No. _____

In the Supreme Court of the United States

JORDAN SPATZ PH. D., M.D.,
Petitioner,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX

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APPENDIX

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Appendix A
[Filed: Aug. 18, 2025]

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JORDAN SPATZ Ph. D., M.D., *Plaintiff – Appellant,* v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, *Defendant – Appellee.*	No. 24-2997 D.C. No. 3:21-cv-09605-LB OPINION

Appeal from the United States District Court
for the Northern District of California
Laurel D. Beeler, Magistrate Judge, Presiding

Argued and Submitted June 2, 2025
San Francisco, California

Filed August 18, 2025

Before: Consuelo M. Callahan, Bridget S. Bade, and
Lucy H. Koh, Circuit Judges.

Opinion by Judge Koh

SUMMARY*

Age Discrimination Act

Affirming the district court's grant of summary judgment for the Regents of the University of California on Jordan Spatz's claims under the Age Discrimination Act of 1975, the panel held that the Age Act did not apply to the University of California San Francisco's refusal to admit Spatz to its neurological surgery residency program.

Spatz alleged that he was denied admission to the medical residency program due to age-based discrimination and retaliation. By its terms, the Age Act exempts from its coverage "any employment practice of any employer." Giving the terms "employer" and "employment practice" their ordinary common-law meaning, the panel concluded that ranking medical residents is an employment practice to which the Age Act does not apply. To the extent that Spatz's Age Act claim is not barred, Spatz failed to demonstrate a genuine issue of material fact.

COUNSEL

Dow W. Patten (argued), Forthright Law PC, San Francisco, California, for Plaintiff-Appellant.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Don Willenburg (argued), Gordon Rees Scully Mansukhani LLP, San Francisco, California; Michael D. Bruno and Rachel Wintterle, Gordon Rees Scully Mansukhani LLP, San Francisco, California; for Defendant-Appellee.

OPINION

KOH, Circuit Judge:

Plaintiff-appellant Jordan Spatz appeals the district court's grant of summary judgment for defendant-appellee the Regents of the University of California on plaintiff's claims under the Age Discrimination Act of 1975, 42 U.S.C. § 6101 *et seq.* (the "Age Act"). [1] In the district court, plaintiff alleged that he was improperly denied admission to a medical residency program at the University of California San Francisco ("UCSF") due to age-based discrimination and retaliation. For the reasons set forth below, we conclude the Age Act does not apply to UCSF's refusal to admit plaintiff to its medical residency program and we accordingly affirm the district court.

I.

Plaintiff Dr. Jordan Spatz graduated from UCSF's medical school in 2021. At the time of his graduation, plaintiff was 36 years old. In 2017 and 2018, while plaintiff was in medical school, plaintiff

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[1] Plaintiff does not appeal the dismissal of his non-Age Act claims, and accordingly we do not address them.

was purportedly subject to two instances of harassment based upon his age. Plaintiff reported both incidents to the school, but it declined to investigate. Plaintiff's performance in medical school was mixed. Plaintiff received positive performance evaluations in many of his classes and clinical internships but received some negative evaluations as well, particularly in connection with his sub-internships. Although the parties dispute exactly how well plaintiff performed, plaintiff concedes that, overall, his grades in medical school were "middle of the pack."

Medical school graduates must complete a residency program at a certified institution before they can become fully licensed doctors. Medical students are placed in residency programs through the National Resident Matching Program (the "Match"). As part of this process, medical schools rank the applicants they would like to accept into their program, and applicants do the same with respect to the medical school residency programs they would like to join. These rankings are then fed into a centralized algorithm which matches students with programs based on a variety of factors. There is no guarantee that every medical student will be matched with a residency program.

Plaintiff first applied to medical residency programs in the 2020 match year. In that year, plaintiff ranked 18 neurological surgery programs and listed UCSF's neurological surgery program as his first choice. However, plaintiff was not accepted into any medical residency program, either at UCSF or elsewhere. Plaintiff applied to residency at UCSF and elsewhere again in 2021, and he again failed to match with any program. It is undisputed that UCSF did

not rank plaintiff in either year. Plaintiff claims, and defendant does not dispute, that had UCSF ranked plaintiff in either year he would have matched with its program.

Plaintiff claims that UCSF's refusal to rank him, and by extension accept him into UCSF's neurological surgery residency program, was the product of age-based discrimination and retaliation. To support this accusation, plaintiff cites various statements made by interviewers that are indicative of age-based animus, a written interview evaluation indicating that plaintiff's age was an area of concern, and conversations plaintiff had with UCSF faculty that suggested to plaintiff that his age was discussed during the meeting where faculty ranked residency candidates.

Plaintiff also claims that his non-ranking was in retaliation for reports of discrimination he had previously made to the school. First, plaintiff claims he was retaliated against for reporting the two instances of age-based harassment in 2017 and 2018. Second, plaintiff claims he was retaliated against for filing a formal complaint of discrimination in February 2020, which alleged that plaintiff's age, disability, and birth in the United States was playing a determinative role in UCSF's residency selection process. In response to this 2020 complaint, UCSF investigated plaintiff's allegations of disability and national origin discrimination and found no wrongdoing. However, UCSF did not investigate the allegations of age-based discrimination.[2]

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[2] Beyond his non-ranking to UCSF's medical residency program, plaintiff identifies only two other allegedly discrimina-

In contrast, defendant claims that plaintiff failed to match with UCSF's program because he had mediocre grades and performed poorly during his sub-internships. Defendant cites various documents that corroborate this purportedly poor performance. Defendant also highlights that UCSF's neurosurgery residency program accepts only 3 or 4 residents per year out of an applicant pool of over 300, amounting to a 1% acceptance rate. Moreover, defendant put forward declarations of participants in the match selection meeting generally stating that plaintiff's age was not discussed at the meeting, the declarant either did not know about or did not consider plaintiff's complaints of age discrimination, and, with one exception, age played no role in their decision-making process.

After plaintiff failed to match with UCSF in 2022, and he was not given an interview by the school, plaintiff filed the instant lawsuit. Plaintiff's complaint asserted seven causes of action: (1) age discrimination in violation of the Age Act, 42 U.S.C.

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tory or retaliatory acts: (1) plaintiff was removed from the website of the laboratory of Dr. Manish Aghi where plaintiff worked while he was a student at UCSF, and (2) plaintiff was denied authorship credit on articles that he was purportedly promised by Dr. Aghi. However, undisputed evidence suggests that neither act was the product of discriminatory or retaliatory animus. Instead, it is undisputed that plaintiff was removed from the website as the result of an inadvertent mistake, and was not given authorship credit on the papers in question because plaintiff did not meet the preexisting objective criteria for obtaining such credit. It is also undisputed that plaintiff was added back on to the website once the error was pointed out, and plaintiff was given the opportunity to appear as an author on other papers where he did meet the authorship criteria.

§ 6101 *et seq.*; (2) age discrimination in violation of California's Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code § 12900 *et seq.*; (3) disability discrimination in violation of the FEHA; (4) harassment in violation of the FEHA; (5) retaliation in violation of the FEHA; (6) failure to prevent discrimination and retaliation in violation of the FEHA; and (7) whistleblower retaliation in violation of California Health & Safety Code § 1278.5.[3] After discovery, defendant moved for summary judgment on all of plaintiff's claims. Plaintiff's opposition addressed solely his Age Act claim.

The district court granted defendant's motion in its entirety. With respect to plaintiff's Age Act claim, the district court concluded that the Age Act does not apply to the residency selection process because it constitutes an "employment practice" beyond the scope of the Act. The district court further found that, even if the Age Act were applicable, there was no genuine dispute of material fact as to the merits of that claim. Finally, the district court concluded that summary judgment was appropriate on plaintiff's remaining claims because he did not oppose defendant's motion and had not otherwise presented

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[3] While the case was pending, plaintiff moved for a preliminary injunction, seeking an order to either place him in a neurosurgery residency at UCSF or create a new neurosurgery residency position for him. The district court denied plaintiff's motion and a motions panel of this court affirmed in a memorandum disposition. *See Spatz v. Regents of Univ. of Cal.*, 2023 WL 5453456, at *1 (9th Cir. Aug. 24, 2023). In a footnote, that order noted that the Age Act may not even apply to plaintiff's claim if the residency ranking constituted an "employment practice," but ultimately declined to resolve the issue. *Id.* at *1 n.1.

sufficient evidence to support those claims. This appeal followed.

II.

The threshold question we must address is whether the Age Act applies to the challenged conduct. By its terms, the Age Act exempts from its coverage "any employment practice of any employer." 42 U.S.C. § 6103(c)(1). As set forth more fully below, we conclude that the decision not to admit plaintiff to UCSF's neurological surgery residency program constitutes an "employment practice of an[] employer" and the Age Act accordingly does not apply to the conduct challenged by plaintiff. We therefore affirm the district court's grant of summary judgment.

A.

The district court's grant of summary judgment is reviewed *de novo*. *See Desire, LLC v. Manna Textiles, Inc.*, 986 F.3d 1253, 1259 (9th Cir. 2021). "Summary judgment is appropriate if 'the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *S. Cal. Darts Ass'n v. Zaffina*, 762 F.3d 921, 925 (9th Cir. 2014) (quoting Fed. R. Civ. P. 56(a)). "Viewing the facts in the light most favorable to the nonmoving party, [the court] must determine whether a genuine issue of material fact exists, and whether the district court applied the law correctly." *Id.*

B.

