

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

RANDELL ALLEN,

Plaintiff,

v.

**BAY AREA RAPID TRANSIT DISTRICT, OFFICER
OUKA, OFFICER ENNIS, OFFICER JOE and DOES
ONE through FIFTY,**

Defendants.

) **CASE NO.: C00 3232 VRW ADR**

) **DECLARATION OF KENNETH FRUCHT
SUPPORT OF PLAINTIFF'S OPPOSITION
MOTION FOR PARTIAL SUMMARY**

) **DATE: November 8, 2001**

) **TIME: 2:00 p.m.**

) **COURTROOM 3.**

) **JUDGE: Hon. Vaughn R. Wa**

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I, Kenneth Frucht, declare:

1. I am an attorney admitted to practice in this Court and in all courts in California. I represent plaintiff Randell Allen in this action. I make this declaration in support of Plaintiff's

Opposition to Defendants' Motion for Partial Summary Judgment.

2. Attached hereto as Exhibit A, are true and correct copies of relevant portions of Plaintiff's Deposition that are referenced in Plaintiff's Memorandum of Points and Authorities.

3. Attached hereto as Exhibit B is a true and correct copy of the transcript of the dispatch report that was made to BART police on November 19, 1999 concerning an attempted robbery at the Bank of America at Powell Street in San Francisco. This document was originally attached as Exhibit B to the Declaration of Catherine Griffin in support of Defendants Motion for Judgment on the Pleadings.

4. The complaint in this case was filed in state court on August 7, 2000. On September 7, 2000, Defendants filed a notice of removal to the Northern District Court. Plaintiff subsequently moved to remand the case back to the state court. This motion was denied on October 27, 2000. Additionally, on January 18, 2001, the Court stayed discovery pending a motion for judgment on the pleadings that Defendants intended to bring. Defendants filed their motion on February 8, 2001 and it was heard on March 15, 2001. The court filed its order on May 17, 2001. Discovery was not permitted until after a case management conference was held on June 14, 2001.

5. On July 5, 2001, I propounded requests for production of documents from BART. Some of the requests were specifically designed to elicit evidence of a pattern and practice of racial profiling. Specifically, No. 19 sought "all BART arrest and detention reports or records containing information of a suspects race from November 1990 to the present."

6. Prior to the date of production of documents, defendant's counsel Todd Boley called

and requested a week extension to reply to the document requests. I agreed to an extension until August 15, 2001. Defendants served responses to the requests for production on August 15, 2001. With respect to Request No. 19, Defendants stated that there was no method for extracting the race of a suspect without a manual search of every record, and that production would be too burdensome. A true and correct copy of Plaintiffs document requests and Defendants relevant responses are attached hereto as Exhibit C.

7. On August 23, 2001, I wrote to Boley and offered to limit Plaintiffs requests for arrest records to the five years preceding, and the years following Plaintiff's arrest. A true and correct copy of my August 23, 2001 letter is attached hereto as Exhibit D.

8. On September 4, 2001, Boley wrote and told me that BART *did* in fact maintain a database that was capable of generating a report listing arrests by age, sex, date of arrest and charges. Boley offered to produce such a report for the one year preceding Plaintiff's arrest. A true and correct copy of Boley's September 4, 2001 letter is attached hereto as Exhibit E.

9. On September 11, 2001, I wrote to Boley suggesting that BART's database information be produced in summary form for each of the five years preceding Plaintiff's arrest so that there would be a record of the number of arrests and a breakdown by race. I further indicated that if there were no indicia of racial profiling, Plaintiff would not pursue further production related to the Monell claim, but that we would seek additional discovery if there was an indication of racial profiling. A true and correct copy of my September 11, 2001 letter is attached hereto as Exhibit F.

10. If the statistical data showed no indication that there was a likelihood of racial profiling, I intended to dismiss the Monell claim.

11. On September 24, I spoke to Boley. Boley told me that he would try to have the documents to me the next day. The documents didn't arrive on the 25th.

