on

1 plaintiff's Fourteenth Amendment claim.

2 C. Fourth Amendment Search and Seizure

3 Plaintiff claims defendants violated the Fourth
4 Amendment by searching and seizing his work iPhone and searching
5 his desk and "other private areas" at the Tracy Police Department
6 (FAC ¶ 46.)

7 The Fourth Amendment protects against unreasonable
8 searches and seizures. See U.S. Const. amend. IV. A four-
9 justice plurality in O'Connor concluded that the proper
10 analytical framework for Fourth Amendment claims against
11 government employers has two steps. City of Ontario v. Quon, 560
12 U.S. 746, 747 (2010) (citing O'Connor v. Ortega, 480 U.S. 709
13 (1987)). "First, because 'some [government] offices may be so
14 open . . . that no expectation of privacy is reasonable,' a court
15 must consider '[t]he operational realities of the workplace' to
16 determine if an employee's constitutional rights are implicated."
17 Quon, 560 U.S. at 747. "[E]mployer policies concerning
18 communications . . . shape the reasonable expectations of their
19 employees, especially to the extent that such policies are
20 clearly communicated. Id. at 760. "The question whether an
21 employee has a reasonable expectation of privacy must be
22 addressed on a case-by-case basis." Id. at 756-57.

23 "Second, where an employee has a legitimate privacy
24 expectation, an employer's intrusion on that expectation 'for
25 noninvestigatory, work-related purposes, as well as for
26 investigations of work-related misconduct, should be judged by
27 the standard of reasonableness under all the circumstances.'" Id.
28 Id. To be reasonable in scope, the search must be "reasonably

1 related to the objectives of the search and not excessively
2 intrusive in light of ... the nature of the [misconduct]."
3 O'Connor, 480 U.S. at 726 (quoting New Jersey v. T.L.O., 469 U.S.
4 325, 342 (1985)).

5 1. Defendant Churchill

6 As an initial matter, plaintiff presents no evidence
7 that Churchill requested, directed, or authorized the search of
8 plaintiff's city-issued iPhone or any work areas, including
9 plaintiff's assigned desk. Moreover, any decision regarding
10 searching plaintiff's iPhone and work areas was made by Chief
11 Hampton. (See Hampton Decl. ¶¶ 45-46.) "Liability under § 1983
12 must be based on the personal involvement of the defendant."
13 Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998).
14 Because Churchill was not involved in the alleged violation of
15 plaintiff's Fourth Amendment rights, defendant Churchill is
16 entitled to summary judgment on plaintiff's Fourth Amendment
17 claim.

18 2. Desk

19 Plaintiff alleges that defendants unlawfully searched
20 his desk. Here, Chief Hampton had two Tracy Police Department
21 staff members locate any pending or active files on plaintiff's
22 desk so that those files could be re-assigned and completed in a
23 timely fashion. (Hampton Decl. ¶ 70.) The Tracy Police
24 Department policy states that desks "may be administratively
25 searched by a supervisor . . . for non-investigative purposes,"
26 like "obtaining a needed report." (Ex. 2 ("Tracy Police
27 Department Policy Manual") at 2-38.) Thus, this policy
28 demonstrates that, under the circumstances, plaintiff did not

1 have a reasonable expectation of privacy in his desk. See Muick
2 v. Glenayre Elecs., 280 F.3d 741, 743 (7th Cir. 2002) (stating
3 that where [defendant] had announced that it could inspect the
4 laptops that it furnished for the use of its employees, [] this
5 destroyed any reasonable expectation of privacy that [plaintiff]
6 might have had."). Moreover, plaintiff does not contend that the
7 desk is private; rather, he recognized that the desk belonged to
8 the City. (Espinoza Dep. I at 157:2-13.)

9 Even if defendant had a reasonable expectation of
10 privacy in the items located in or on his desk, defendants
11 present evidence that any search that allegedly occurred was
12 reasonable and limited in scope. For instance, defendants state
13 that there was no search inside plaintiff's desk, and any
14 personal items on the desk were placed in a box and put in the
15 closet in plaintiff's office. (Hampton Decl. ¶ 70; Espinoza Dep.
16 at 156:7-17). Thus, defendants demonstrate that even assuming
17 there was a search of plaintiff's desk, "the search was justified
18 at its inception because there were 'reasonable grounds for
19 suspecting that the search [was] necessary for a noninvestigatory
20 work-related purpose.'" See Quon, 560 U.S. 746. For the
21 foregoing reasons, there was no unreasonable search of
22 plaintiff's desk.

23 3. Phone

24 Plaintiff alleges that defendants illegally seized and
25 searched his iPhone. (FAC ¶ 38.) Here, the city presents
26 evidence, unrebutted by plaintiff, that plaintiff had no
27 reasonable expectation of privacy in the phone. The phone was
28 the property of the City, even though plaintiff paid a small sum

1 each pay period to be able to use the phone for limited personal
2 purposes. (Ex. 43 ("Suppl. Responses to Requests for Admissions
3 Number 4"); Espinoza Dep. I at 147:2-10; Hampton Decl. ¶¶ 41, 45,
4 47.) Most importantly, the Tracy Police Department policies
5 notified employees that they had no expectation of privacy when
6 using phones provided by the department. (Hampton Decl. ¶¶ 34,
7 41, 45, 47); Tracy Police Department Policy Manual at 2-25-2-29.)
8 Thus, there is no genuine issue of material fact as to whether
9 plaintiff had a reasonable expectation of privacy in his cell
10 phone.