The sole claim at issue on appeal asserts violations of the Age Act. The Age Act states that "no

person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance." 42 U.S.C. § 6102. A private cause of action was added to the Age Act in 1978, permitting "any interested person" to sue "to enjoin a violation of th[e] Act by any program or activity receiving Federal financial assistance" and to recover "reasonable attorney's fees." 42 U.S.C. § 6104(e)(1).

The Age Act stands in contrast to the Age Discrimination in Employment Act of 1967 ("ADEA"), which generally prohibits age-based employment discrimination and is only indirectly relevant here. The ADEA makes it unlawful for an employer to, among other things, "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). Unlike the Age Act, an ADEA plaintiff may also recover damages for violations of the ADEA. *See* 29 U.S.C. § 626(c). Significantly, however, the ADEA's protections are categorically "limited to individuals who are at least 40 years of age." 29 U.S.C. § 631(a).

Plaintiff was under 40 at the time of the relevant conduct and accordingly could not rely on the ADEA to pursue his claims. Plaintiff instead brought suit under the Age Act, which has no similar requirement that the plaintiff be at least 40 years of age for it to apply. However, the Age Act contains another limitation that is significant here.

The Age Act provides that "[n]othing in this chapter shall be construed to authorize action under

this chapter by any Federal department or agency with respect to any employment practice of any employer, employment agency, or labor organization, or with respect to any labor-management joint apprenticeship training program." 42 U.S.C. § 6103(c)(1); *see also* 45 C.F.R. § 90.3(b)(2) ("The Age Discrimination Act of 1975 does not apply to . . . [a]ny employment practice of any employer, employment agency, labor organization, or any labor-management joint apprenticeship training program, except for any program or activity receiving Federal financial assistance for public service employment under the Comprehensive Employment and Training Act of 1974 (CETA), (29 U.S.C. 801 *et seq.*)."). The Age Act further provides that "[n]othing in this chapter shall be construed to amend or modify the [ADEA] . . . or to affect the rights or responsibilities of any person or party pursuant to" that act. 42 U.S.C. § 6103(c)(2). Accordingly, insofar as the conduct challenged by plaintiff constitutes an "employment practice of any employer," the Age Act does not apply.[4]

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[4] Plaintiff does not dispute that the Age Act does not apply to "employment practice[s] of any employer." 42 U.S.C. § 6103(c)(1). However, it is worth noting that Section 6103(c)(1), which exempts "employment practice[s] of any employer" from the Age Act, is worded such that it arguably only applies to actions brought by "any Federal department or agency" and not to suits by private plaintiffs to enforce the Age Act. *Id.* Notwithstanding this phrasing, every district court that has addressed the question has found that Section 6103(c)(1)'s limitation on the scope of the Age Act applies to suits brought by private parties as well. *See Kamakeeaina v. Armstrong Produce, Ltd.*, No. 18-cv-00480, 2019 WL 1320032, at *4 (D. Haw. Mar. 22, 2019) ("Although this language could be

C.

The central question is whether the decision not to accept plaintiff into UCSF's neurological surgery residency program constitutes an "employment practice of any employer." 42 U.S.C. § 6103(c)(1). Neither the Age Act nor its implementing regulations define the terms "employer" or "employment practice." *See* 42 U.S.C. § 6107; 45 C.F.R. § 90.4. Nor do the parties cite any case construing these terms in the context of the Age Act. We accordingly give these terms their ordinary common-law meaning. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–23 (1992) (stating that when "asked to construe the meaning of 'employee' where the statute containing the term does not helpfully define it," courts typically infer that Congress intended to incorporate the common-law meaning of the term); *Cmty. for Creative Non–*

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construed as limiting only a federal department or agency from bringing an action against an employer, the Court agrees with, as far as this Court can tell, every district court to have addressed the issue that an individual also does not have authority to bring an action under the Age Discrimination Act against an employer." (citation omitted)). We agree.

The language of Section 6103(c)(1) was included in the original version of the Age Act when it was passed in 1975. *See* Older Americans Amendments of 1975, Pub. L. No. 94-135, 89 Stat. 713, 729–30, § 304(c)(1). When the Age Act was first passed, the Act did not contain a private right of action, and accordingly it makes sense that Section 6103(c)(1)'s limitation applied only to the federal agencies, who were its sole enforcers. When a private right of action was added in 1978, Congress did not amend Section 6103(c)(1), but there is no indication Congress thereby intended to permit Age Act suits by private parties against employers concerning their employment practices. *See* Comprehensive Older Americans Act Amendments of 1978, Pub. L. No. 95-478, 92 Stat. 1513, 1555–56, § 401(c).

Violence v. Reid, 490 U.S. 730, 739–40 (1989) (similar). Adopting the common law definition of these terms is particularly appropriate given that we have previously adopted a common-law agency test in construing the term "employee" under the ADEA. *See Barnhart v. N.Y. Life Ins. Co.*, 141 F.3d 1310, 1312–13 (9th Cir. 1998). The Age Act picks up where the ADEA leaves off, governing non-employment age discrimination by recipients of federal funding. *See* 42 U.S.C. § 6103(c). The Age Act and ADEA are accordingly *in pari materia* and should "be construed as if they were one law." *California v. Trump*, 963 F.3d 926, 947 n.15 (9th Cir. 2020) (quoting *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972)); *see id.* ("[S]tatutes addressing the same subject matter should be construed *in pari materia*." (citation and internal quotation marks omitted)).

At common law, an "employee" is generally defined as "[s]omeone who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance." *Employee*, Black's Law Dictionary (12th ed. 2024); *see also* Restatement (Second) of Agency § 220(1) ("A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."). An employer is "[a] person, company, or organization for whom someone works; esp., one who controls and directs a worker under an express or implied contract of hire and who pays the worker's salary or wages." *Employer*, Black's Law Dictionary (12th ed. 2024). In the ADEA context, courts consider

the following factors to determine if an individual is an employee:

> 1) the skill required; 2) source of the instrumentalities and tools; 3) location of the work; 4) duration of the relationship between the parties; 5) whether the hiring party has the right to assign additional projects to the hired party; 6) the extent of the hired party's discretion over when and how long to work; 7) the method of payment; 8) the hired party's role in hiring and paying assistants; 9) whether the work is part of the regular business of the hiring party; 10) whether the hiring party is in business; 11) the provision of employee benefits; and 12) the tax treatment of the hired party.

Barnhart, 141 F.3d at 1312–13 (quoting *Darden*, 503 U.S. at 323–24).

Although the record here is not as well developed as it could be, virtually every one of the factors above suggests that ranking medical residents is akin to hiring an employee:

- **1):** residency requires substantial skill, including a degree from a medical school;
- **2) & 3):** the hospital provides both the "instrumentalities" and "location" of work;
- **4)**: the "duration" of the residency is long, lasting upwards of four years;

5), 6), 9) & 10): medical residents work extremely long hours—up to 80 hours a week—and are directly responsible for providing patient care, which suggests medical residents are "part of the regular business of the" hospital and the hospital has substantial control over the work residents perform; and

7), 11) & 12): medical residents are paid a salary, provided with benefits by UCSF, and are taxed as employees. *See Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 48, 60 (2011) (discussed below).

Precedent likewise reinforces that residency bears many similarities to employment. The United States Supreme Court has found that medical residents can be treated as employees, rather than students, for purposes of taxation under the Federal Insurance Contributions Act. *See Mayo*, 562 U.S. at 60. The California Supreme Court has found that bargaining rights under state law. *See Regents of Univ. of Cal. v. Pub. Emp. Rels. Bd.*, 715 P.2d 590, 593–605 (Cal. 1986) ("[A]lthough [residents] did receive educational benefits in the course of their programs, this aspect was subordinate to the services they performed."). The NLRB has reached the same conclusion under federal law. *See Bos. Med. Ctr. Corp.*, 330 N.L.R.B. 152, 160–61 (1999) ("Almost without exception, every other court, agency, and legal analyst to have grappled with this issue has concluded that interns, residents, and fellows are, in large measure, employees."). Finally, the California Court of Appeals

has held that the decision to dismiss a medical resident from a residency program was not entitled to academic deference—as would be true if a typical student were involved—because "the predominant relationship between a medical resident and a hospital residency program is an employee-employer relationship." *Khoiny v. Dignity Health*, 76 Cal. App. 5th 390, 396, 399–403 (2022) (noting that residents are "paid ordinary taxable income," "much of the service [residents] provide is indistinguishable from that provided by fully licensed physicians" and "residents have been found to spend 75 percent to 80 percent of their time providing services to the medical centers or hospitals").

Ultimately, we need not definitively categorize medical residents as employees or students to resolve the case before us. Instead, we hold that ranking medical residents is an employment practice to which the Age Act does not apply.[5]

Plaintiff offers two arguments in response, neither of which is persuasive.

First, plaintiff argues that the "legislative and regulatory history" of the Age Act "demonstrates its specific application to Medical Schools." Plaintiff's reply brief seemingly quotes legislative history that suggests the Age Act was enacted, in part, in

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[5] Our holding today follows from the text of the Age Act. We acknowledge that there are educational aspects of medical residency that may have different ramifications for other statutes. *See, e.g.*, *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 557 (3d Cir. 2017) (concluding that plaintiff plausibly alleged medical residency program constituted "education program or activity" for purposes of Title IX); *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 897 (1st Cir. 1988) (similar). We express no view on this matter.

response to medical schools refusing to admit older applicants, but plaintiff does not actually provide any citations to the documents being quoted. When asked about the source of these quotes at oral argument, plaintiff's counsel was unable to provide any clarification. Plaintiff's failure to provide appropriate citations is sufficient grounds to disregard this argument. *See* Fed. R. App. P. 28(a)(8)(A) (stating that an appellate brief "must contain . . . appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies").