12. On September 26, 2001, two days before the discovery cut-off, Defendants produced almost 3,000 pages of statistical information from the BART database for the years 1996 through 2000.[\[1\]](#)

13. I reviewed the documents produced by BART and hand-counted the data to determine the percentage of African Americans arrested by BART police officers as compared to the general population of arrestees. The results are as follows:

Month/Year	African American Arrestees	Total Arrestees	Percentage of African American Arrestees
Jan-96	369	555	66.5
Feb-96	431	691	62.4
Mar-96	437	727	60.1
Apr-96	324	532	60.9
May-96	320	546	58.6
Jun-96	300	474	63.3
Jul-96	307	476	64.5
Aug-96	364	588	61.9
Sep-96	332	569	58.3
Oct-96	359	577	62.2

Nov-96	293	535	54.8
Dec-96	259	427	60.7
Jan-97	317	535	59.3
Feb-97	283	545	51.9
Mar-97	328	555	59.1
Apr-97	255	449	56.8
May-97	246	443	55.5
Jun-97	241	428	56.3
Jul-97	258	469	55.0
Aug-97	261	444	58.8
Sep-97	137	238	57.6
Oct-97	242	413	58.6
Nov-97	217	368	59.0
Dec-97	234	396	59.1
Jan-98	266	459	58.0
Feb-98	294	511	57.5
Mar-98	325	588	55.3
Apr-98	325	564	57.6
May-98	287	516	55.6
Jun-98	271	506	53.6
Jul-98	290	483	60.0
Aug-98	380	643	59.1
Sep-98	359	617	58.2
Oct-98	330	560	58.9
Nov-98	299	476	62.8
Dec-98	256	487	52.6
Jan-99	323	537	60.1
Feb-99	302	528	57.2
Mar-99	334	569	58.7
Apr-99	357	603	59.2
May-99	323	557	58.0
Jun-99	326	570	57.2
Jul-99	386	652	59.2
Aug-99	415	720	57.6
Sep-99	434	723	60.0

Oct-99	454	733	61.9
Nov-99	358	627	57.1
Dec-99	308	500	61.6
Jan-00	440	725	60.7
Feb-00	521	831	62.7
Mar-00	503	882	57.0
Apr-00	489	828	59.1
May-00	460	799	57.6
Jun-00	328	614	53.4
Jul-00	397	669	59.3
Aug-00	499	861	58.0
Sep-00	413	743	55.6
Oct-00	422	730	57.8
Nov-00	406	797	50.9
Dec-00	451	815	55.3

14. The breakdown by year is as follows:

Year	Total Arrestees	African American Arrestees	Percentage Of African American Arrestees
1996	6,697	4,095	61.2%
1997	5,283	3,019	57.1%
1998	6,410	3,682	57.4%
1999	7,319	4,320	59.0%
2000	9,294	5,329	57.3%

15. The combined percentage of African Americans arrested by BART from 1996 through 1997 is 58.4%.

16. I obtained census data from the website of the Associated Bay Area Governments.

This website contains data from the 2000 U.S. Census showing that African Americans represent 7.5 percent of the population in the Bay Area. In the Bay Area counties served by BART the percentage of African Americans in the population is respectively 7.8% (San Francisco), 14.9% (Alameda) and 9.4% (Contra Costa). (See Request for Judicial Notice).

17. In order to offer sufficient evidence of racial profiling with which to defeat a motion for summary judgment, Plaintiff needs to conduct additional discovery.

18. While the data produced to date is insufficient evidence of racial profiling, the disparity between the percentage of African Americans in the Bay area and those arrested on BART appears to be significant. Plaintiff needs to obtain more information on the racial makeup of BART passengers in order to complete the statistical analysis.

19. Additionally, Plaintiff needs to obtain evidence of other persons who have complained about racial profiling by BART officers. While at this time Plaintiff is only aware of his case and one other incident involving Officer Ennis, there are sure to be other records, complaints and grievances relating to racial profiling.

20. Plaintiff also wants to conduct a sampling of the arrest records that BART maintains to determine if there are unique circumstances attending the arrest of African Americans on BART. For example, if a person is arrested and cited for a fare evasion (pursuant to Cal. Pen. Code § 640), the violation may be discovered only after an officer stops a person and demands to see a BART ticket. In such a case, the officer exercises tremendous discretion in deciding who to stop and ask for proof of fare payment. To make this determination a sampling of the actual

arrest records is necessary.

21. Finally, Plaintiff wants to depose BART policy makers to determine the extent to which they are aware of the disparities in arrests between African Americans and others, and to determine what, if any training is given to BART officers on the issue of racial profiling.

22. I believe that the information outlined above will raise a genuine issue of material fact and, therefore, that the present motion should be denied as premature pursuant to Fed. R. Civ. Proc. R. 56(f).

I declare under penalty of perjury that the foregoing statements are true and accurate to the best of my knowledge and based upon my personal knowledge. Executed this 18th day of October, 2001, at San Francisco, California.

KENNETH FRUCHT

[1] The documents produced by Defendant number close to 3,000 pages of computer print-out data. If the Court wishes to have these documents attached to my Declaration, I will copy all of the documents and have them delivered to the Court prior to the hearing on November 8, 2001.