11 Even if plaintiff had a reasonable expectation of
12 privacy, defendants' search of plaintiff's city-issued phone was
13 reasonable as a matter of law. Here, plaintiff was being
14 investigated for the unauthorized disclosure of confidential
15 peace officer information, a violation of Tracy Police Department
16 policy, and defendants suspected that plaintiff used his cell
17 phone to send confidential work files to an unauthorized third
18 party. Thus, the search was related to the purpose of the
19 investigation, was not excessive in scope, and was reasonable.
20 See Quon, 560 U.S. at 765-66, (holding that government employer
21 did not violate the Fourth Amendment when it reviewed the law
22 enforcement officer's text messages sent on a government-issued
23 pager, where the search was motivated by legitimate work-related
24 purpose.) Moreover, "that the search did reveal intimate details
25 of [plaintiff's] life does not make it unreasonable, for under
26 the circumstances a reasonable employer would not expect that
27 such a review would intrude on such matters." Id. at 763.

28 For the foregoing reasons, there is no triable issue of

1 material fact and the court will grant summary judgment to
2 defendants on the Fourth Amendment claim.

3 D. Fourteenth Amendment Equal Protection

4 Plaintiff claims that defendants discriminated against
5 him based on his race and ethnic origin, "Latin and Mexican,"
6 because Caucasian officers under the administrative discipline
7 process at the Tracy Police Department were not subjected to the
8 same searches and seizures to which plaintiff was subjected.
9 (FAC ¶ 40.)

10 To state a claim under 42 U.S.C. § 1983 for a violation
11 of the Equal Protection Clause of the Fourteenth Amendment a
12 plaintiff must show that the defendants acted with an intent or
13 purpose to discriminate against the plaintiff based upon
14 membership in a protected class, and that plaintiff was treated
15 differently from persons similarly situated. See Barren v.
16 Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998), Lam v. City &
17 County of San Francisco, 868 F. Supp. 2d 928, 951 (N.D. Cal.
18 2012), aff'd, 565 F. App'x 641 (9th Cir. 2014). A plaintiff may
19 make such a showing by proving: (1) the plaintiff was treated
20 differently from others similarly situated; (2) this unequal
21 treatment was based on an impermissible classification; (3) that
22 the defendant acted with discriminatory intent in applying this
23 classification; and (4) the plaintiff suffered injury as a result
24 of the discriminatory classification." Lam, 868 F. Supp. 2d at
25 951 (citations omitted).

26 Here, plaintiff presents no evidence that he was
27 similarly situated to the other Tracy Police Department officers,
28 other than to allege in conclusory terms in the FAC that the

1 Caucasian officers were also subject to the administrative
2 discipline process. Additionally, there is no evidence in the
3 record of intentional discrimination on the basis of race. For
4 instance, plaintiff presents no evidence of racial animus, no
5 evidence of what is typical for internal affairs investigations,
6 and no evidence of a pattern of disparate treatment motivated by
7 racial animus. See Jimmie's Limousine Serv., Inc. v. City of
8 Oakland, Civ. No. 04-3321 WHA, 2005 WL 2000947, at *5 (N.D. Cal.
9 Aug. 18, 2005), aff'd, 252 F. App'x 847 (9th Cir. 2007).
10 Moreover, plaintiff did not file an opposition, and the court
11 notes "it is not the Court's responsibility to cobble together
12 plaintiff's case without assistance from counsel." See id.
13 (citing Carmen v. San Francisco Unified Sch. Dist., 237 F.3d
14 1026, 1031 (9th Cir. 2001)) (granting defendants' summary
15 judgment on plaintiff's equal protection claim where plaintiff
16 lacks evidence to demonstrate intentional discrimination).

17 Furthermore, defendants present evidence to establish
18 that plaintiff and the other officers who were allegedly treated
19 differently were not similarly situated. For instance, plaintiff
20 was a Police Captain, part of the command staff, and thus he was
21 held to a higher standard as compared to the other rank and file
22 officers--one a sergeant and the other a police officer.

23 (Hampton Decl. ¶¶ 21, 34, 48; Churchill Decl. ¶ 10(a).)

24 Moreover, plaintiff was the only command staff member being
25 investigated for breach of confidentiality. (Hampton Decl. ¶
26 48.) As to the officer whose phone was seized but not searched,
27 that officer was not accused of misconduct involving the use of
28 his phone, and nonetheless, it was plaintiff, not defendants, who

1 was responsible for recommending whether that officer's phone
2 should be searched. (Id. ¶ 34; Espinoza Dep. I 157:19-158:3-11.)
3 Thus, plaintiff was not similarly situated to the other officer's
4 subject to Internal Affairs investigations.

5 Accordingly, the court will grant defendant's Motion
6 for Summary Judgment on plaintiff's Equal Protection claim.

7 IT IS THEREFORE ORDERED that defendants' Motion for
8 Summary Judgment (Docket No. 67) be, and the same hereby is,
9 GRANTED.

10 The Clerk of Court is instructed to enter judgment in
11 favor of defendants and against plaintiff.

12 Dated: May 21, 2018



13 WILLIAM B. SHUBB

14 UNITED STATES DISTRICT JUDGE
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