Even setting this aside, taken on its own terms the argument lacks merit. A handful of scattered citations to legislative history cannot overcome the clear text of the Age Act. And the language quoted by plaintiff refers only to "medical schools," but says nothing about medical residency programs. So even if the Age Act applies to the admission of medical students to medical schools, a question we are not called on to consider, it does not follow that it also covers admission to medical residency programs.

Second, plaintiff argues that the relevant discrimination occurred while he was a student in UCSF's medical school,

rather than a medical resident, and so the Age Act applies to the conduct. This misunderstands the relevant inquiry. The question is not whether plaintiff was a student at the time of the relevant conduct. Rather, the question is whether UCSF's refusal to rank (i.e., to hire) plaintiff was an "employment practice of an employer." 42 U.S.C. § 6103(c)(1). Insofar as medical residents are employees, and the hospital is their employer, the

decision not to select plaintiff for residency at UCSF constitutes an "employment practice of an employer" exempt from the Age Act, regardless of plaintiff's status as a medical student at the time the conduct occurred.

To be sure, some of the allegedly discriminatory conduct identified by plaintiff—such as Dr. Aghi's refusal to credit plaintiff for publications or plaintiff's removal from Dr. Aghi's laboratory's website—is arguably independent from plaintiff's non-admission to medical residency, and so to that extent could form the basis of a claim for violation of the Age Act. However, defendants have offered evidence establishing non-discriminatory and non-retaliatory reasons for this independent conduct that plaintiff has failed to refute. *See supra* note 2. Accordingly, the district court also correctly granted summary judgment on plaintiff's claim with respect to this conduct.

III.

For the reasons discussed above, the district court correctly granted defendants' motion for summary judgment.

AFFIRMED.

Appendix B
[Filed: Sep. 25, 2025]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JORDAN SPATZ Ph. D., M.D., *Plaintiff – Appellant,* v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, *Defendant – Appellee.*	No. 24-2997 D.C. No. 3:21-cv-09605-LB ORDER

Before: CALLAHAN, BADE, and KOH, Circuit Judges.

The panel unanimously voted to deny the petition for rehearing en banc, the full court has been advised of the petition, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petition for rehearing en banc (Dkt. 35) is **DENIED**.

Appendix C
[Filed: Apr. 11, 2024]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JORDAN SPATZ Ph. D., M.D., Plaintiff, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant.	Case No. 21-cv-09605-LB **ORDER GRANTING THE DEFENDANT SUMMARY JUDGMENT** Re: ECF No. 99

INTRODUCTION

The case is about whether the University of California, San Francisco, wrongly denied Plaintiff Jordan Spatz a neurosurgery residency at UCSF. The plaintiff was 38 in 2021, when he graduated from UCSF medical school. He applied to neurosurgery residency programs in 2020, 2021, and 2022 (including at UCSF) but did not obtain a residency placement anywhere in the country. The defendant, the Regents of the University of California, operated the medical school. The plaintiff claims violations of federal and state laws: (1) age discrimination under the federal Age Discrimination Act of 1975; (2) age discrimination in violation of California's Fair

Employment and Housing (FEHA); (3) disability discrimination in violation of FEHA; (4) harassment in violation of FEHA; (5) retaliation in violation of FEHA; (6) failure to prevent discrimination and retaliation in violation of FEHA; and (7) whistle-blower retaliation in violation of Cal. Health & Safety Code § 1278.5.[1] The defendant moved for summary judgment on all claims, primarily on the grounds that the federal Act does not apply to employees and in any event, the undisputed evidence establishes that the plaintiff did not match into the highly competitive USCF neurological-surgery program on the merits, not because of retaliation or discrimination.[2] For these reasons, the court grants the defendant summary judgment.

STATEMENT

UCSF's neurosurgery program is among the best in the country, is extremely selective, and each year, accepts three of about three hundred applicants.[3] According to the plaintiff, that is the national trend: nearly all neurosurgery programs accept three to four residents per year.[4]

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[1] First Am. Compl. – ECF No. 31 at 16–26 (¶¶ 67–143); First Suppl. Compl. – ECF No. 48 at 7–8 (¶¶ 32–43). Citations refer to material in the Electronic Case File (ECF); pinpoint citations are to the ECFgenerated page numbers at the top of documents (and for depositions, to the page numbers at the bottom).

[2] Mot. – ECF No. 99; Reply – ECF No. 102.

[3] Berger Decl. – ECF No. 99-9 at 3 (¶ 9); Aghi Decl. – ECF No. 99-12 at 2–3 (¶ 4).

[4] Opp'n – ECF No. 101 at 3 (citing Spatz Decl.). In his declaration, the plaintiff says, "Having applied to

The two sections recount (generally chronologically) the facts identified in the briefs about (1) the plaintiff's experiences at UCSF and (2) his attempts to match to a neurosurgery residency.[5]

1. Experiences at UCSF

In October 2017, during the plaintiff's third-year rotation, a senior resident told him that he "needed to be careful given my age, Ph.D., and then mentioned my . . . speech pattern."[6] The resident had no input into the match evaluations for neurosurgery residencies. The plaintiff reported the comment to the UCSF Office for Prevention of Harassment and Discrimination.[7] The plaintiff's opposition says — without any citation to the fact record — that the "OPHD refused to formally investigate Dr. Spatz['s] age complaint because he 'was not 40,' but nevertheless informally intervened with the resident."[8]

The plaintiff has suffered from auditory dyslexia from childhood, requiring interventions.[9] Beginning in December 2017, UCSF granted the plaintiff an

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numerous Neurosurgery residency programs, I am aware that nearly all Neurosurgery programs only accept a maximum of 3 to 4 residents per year." Spatz Decl. – ECF No. 100-2 at 9 (¶ 51).

[5] Mot. – ECF No. 99-1 at 10–19; Opp'n – ECF No. 101 at 3–15.

[6] Spatz Dep., Ex. A. to Wintterle Decl. – ECF No. 99-2 at 19:9–20:6 (pp. 20:9–11:6).

[7] Decl. – ECF No. 100-2 at 1 (¶ 2) (providing the October date).

[8] Opp'n – ECF No. at 101 at 3. The opposition is not evidence: the court recounts it for context only and because the defendant did not challenge it in its reply.

[9] First Am. Compl. ECF No. 31 at 2 (¶ 6), 4 (¶ 14) (lifelong learning disability arising from an innerear condition requiring surgeries, tubes, speech therapy, and accommodations).

accommodation for his disability. The letter does not identify the disability.[10] UCSF does not tell departments whether students have disabilities or need accommodations. Instead, students decide whether to tell departments, clinical rotations, or clerkships about a need for accommodation. The plaintiff did not provide the Department of Neurological Surgery with his letter of accommodation.[11]

On March 5, 2018, Andre Campbell, M.D., FACS, FACP, FCCM (and the director of the UCSF Surgical Critical Care Fellowship and Vice Chair for DEI) said — to a group of more than twenty medical students at a third-year clerkship orientation — that "Jordan is old as shit and won't be able to take overnight call." The plaintiff and "multiple other" students reported this to Dean Leon Jones, M.D., the associate dean of students. Dean Jones advised the plaintiff not to report it to UCSF's Office for the Prevention of Harassment and Discrimination because the plaintiff was interested in neurological surgery and a report could subject him to retaliation within the residency-ranking process for surgery-residency programs in neurological surgery and general surgery.[12]

From 2018 to 2019, the plaintiff "extended [his] education" to participate in a "year-long inquiry into glioblastoma immunotherapy" with Manish Aghi, M.D., Ph.D., at UCSF. He "orchestrated intellectual property and transfer agreements" with MIT and

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[10] Lucey Dep., Ex. C to Wintterle Decl. – ECF No. 99-2 at 41:6–7 (p. 52:6–7)

[11] *Id.* at 39:16–41:2 (pp. 50:16–52:2), 41:6–7 (p. 52:6–7)

[12] Decl. – ECF No. 100-2 at 2 (¶ 3).

Beth Israel Deaconess Medical Center and "invented[] and conducted research" at the Aghi lab. For these contributions, Dr. Aghi promised co-authorship or acknowledgement "for any resulting publications, patents, and manuscripts."[13] To date, despite citations in patent applications and publications, the plaintiff has not been credited as "co-first author" or other authorship or acknowledgement of contribution.[14] According to the defendant, authorship credit is based on criteria; the plaintiff did not meet them.[15] The person who decided inventorship credit did not consider the plaintiff's complaints about age or disability discrimination.[16] In the complaint, the plaintiff contends that he was removed from the Aghi Lab website in retaliation for his complaints.[17] UCSF inadvertently deleted personnel, including the plaintiff, from the website, and the person who did so would have had no knowledge of the plaintiff's protected activities.[18]

In the complaint, the plaintiff contends that he was denied a residency because "he reported to superiors regarding unsafe patient practices arising from resident scheduling in violation of ACGME Duty Hour Limits."[19] The UCSF neurosurgery faculty who interviewed the plaintiff for a residency or attended the 2020 or 2021 rank meetings did not

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[13] *Id.* (¶ 4).
[14] *Id.* (¶ 5).
[15] Aghi Decl. – ECF No. 99-12 at 3–4 (¶ 9).
[16] Hinsch Decl. – ECF No. 99-13 at 2 (¶ 2).
[17] First Suppl. Compl. – ECF No. 48 at 6, 7 (¶¶ 27, 35–37).
[18] Aghi Dep., Ex. B to Wintterle Decl. – ECF No. 99-2 at 31–32 (pp. 62:20–63:19); Aghi Decl. – ECF No. 99-12 at 5 (¶ 13).
[19] FAC – ECF No. 31 at 25 (¶¶ 138–39).

know that the plaintiff reported a duty-hour violation.[20] Complaints about duty-hour violations are anonymous.[21]

During their fourth year, medical students participate in sub-internships, called sub-Is, where they learn in a clinical setting. These occur at their home institution or elsewhere. "[T]he number one determining factor in someone's acceptance into residency is their performance on the rotation."[22]

The plaintiff had internships at Stanford, Harvard/Massachusetts General, and UCSF. In an October 8, 2019, evaluation from Stanford, the plaintiff had six 3s out of 4 ("At Expected Competency"), and some 2s ("Near Expected Competency") and 2–3s. He had no 4s ("Above Expected Competency/Outstanding"). The "Summary Comments" said, "Seems to have a genuine interest in neurosurgery, although his attendance, effort, enthusiasm, and overall performance were fair at best." The "Cons-

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[20] Aghi Decl. – ECF No. 99-12 at 3 (¶ 8); Auguste Decl. – ECF No. 99-4 at 3 (¶ 5); Berger Decl. – ECF No. 99-9 at 3 (¶ 7); Chang Decl. – ECF No. 99-17 at 3 (¶ 7); Gupta Decl. – ECF No. 99-14 at 3 (¶ 5); Hervey-Jumper Decl. – ECF No. 99-20 at 3 (¶ 4); Lim Decl. – ECF No. 99-16 at 3 (¶ 5); Manley Decl. – ECF No. 99-15 at 3 (¶ 5); Morshed Decl. – ECF No. 99-5 at 4 (¶ 8); Mummaneni Decl. – ECF No. 99- 15 at 3 (¶ 5); Raygor Decl. – ECF No. 99-11 at 3 (¶ 8); Scheer Decl. – ECF No. 99-6 at 2 (¶ 5); Starr Decl. – ECF No. 99-3 at 2–3 (¶ 6); Tarapore Decl. – ECF No. 99-18 at 2 (¶ 4); Theodosopoulos Decl. – ECF No. 99-10 at 4 (¶ 7); Wang Decl. – ECF No. 99-19 at 3 (¶ 7).

[21] Aghi Decl. – ECF No. 99-12 at 3 (¶ 8); Berger Decl. – ECF No. 99-9 at 3 (¶ 7).

[22] Aghi Dep., Ex. B to Wintterle Decl. – ECF No. 99-2 at 35:11–16 (p. 70:11:16); *see* Mot – ECF No. 99-1 at 11–12 (citing many declarations).

tructive Comments" said the following: (1) "Awful body language and attitude;" (2) "Kind of a passenger, not looking for ways to shine;" (3) "snappy with interns;" (3) "If he lacks the fortitude/stamina to endure these hours without breaks, he probably won't survive residency;" (4) "Only presented on rounds once because it was the only day he showed up on time;" (5) "Outstanding research talk based on his laboratory work at UCSF [with] Dr. Aghi; and (6) "Will make significant scientific contributions to the field. Not sure if neurosurgery a path best for him to accomplish his goals as a brilliant scientist."[23] According to the plaintiff, the evaluation was revised to all 3s and 4s because the derogatory remarks were from a Stanford intern who was removed from his job.[24]

At Harvard/Mass General, the plaintiff had a neurosurgery clerkship from September 30, 2019, to October 27, 2019, and received seven ratings of "Consistently above appropriate level" and three ratings of "Most often above appropriate level." The comments said the following: (1) "Excellent rotation. Remarkable depth of knowledge as it pertains to neurooncology which did not go unnoticed. Faculty and residents had very positive comments. Their only advice for improvement (not to be quoted in Dean's letter) is to focus on deepening involvement with patient care and with surgery/procedural skills whenever the opportunity arises. Otherwise no specific suggestions[;]" and (2) "Excellent rotation.

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[23] Evaluation Form, Ex. D to Wintterle Decl. – ECF No. 99-2 at 45–48).

[24] Spatz. Decl. – ECF No. 100-2 at 10 (¶ 54) (citing Email Chain, Ex. P to *id.* – ECF No. 100-2 at 153–56). The plaintiff did not provide the revised evaluation.

Jordan Spatz was able to participate in a wide range of surgeries and gain exposure to a wide variety of diagnoses. He is absolutely passionate about neuro-oncology and has already amassed an impressive fund of knowledge that rivals that of experts in the field. We anticipate he will succeed in an academic environment if he continues along this trajectory." His final grade was H (Honors).[25]

At UCSF, the plaintiff had a research elective from December 16, 2019, to December 22, 2019, in research in neurosurgery. He scored 4 (the highest score) for all ten categories. The comments said that "Jordan did great work on his research elective and will make a great neurosurgeon-scientist. He was a team player and helped others with their projects in addition to leading his own project."[26]

From October 26, 2020, to November 22, 2020, the plaintiff took a neurosurgery course called Advanced Inpatient Clerkship 2 with Dr. Aghi. He received 4s (the highest mark) for all ten categories. The "Summary Comments" said, "Jordan did a good job on the four week rotation, spending time on our pediatric service as well as our adult services at Moffitt and SFGH." The "Specific Comments" said, "Takes initiative, good at doing clear sub-I tasks such as generating HPIs, taking imaging down, etc.," and "Overall appropriate interactions with staff and residents. Has put in adequate effort so far on rotation. Tries to be helpful." The "Constructive Comments" said, "Areas for Jordan to improve at are suggested below[;] most of these involve improving

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[25] Evaluation, Ex. O to Spatz Decl. – ECF No. 100-2 at 151.

[26] Student Summary, Ex. K to id. – ECF No. 100-2 at 60.

knowledge base so that he can anticipate next steps in patient care and perform tasks in a way that is as helpful as possible." "Does not always follow direct instructions. For example, told him exactly how to present ICU patients in abbreviated way due to time constraints but he presented with a prolonged format despite this instruction." "Can work on neurosurgical knowledge, including learning many common grading systems for common neurosurgical problems such as spetzler-martin or supplemental school for AVMs, TLICs for traumatic fractures." "Jordan can also work on timeliness per comments provided by the team." "These are skills to continue to work at as he transitions from being a medical student into being a resident."[27]

The plaintiff submitted other positive performance evaluations: (1) a rotation in May and June 2018 in Clinical Neurosurgery (all 4s in ten categories and a reflection of "amazing job" and "a great future as a neurosurgeon;" (2) a rotation in July 2019 in Advanced Neurosurgery Clerkship (eight 3.5s and two 4s); (3) a rotation in July and August 2019 in the University of Colorado (all 4s and "exemplary job on his Neurosurgery sub-I rotation at CU"); (4) a rotation in December 2019 in Research in Neurosurgery (all 4s and a reflection of "great work;" (5) a rotation in March 2020 in Acting Internship in Medicine (all 3.5s); (6) a rotation in August and September 2020 in Advanced Clinical Clerkship (six 3.5s and four 4s and good comments); (7) a rotation in September and October 2020 in Advanced General

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[27] Student Summary, Ex. K to Spatz Decl. – ECF No. 100-2 at 87–88.

Surgery (all 3.5s and generally positive comments); (8) a rotation in June 2021 in Advanced Neurocritical Care and Emergency Neurology (five 3s, two 3.5s, and three 4s); and (9) a rotation in June and July 2021 in Advanced Trauma & General Surgery (all 4s and positive comments, including "exemplary").[28]

2. The 2020, 2021, and 2022 Residency Matches

During their last year of medical school, students participate in a "Match" through the National Resident Matching Program. "The NRMP uses a mathematical algorithm to place applicants into residency and fellowship positions. Research on the algorithm was the basis for awarding the 2012 Nobel Prize in Economic Sciences."[29] Students who do not match can try to match through a second-round process called the Supplemental Offer and Acceptance Program (SOAP).[30] The plaintiff applied for residencies in 2020, 2021, and 2022. [31] As discussed in the next sections, he did not match with any neurosurgery residency. His expert opines that he had a greater than ninety-percent chance of matching into a neurosurgery residency in 2020 and

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[28] Evaluations, Ex. K to Spatz Decl. – ECF No. 100-2 at 59–94.

[29] NRMP | National Resident Matching Program, https://www.nrmp.org/.

[30] 2024 Main Residency Match Applicants Calendar | NRMP, https://www.nrmp.org/matchcalendars/main-residency-applicants/.

[31] Spatz Decl. – ECF No. 100-2 at 2 (¶ 6).

his not matching in 2020 and 2021 is aberrant. After two failed matches, the chance of matching is low.[32]

2.1 The 2020 Match

For Match year 2020, the plaintiff applied to eighteen programs and ranked UCSF first, which means that if UCSF ranked him, they would match.[33] Dr. Aghi provided a letter of Spatz Decl. – ECF No. 100-2 at 2 (¶ 7) & Rank List, Ex. A to *id.* – ECF No. 100-2 at 12–13.recommendation.[34]

On August 16, 2019, a resident at USCF interviewed the plaintiff for a position as a resident at the department of Neurosurgery at USCF, ranked him as a "Low" performer, said, "Difficult attitude/abrasive with other team members."[35] He identified as an area of concern "clinical performance during subinternship" based on "generally negative resident feedback" when he collected resident evaluations of subinterns for the neurosurgery residency.[36]

In January 2020, UCSF solicited rankings from neurosurgery residents for sixteen neurosurgery

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[32] Miller Decl. – ECF No. 57 at 3–5 (¶¶ 13–19). The defendant objects to this evidence on the ground that there is no evidence of the declarant's expertise, the basis for her conclusions, or the relevance to a challenge to a decision allegedly based on impermissible reasons. Reply – ECF No. 102 at 2–3. The court weighs the evidence accordingly. It in any event does not change the outcome.

[33] Spatz Decl. – ECF No. 100-2 at 2 (¶ 7) & Rank List, Ex. A to *id.* – ECF No. 100-2 at 12–13.

[34] Spatz Decl. – ECF No. 100-2 at 3 (¶ 8).

[35] Email, Ex. B to Morshed Decl. – ECF No. 99-5 at 6.

[36] Morshed Decl. – ECF No. 99-5 at 3 (¶ 6).

residency candidates and the plaintiff. For the other candidates, the residents ranked them in three tiers (one, two, and three) but they "uniformly did not want to rank" the plaintiff.[37] The section about the plaintiff begins, "**DO NOT RANK!"** It then says the following:

> - "not good on too many dimensions to enumerate"
> - "left early, and arrived late, so bad"
> - "went home while at SFGH multiple times, was the only sub-I who went home at night"
> - "no way!"
> - "would be a disaster, not a single positive comment from anyone who worked with him?"[38]

In January 2020, the plaintiff interviewed with members of UCSF's faculty. Praveen Mummaneni, M.D., the vice-chair of the UCSF Neurological Surgery Department, told the plaintiff that he was "an older applicant" and asked him to "justify why you won't burn out in 3–4 years and go into investment banking."[39] Dr. Aghi told him "it's going to be a tough year for M.D.–Ph.D. Applicants" because Dr. Theodosopoulos (the program director) "doesn't want to train M.D.–Ph.D.s". [40] Mitchel

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[37] Email, Ex. 3 to Theodosopolous Decl. – ECF No. 99-10 at 13–17.
[38] *Id.* at 16–17.
[39] Spatz Decl. – ECF No. 100-2 at 3 (¶ 9(a)).
[40] *Id.* (¶ 9(b)).

Berger, M.D., said "Well, you're only going to have a 25-year career in neurosurgery."[41]

The UCSF doctors who participated in the 2020 Match completed evaluation forms with written comments. They said that no one perceived the plaintiff to be 40 or older at the relevant times or considered his age when evaluating his application. Instead, they considered the plaintiff's performance and evaluations during his sub-internships.[42] By his own account, the plaintiff's grades were middle of the pack.[43] According to Dr. Berger, no one thought the plaintiff did well on his clinical duties: "all comments about him were entirely negative. I did not hear one positive comment from any of the faculty or residents about his potential to be a resident in our program."[44] Another doctor initially supported the plaintiff until he heard residents' assessments of the plaintiff, including that he did not work hard: "I was disappointed to learn that the residents who worked

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[41] *Id.* (¶ 9(c)).

[42] Aghi Decl. – ECF No. 99-12 at 3 (¶¶ 5–7); Auguste Decl. – ECF No. 99-4 at 2 (¶¶ 2–4); Berger Decl. – ECF No. 99-9 at 3, 3–4 (¶¶ 5–6, 10); Chang Decl. – ECF No. 99-17 at 2–3 (¶¶ 4–5); Gupta Decl. – ECF No. 99-14 at 2 (¶¶ 2–4); Hervey-Jumper Decl. – ECF No. 99-20 at 2 (¶ 3); Lim Decl. – ECF No. 99-16 at 2–3 (¶¶ 3–4); Manley Decl. – ECF No. 99-15 at 2–3 (¶¶ 3–4); Morshed Decl. – ECF No. 99-5 at 2–3 (¶¶ 4–5); Mummaneni Decl. – ECF No. 99-7 at 2, 3 (¶¶ 3, 6); Raygor Decl. – ECF No. 99-11 at 2 (¶¶ 3–5); Scheer Decl. – ECF No. 99-6 at 2 (¶¶ 3–4); Starr Decl. – ECF No. 99-3 at 2,3 (¶¶ 4, 8); Tarapore Decl. – ECF No. 99-18 at 2 (¶ 2–3); Theodosopoulos Decl. – ECF No. 99-10 at 3–4 (¶ 5); Wang Decl. – ECF No. 99-19 at 3 (¶¶ 5–6).

[43] Spatz Dep., Ex. A to Wintterle Decl. – ECF No. 99-2 at 9:3–10 (p. 77:3–10).

[44] Berger Decl. – ECF No. 99-9 at 3–4 (¶ 8)

with Dr. Spatz observed that he did not work hard, and was often not present when there was work to be done or cases to assist on."[45] Dr. Mummaneni based his decision on the plaintiff's stamina:

> I did ask Dr. Spatz what he thought of the 80-hour workweek. This is something that I ask almost every applicant I interview. In all my years of interviewing potential residents and asking this same question, Dr. Spatz is the only applicant who ever said they recommend working "far less hours" and wondered if the program could be made easier. This raised a red flag because neurosurgery is an intense, hands-on profession. The neurosurgery national Residency Review Committee has provided guidance for residencies to utilize the 80-hour workweek for residents to learn to take care of the sickest patients and learn the nuances of surgical technique. To be successful, an applicant needs drive and desire, otherwise patients suffer. This is the basis for my comment that I was "not sure if [Dr. Spatz] has enough stamina for NS residency." It had nothing to do with his age, but rather whether he had the grit and drive to be a neurosurgery resident. Not everyone does, and I routinely ad-

[45] Starr Decl. – ECF No. 99-3 at 3 (¶ 8).

> vise students to be sure this challenging career is the one they wish to pursue.[46]

Philip Theodosospolous, M.D., the program director for neurological surgery training at UCSF, ranked the plaintiff to "match," saying he was an outstanding candidate, very mature, humble" and, as to areas of concern, "engineering to medicine transition." He ranked him two of ten applicants and checked the boxes for "Yes! Top 3! Rank to Match!" and "Yes, okay to rank."[47] He also said that the plaintiff "has characteristics which have been observed by several evaluators during his rotations in our department which raised red flags, including his attitude, his at-best lackluster fervor for clinical care, and his quiet and aloof demeanor."[48]

Another doctor said:

> What stood out was Dr. Spatz asking if there was a way to make residency easier. This was an unusual question and why I noted it on the evaluation form. It is also why I rated "Applicant's motivation to be in the program" as "fair." If he was asking if residency can be easier, I had to wonder why he wanted to do neurosurgery. . . . I recall that Dr. Spatz was academically strong in terms of research productivity but the reports of his clinical performance were almost all

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[46] Mummaneni Decl. – ECF No. 99-7 at 2–3 (¶ 4).

[47] Theodosopolous Decl. – ECF No. 99-10 at 3 (¶ 4) & Evaluation, Ex. 1 to *id.* – ECF No. 99-10 at 6.

[48] Theodosopolous Decl. – ECF No. 99-10 at 4 (¶ 6).

> negative. That is why I wrote on the evaluation "not sure that he would be a good fit."[49]

Dr. Aghi observed, "The most important consideration for an applicant is performance on the clinical sub-internship. A poor performance on the rotation makes our program unlikely to consider a candidate further. Dr. Spatz's sub-internship evaluations revealed to me that he had the poorest performance of nearly 30 rotating students during summer of 2019. . . . In both years, I indicated it was ok to rank him, though he was not a top three candidate."[50] Another doctor said, "While I did note Dr. Spatz's age on my 2020 interview evaluation form (and clearly did not perceive him to be 40 years of age or older), it was one data point among many and not a determinative factor in the residency selection process. Indeed, I indicated that it was ok to rank Dr. Spatz for both the 2020 Match and 2021 Match." (She listed as an "area of concern" "36 y/o" on her form.)[51] Another doctor listed the plaintiff's competencies as good, and another said it was "okay to rank" him.[52]

On February 6, 2020, Sigurd Berven, M.D., told the plaintiff that "he spoke with Dr. Mummaneni about me and discussed my age, 'burn out,' and my statements about the 'maximum 80-hour' work

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[49] Raygor Decl. – ECF No. 99-11 at 2–3 (¶ 6–7).
[50] Aghi Decl. – ECF No. 99-12 at 2–3 (¶¶ 3–5).
[51] Gupta Decl. – ECF No. 99-14 at 2 (¶ 2) & Evaluation, Ex. 1 to *id.* – ECF No. 99-14 at 5.
[52] Lim Decl. – ECF No. 99-16 at 2 (¶ 2) & Evaluation, Ex. 1 to *id.* – ECF No. 99-16 at 5; Hervey-Jumper Decl. – ECF No. 99-20 at 2 (¶ 2) & Evaluation, Ex. 1 to *id.* – ECF No. 99-20 at 5,

week."[53] Dr. Aghi told the plaintiff "that my age was openly discussed and formally considered at the UCSF Neurological Surgery residency rank selection meeting."[54]

On February 9, 2020, Dr. Aghi sent him a text message: "So they discussed the age of this kid nate from Pitt but everyone felt like he was a bundle of energy and no concerns that he would be too old, in your case there were concerns that you might not have the stomach for the pace of our program. It is pretty brutal and the good subIs are constantly on the move without stopping."[55]

On February 14, 2020, "'Dr. Aghi reiterated that my age and 'slowness,' which was in regard to my disability that Dr. Aghi was aware of at this time, were discussed during the UCSF Neurological Surgery residency rank selection meeting."[56] On February 20, 2020, Dr. Berven told him that "they had also discussed 'concerns about you burning out of residency' and that they had observed that 'as an older applicant, you have a more laid back personality.'" [57] On February 21, 2020, in the operating room, Andrew Chan (the chief resident) and Sanjay Dhall (a professor) had this conversation:

> Dhall: Have either of you seen Forrest Gump?
> Plaintiff: I've seen it.
> Chan: You know [Plaintiff] is 40.

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[53] Spatz Decl. – ECF No. 100-2 at 3 (¶ 10(a)).
[54] *Id.* (¶ 10(b)).
[55] *Id.* (¶ 11) & Text Message, Ex. B to *id.* – ECF No. 100-2 at 15.
[56] Spatz Decl. – ECF No. 100-2 at 3 (¶ 12(a)).
[57] *Id.* at 4 (¶ 12(b)).

> Plaintiff: I'm 36.
> Chan: Like it makes any difference.
> Dhall: So, when you are done with residency, they can roll you right into the nursing home.[58]

In January 2020, after he learned that his age was discussed during the Rank List meeting, the plaintiff emailed Dean Jones to discuss age discrimination, and on February 9, 2020, he filed a complaint with the Office for the Prevention of Harassment and Discrimination alleging age discrimination. In March 2020, Grant Abernathy called the plaintiff to let him know that the Office for the Prevention of Harassment and Discrimination would investigate some of the claims filed in February 2020 but not the claims about age discrimination.[59]

In March 2020, the plaintiff learned that he did not match with any neurological surgery residency in 2020. He participated in the second-round process (SOAP) and was not selected for any residency training.[60]

On March 17, 2020, the plaintiff "spoke with Dr. Campbell, who asked me to state my age; when I answered, he responded, 'well, that's a problem because they got to believe you'll make it through 6–7 years of the hard grind.'"[61]

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[58] *Id.* (¶ 13) (cleaned up) & Note, Ex. C to *id.* – ECF No. 100-2 at 17–18.

[59] Spatz Decl. – ECF No. 100-2 at 4–5 (¶¶ 18–20); Notices, Exs. D–E to *id.* – ECF No. 100-2 at 20–29.

[60] Spatz Decl. – ECF No. 100-2 at 4 (¶¶ 15–16).

[61] *Id* at 4 (¶ 17)

2.2 The 2021 Match

The plaintiff applied for, and was not selected for, neurosurgery residencies in 2021, and he applied again through SOAP but was not selected for a residency. He again ranked UCSF first.[62] Dr. Aghi provided him a letter of recommendation "but did not provide other, essential advocacy for my candidacy in 2021 or thereafter."[63]

A November 7, 2020, email with a survey from residents had the following about the plaintiff:

- **Currently on rotation and about 2 weeks in. Some concerns regarding performance on rotation.**
- "Takes initiative, good at doing clear sub-I tasks such as generating HPIs, taking imaging down, etc"
- "Does not always follow direct instructions. For example, told him exactly how to present ICU patients in abbreviated way due to time constraints but he presented with a prolonged format despite this instruction."
- "Did not show up to rounds on time. Did not come prepared to rounds. Did not have a list. Did not know the patients. Did not have supplies. Did not supplement rounds, slowed down rounds. On headpager call, did not write down H&Ps or offer to help.

[62] *Id.* at 5 (¶¶ 23–25)
[63] *Id.* at 5 (¶¶ 23–25)

Had to be asked to perform certain tasks. Did not complete assigned tasks on time (calling Micro lab/uploading images). Left call early."

- "Initially very passive role player on service and had to be asked to help out but progressed back to being slightly more engaged by asking "how can I help." Still remained somewhat aloof and never progressed to the point of being able to anticipate needs/needs step in work despite being explicitly encouraged to pay attention to common logistics issues of the service or what the on-call resident may need." Displayed poor interpersonal skills and tact (made comments such that he had suggested interventions prior to them being carried out, implying that such actions were his idea and he was right all along)."
- "Lack of situational awareness (asking questions during critical moments of a procedure, humming aloud in common spaces where multiple people in the room were quietly and intently working, never seemed to understand when things were urgent/emergent or when others were stressed or overburdened by work)"
- "Appropriate fund of knowledge with regard to basic neurology and physical exam correlates but poor neuro-

> surgical knowledge - did not know many common grading systems for common neurosurgical problems such as spetzler-martin or supplemental score for AVMs, TLICS for traumatic fractures."[64]

Dr. Theodosopolous and others "considered this feedback in evaluating Dr. Spatz's fitness to become a neurosurgery resident. . . ." in 2021.[65]

The plaintiff submitted text messages exchanged during this internship to show that he was performing tasks as requested and that two doctors thanked him for his work.[66]

The interviews were in December 2020. The participating doctors all said that age was not a factor and relied on the plaintiff's performance and evaluations during his sub-internships. Representative comments include the following.

- I did not think that UCSF should rank him in the 2021 because of the difficulties he had working with residents and the ability to blend and work well with the residents is very important to a cohesive resident cohort and the most important consideration for an applicant.[67]

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[64] Email, Ex. 2 to Theodosopolous Decl. – ECF No. 99-10 at 10–11.

[65] Theodosopolous Decl. – ECF No. 99-10 at 4 (¶ 6)

[66] Spatz Decl. – ECF No. 100-2 at 8 (¶¶ 43–44) & Text Messages, Exs. L–M to *id.* – ECF Nos. 100-2 at 96–146 (texts include thank yous for the plaintiff's help).

[67] Auguste Decl. – ECF No. 99-4 at 2 (¶ 2).

- On my evaluation form I noted "clinical performance during the subinternship" as an area of concern. This was based on the generally negative resident feedback I reviewed when I was asked to collected resident evaluations of subinterns for the neurosurgery residency program director.[68]
- As indicated on my evaluation form, Dr. Spatz did not do well on his subinternship and was not a good fit with the residents. His poor sub-internship performance was the determinative factor in why I indicated UCSF should not rank Dr. Spatz.[69]
- While I thought Dr. Spatz had some outstanding qualities, I ultimately decided that he was not a good fit for UCSF. In my opinion, fit is both extremely important and hard to define. Certainly the negative evaluations of the neurosurgery residents showed Dr. Spatz would not have been a good fit.[70]
- I indicated that it was ok to rank him for the 2021 Match, though he was not a top three candidate. The most important considerations when

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[68] Morshed Decl. – ECF No. 99-5 at 3 (¶ 6).
[69] Scheer Decl. – ECF NO. 99-6 at 2 (¶ 2).
[70] Manley Decl. – ECF No. 99-15 at 2 (¶ 2).

assessing an applicant is the opinion of the residents.[71]

- I indicated that he should not be ranked based on his strange social interactions and reference letters which were mediocre and raised issues from his neurosurgery rotation. An applicant's clinical performance on the neurosurgery rotation is the key factor in deciding whether to rank an applicant to Match. This designation in my evaluations is usually reserved for the absolute worst candidates.[72]
- As indicated on my evaluations form, Dr. Spatz had poor sub-internship performance and did not work well with the team. These were the determining factors in why I indicated we should not rank Dr. Spatz to match.[73]
- I rated him poor or fair in all categories. As but one example of his poor "Interpersonal Skills" (one of the categories on the evaluation form), throughout the interview he referred to me as "Doris" and Manish Aghi as "Dr. Aghi." . . . Dr. Spatz was one of the worst clinical performers

[71] Lim Decl. – ECF No. 99-16 at 2 (¶ 2).
[72] Chang Decl. – ECF No. 99-17 at 2 (¶ 2).
[73] Terapore Decl. – ECF No. 99-18 at 2 (¶ 2).

> and that is the reason he did not match.[74]

Two other doctors said that the plaintiff was "okay to rank."[75]

In March 2021, Dr. Starr told the plaintiff that he refused to select him because "you have a higher risk of killing a patient than others" and "your capacity to work long hours is not good enough to be a resident."[76] Dean Lucey, who had spoken to Drs. Chang and Starr, "related concerns about my 'durability for a neurosurgery residency.'"[77]

On April 13, 2021, Dean Lucey sent the plaintiff a letter saying that UCSF "will not submit past or new letters in support of your candidacy, now or in the future."[78]

On April 19, 2021, the plaintiff met with Dr. Aghi to discuss a potential postdoctoral position in his laboratory. Dr. Aghi told him that "he did not advocate for me at external institutions because internal UCSF investigations caused Dr. Aghi 'frustration,' 'to hate his job,' and 'made his life hell.' He went on to say 'I am the Neurosurgery Department and did not advocate for you."[79] Dr. Aghi said in his declaration, "I did not take Dr. Spatz's

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[74] Wang Decl. – ECF No. 99-19 at 2 (¶ 2–3).
[75] Gupta Decl. – ECF No. 99-14 at 2 (¶ 2); Ex. 1 to *id.* – ECF No. 99-14 at 6; Hervey-Jumper Decl. – ECF No. 99-20 at 2 (¶ 2); Ex. 1 to *id.* – ECF No. 99-20 at 6.
[76] Spatz Decl. – ECF No. 100-2 at 5–6 (¶ 26).
[77] *Id.* at 6 (¶ 27).
[78] *Id.* at 6 (¶ 28) (cleaned up) & Letter, Ex. H to *id.* – ECF No 100-2 at 45–46.
[79] Spatz Decl. – ECF No. 100-2 at 6 (¶ 29).

complaints related to discrimination or retaliation into consideration when assessing him for a residency position."[80]

2.3 The 2022 Match

In Match year 2022, the plaintiff again applied to UCSF's Neurological Surgery residency program, ranked it second (which would have resulted in a match had UCSF ranked him), was not selected for an interview, did not match with any neurological-surgery residencies, and matched with a one-year non-categorical preliminary surgery residency at Oregon Health & Science University.[81]

3. Relevant Procedural History

The complaint has seven claims: (1) age discrimination under the federal Age Discrimination Act of 1975; (2) age discrimination in violation of California's Fair Employment and Housing (FEHA); (3) disability discrimination in violation of FEHA; (4) harassment in violation of FEHA; (5) retaliation in violation of FEHA; (6) failure to prevent discrimination and retaliation in violation of FEHA; and (7) whistleblower retaliation in violation of Cal. Health & Safety Code § 1278.5.[82] The defendant moved for summary judgment.[83] The court has federal-question jurisdiction under the Age Discrimination Act of

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[80] Aghi Decl. – ECF No. 99-12 at 3 (¶ 7).

[81] Spatz Decl. – ECF No. 100-2 at 6 (¶¶ 30–31) & Rank List, Ex. I to *id.* – ECF No. 100-2 at 47–50.

[82] First Am. Compl. – ECF No. 31 at 16–26 (¶¶ 67–143); First Suppl. Compl. – ECF No. 48 at 7–8 (¶¶ 32–43).

[83] Mot. – ECF No. 99.

1975 and supplemental jurisdiction over the state claims under 28 U.S.C. § 1367(a). All parties consented to magistrate-judge jurisdiction.[84] 28 U.S.C. § 636(c)(1). The court held a hearing on April 4, 2024.

STANDARD OF REVIEW

The court must grant summary judgment where there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). Material facts are those that may affect the outcome of the case. *Id.* at 248. A dispute about a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* at 248–49.

The party moving for summary judgment has the initial burden of informing the court of the basis for the motion and identifying portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). To meet its burden, "the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000); *see Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) ("When the

[84] Consents – ECF Nos 12, 13.

nonmoving party has the burden of proof at trial, the moving party need only point out 'that there is an absence of evidence to support the nonmoving party's case.'") (quoting *Celotex*, 477 U.S. at 325). "Where the moving party will have the burden of proof on an issue at trial, the movant must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007).

If the moving party meets its initial burden, then the burden shifts to the nonmoving party to produce evidence supporting its claims or defenses. *Nissan*, 210 F.3d at 1103. "Once the moving party carries its initial burden, the adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but must provide affidavits or other sources of evidence that set forth specific facts showing that there is a genuine issue for trial.") *Devereaux*, 263 F.3d at 1076 (cleaned up). If the non-moving party does not produce evidence to show a genuine issue of material fact, the moving party is entitled to summary judgment. *Celotex*, 477 U.S. at 322–23.

In ruling on a motion for summary judgment, the court does not make credibility determinations or weigh conflicting evidence. Instead, it views the evidence in the light most favorable to the non-moving party and draws all factual inferences in the non-moving party's favor. *E.g.*, *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986); *Ting v. United States*, 927 F.2d 1504, 1509 (9th Cir. 1991).

In ruling on a summary-judgment motion, the court "need only consider the cited materials." Fed. R. Civ. P. 56(c)(3). A "district court need not examine

the entire file for evidence establishing a genuine issue of fact, where the evidence is not set forth in the opposing papers with adequate references so that it could conveniently be found." *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001). In other words, "whatever establishes a genuine issue of fact must *both* be in the district court file *and* set forth in the response." *Id.* at 1029; *see Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) ("[I]t is not our task, or that of the district court, to scour the record in search of a genuine issue of triable fact. We rely on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment.").

ANALYSIS

The plaintiff's opposition analyzes only age discrimination under the federal Age Discrimination Act of 1975 (claim one) and retaliation in the form of Dr. Aghi's failure to advocate for the plaintiff and give authorship credit, which he casts a claim under the 1975 Act too (and not as a FEHA claim for retaliation, which is claim five).[85] There are no material issues of fact about the Age Discrimination Act because it does not apply to employees, and in any event, the plaintiff has not established age discrimination or retaliation in violation of the Act.

The failure to address the remaining claims is a concession of them. *Lansdown v. Bayview Loan Servicing, LLC*, No. 22-cv-00763-TSH, 2023 WL

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[85] Opp'n – ECF No. 101 at 15–21; *see id.* at 18:15–27 (retaliation).

2934932, at *4 (N.D. Cal. Apr. 12, 2023) (a failure to oppose an argument is waiver and abandonment and thus "cedes the argument"); *Azpetia v. Tesoro Ref & Mktg. co. LLC*, No. 17-cv-00123-JST, 2017 U.S. Dist. LEXIS 1 14210, at *27 (N.D. Cal. July 21, 2017) (same); *GN Resound A/S v. Callpod, Inc.*, No. C 11-04673 SBA, 2013 WL 1190651, at *5 (N.D. Cal. Mar. 21, 2013) (construing a failure to oppose an argument as a concession); *Rosenfeld v. U.S. DOJ,* 903 F. Supp. 2d 859, 862 (N.D. Cal. 2012) ("In most circumstances, failure to respond in an opposition brief to an argument put forward in an opening brief constitutes waiver or abandonment in regard to the uncontested issue."). The plaintiff nonetheless said at the hearing that he preserved the other claims — age discrimination in violation of California's Fair Employment and Housing (FEHA) (claim two), disability discrimination in violation of FEHA (claim three), harassment in violation of FEHA (claim four), retaliation in violation of FEHA (claim five), failure to prevent discrimination and retaliation in violation of FEHA (claim six), and whistleblower retaliation in violation of Cal. Health & Safety Code § 1278.5 (claim seven) — by recounting facts about them in the "disputed facts" section of the opposition. The citation of facts (summarized in the Statement) does not mitigate a failure to analyze the claims. The court nonetheless addresses the claims below and concludes that the fact allegations do not establish material disputes of fact that preclude summary judgment.

1. Age Discrimination Act of 1975 — Claim One

The Act provides that "no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance." 42 U.S.C. § 6102. The Act excludes from coverage an action that "reasonably takes into account age as a factor necessary to the normal operation or achievement of any statutory objective" of a recipient or actions that are based on "reasonable factors other than age." *Id.* § 6103(b). The Act does not "authorize action under this chapter by any Federal department or agency with respect to any employment practice of any employer, employment agency, or labor organization, or with respect to any labor-management joint apprenticeship training program." *Id.* § 6103(c)(1). The Act does not "amend or modify the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621–634), as amended, or [] affect the rights or responsibilities of any person or party pursuant to such Act." *Id.* § 6103(c)(2). The Act authorizes a private right of action for injunctive relief. *Id.* § 6104(e)(1).

When the Ninth Circuit denied the plaintiff's appeal of this court's denial of a preliminary injunction, it said that the Act does not apply to employment practices of any employer:

> The regulations promulgated under the ADA state that the ADA does not apply to "employment practice[s]." *See* 45 C.F.R. § 90.3(b)(2) ("The Age Discrimi-

> nation Act of 1975 does not apply to ... [a]ny employment practice of any employer."); 42 U.S.C. § 6103(c); *see also Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 60 (2011); *Stretten v. Wadsworth Veterans Hosp.*, 537 F.2d 361, 363, 366–67 (9th Cir. 1976). However, UCSF did not raise this issue, and the district court did not address it. For these reasons and because it is not necessary to decide this issue to resolve the appeal, we do not reach it.

Spatz v. Regents of Univ. of Cal., No. 23-15064, 2023 WL 5453456, at *1 n.1 (9th Cir. Aug. 24, 2023) (affirming denial of preliminary injunction because the facts did not clearly favor the plaintiff's position of a discriminatory decision based on age or a retaliatory decision based on complaints, UCSF would experience substantial hardship by an injunction, relief could be accorded after resolution on the merits, and the public interest favors high standards in medical training); *see Tyrell v. City of Scranton*, 134 F. Supp. 2d 373, 383 (M.D. Pa. 2001) (Act was created to protect persons from age discrimination in the provision of services by government-funded programs, not to combat age discrimination in their employment practices, which already is illegal under the ADEA).

Medical residents are employees.[86] *Mayo Found. for Med. Educ. & Rsch. v. U.S.*, 562 U.S. 44, 60 (2011)

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[86] Mot. – ECF No. 99-1 at 20–21; Opp'n – ECF No. 100 at 16–17 (analyzing only the standards for discrimination, not whether a resident is an employee exempt from the Act).

(medical residents are subject to FICA taxes under the full-time employee rule); *Khoiny v. Dignity Health*, 76 Cal. App. 5th 390, 399 (2002) (medical residents are employees and thus can assert FEHA claims); *Stretten*, 537 F.2d at 363, 365–69 (due-process and property-rights challenge to termination of residency, which the court characterized as employment); *Regents of Univ. of Cal. v. Pub. Empl. Rel. Bd.*, 41 Cal. 3d 601, 618 (1986) (confirming PERB ruling that medical residents are employees); *Bos. Med. Ctr. Corp.*, 330 NLRB 152, 199 (1999) (NLRB held that house staff, including medical residents, are employees). No cases address whether medical residents are subject to the Act. The authority in this paragraph suggests that the decision not to accept the plaintiff for a neurosurgery residency was an employment decision not covered by the Act. The court follows that authority as persuasive.

At the hearing, the plaintiff pointed to the dual purpose of a residency: education and employment. He cited *Mares v. Miami Valley Hosp.*, which involved the termination of a resident following complaints and escalating discipline for her unprofessional behavior. --- F.4th ---, No. 23- 3475, 2024 WL 1209122, at *1 (6th Cir. 2024). The resident sued for violations of her procedural and substantive due-process rights, her equal-protection rights, and Ohio contract law. The district court granted summary judgment for the defendants. The Sixth Circuit affirmed. *Id.* at *3. In analyzing the procedural due-process argument, the Sixth Circuit rejected the argument that the resident should be treated as an employee and instead held that "medical residency is more akin to an educational

program than full employment and that [the resident's] claim should be evaluated as such." *Id.* at *4 (collecting cases). Students receive only "minimal due-process protections." *Id.* (collecting cases and holding that students were entitled only to notice of unsatisfactory academic performance and a "careful and deliberate" decision regarding their punishment); *cf. Stretten*, 537 F.2d at 363, 366–69 (characterized a medical residency as employment).

This case does not involve a due-process challenge to a termination of a residency. It's about an age-based challenge to the very different decision to reject the plaintiff's application for a neurosurgery residency, which is an employment practice excluded under the Act. And even by analogy, *Mares* does not cut the plaintiff's way: even if one could shoehorn a decision not to accept a medical student for a residency into a claim under the Act (and no case supports that conclusion), the Act — which allows only injunctive relief — embodies other policy considerations that might eliminate any claim here: reasonable consideration of age or factors other than age, 42 U.S.C § 6103(c)(1), or a concern about services (not employment practices), as discussed above. (The parties did not discuss these issues. The court does not reach them.)

Also, even if the statute allowed the claim, then on the merits, the undisputed evidence (recounted in the Statement) is that no one considered the plaintiff's age when considering the application for the neurosurgery residency. Instead, his clinical performances and resident evaluations were the reasons he was not selected. The gist of the plaintiff's challenge to the comments by the decisionmakers —

and the Statement distinguishes between comments by decisionmakers and comments by others who had no connection to the selection process — is that they were proxies for age: stamina, energy, work ethic, and the like.[87] There are almost no cases addressing this issue (as discussed at oral argument). One case is *Martinez v. Novo Nordisk Inc.*, where the court rejected the argument that qualities such as energy, dynamic, and stamina displayed age-based animus. 992 F.3d 12, 17 (1st Cir. 2017) (described the qualities for three positions covering a sales territory previously covered by fourteen people).

As the court said at the hearing, sales positions are qualitatively different than neurosurgery residencies. But *Martinez*'s legal point applies here: qualities that are accurate about, and relevant to, the demands of a position are not age-based bias. *Id.* The evidence is undisputed that the plaintiff did not match into residencies based on the evaluations, not his age. Thus, in the context of this case involving a competitive process for a demanding position as a neurosurgery resident, the plaintiff has not established a genuine issue of material fact that precludes summary judgment on any claim under the Act. *See also Marques v. Bank of Am.*, 59 F. Supp. 2d 1005, 1019 (N.D. Cal. 1999) (in addressing Title VII and ADEA age-discrimination claims, identified four relevant elements: "(1) whether the comment is ambiguous as an indicator of discriminatory animus, (2) whether the comment is uttered by a decisionmaker (i.e., a person responsible for one of the adverse employment decisions at issue), (3)

[87] Opp'n – ECF No. 101 at 5–8, 11–12, 18.

whether the comment is related in time and subject matter to the decisional process[,] and (4) whether there are multiple comments or only a single statement."), *aff'd*, 5 F. App'x 763 (9th Cir. 2001).

The plaintiff also casts his retaliation claim as a violation of the Act, citing 45 C.F.R. 91.45(a), which precludes a recipient's intimidating or retaliating against anyone who attempts to assert a right protected by the Act or its regulations.[88] He asserts that

> After Plaintiff's complaints were investigated by OPHD, Dr. Aghi communicated directly to Plaintiff that the internal investigations "made [his] life hell." Consequently, and subsequently, Dr. Aghi refused to advocate for Plaintiff after the 2020 Match. Because strong support from one's home institution is critical for any re-applicant and even more so in highly competitive specialties, Dr. Aghi's lack of support effectively eliminated Dr. Spatz's chance of matching into Neurological Surgery after Match year 2020.
>
> In addition to refusing to advocate for Plaintiff, Dr. Aghi further retaliated by withholding previously promised authorship credit from Plaintiff in Patent applications, draft and submitted manuscripts, and announcements of funding

[88] *Id.* at 18 (citing 45 C.F.R. § 91.45(a)).

> all made by the Aghi Laboratory based on work performed by Plaintiff.[89]

Even assuming the Act applies, no disputes of fact preclude summary judgment. The plaintiff did not counter the evidence in the Statement about authorship (the plaintiff did not meet the criteria), the inadvertent removal of his information from the website, or inventorship (an outside determination that did not involve consideration of the complaints).[90] That leaves the allegations that Dr. Aghi told the plaintiff — during the meeting on April 19, 2021, for a potential postdoctoral position in Dr. Aghi's laboratory — that the USCSF investigations were frustrating, caused Dr. Aghi to hate his job, and made his life hell, and Dr. Aghi's statement that "I am the Neurosurgery Department and did not advocate for you."[91] But those comments do not suggest discrimination or retaliation against someone asserting an age-discrimination claim under the Act, which is what 45 C.F.R. 91.45(a) forbids. Instead, they reflect frustration (and perhaps reality). Also, Dr. Aghi was one voice in the UCSF selection process (and the other selection processes), submitted a letter of recommendation, and declared that he "did not take Dr. Spatz's complaints related to discrimination or retaliation

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[89] *Id.*

[90] The University's amending its policies in 2020 and 2021 to address the Age Act does not affect the outcome, for the reasons advanced by the defendant.

[91] Spatz Decl. – ECF No. 100-2 at 6 (¶ 29).

into consideration when assessing him for a residency position."[92]

* * *

This analysis disposes of the arguments that the plaintiff opposed. The other unopposed arguments for summary judgment on the remaining claims thus are conceded. *See supra.* But because the FEHA discrimination and retaliation claims involve the same facts, the court addresses them.

First, as to the FEHA claim for age discrimination (claim two), the plaintiff has the initial burden of establishing a prima facie case. To state a prima facie case of age discrimination, the plaintiff must show that he (1) is a member of a protected class (here, that he was at least 40 years old or was perceived to be at or over 40 by the decisionmakers),[93] (2) he was qualified for the job, (3) he suffered an adverse employment action, and (4) there are circumstances giving rise to an inference of discrimination. *Nesbit v. Pepsico, Inc.*, 994 F.2d 703, 704 (9th Cir. 1993); *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 355 (2000).

Under FEHA, "age" means the "chronological age of any individual who has reached a 40th birthday." Cal. Gov't Code § 12926(b). FEHA covers actual protected characteristics (like age) and also the perception that a person has the protected characteristic. Id. § 12926(o) ("Race, religious creed, color, national origin, ancestry, physical disability,

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[92] Aghi Decl. – ECF No. 99-12 at 3 (¶ 7).

[93] Mot. – ECF No. 99-1 at 22; Reply – ECF No. 102 at 10.

mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, or veteran or military status includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.").

If the plaintiff states a prima facie case, then the burden shifts to the defendant to articulate a legitimate, nonretaliatory reason for its action. If it does, then the plaintiff must show a triable issue that the articulated reason is a pretext for discrimination. *Guz*, 24 Cal. 4th at 355–356.

As set forth in the Statement, the one time that the plaintiff arguably was perceived as 40, he corrected the misapprehension. As set forth above, no decisionmaker perceived him as 40 or decided not to select him based on the apprehension that he was. The defendant offered undisputed evidence that the decisionmakers did not rank him to match based on his performance, not his age. No evidence suggests that this was pretext.

Second, as to FEHA retaliation (claim five), to establish a prima facie case of retaliation under FEHA, a plaintiff must show that (1) he engaged in a protected activity, (2) the employer subjected him to an adverse employment action, and (3) there was a causal link between the protected activity and the employer's action. *See, e.g., Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 506 (9th Cir. 2000); *Morgan v. Regents of the Univ. of Cal.*, 88 Cal. App. 4th 52, 69 (2000). If the plaintiff establishes a prima facie case, then the burden of production shifts to the employer to articulate a

legitimate, nonretaliatory reason for the action taken. If it does, then the plaintiff must show "substantial" evidence that the articulated reason is a "pretext" for retaliation. *Flait v. N. Am. Watch Corp.*, 3 Cal. App. 4th 467, 475–76, 479 (1992). Again, there are no material issues of fact that the conduct here was retaliatory or affected the Match process, the defendant offered legitimate reasons for its actions, and no evidence suggests pretext.

2. Other Claims

There are three other FEHA claims: disability discrimination (claim three); harassment (claim four); and failure to prevent discrimination and retaliation (claim six).

First, as to disability discrimination, as set forth in the Statement, the plaintiff never told the neurosurgery department about his disability or the accommodation. Dr. Aghi's February 14, 2020, comment about slowness was in the context of concerns about stamina, not disability, and there is no evidence to support the plaintiff's allegation that Dr. Aghi knew of the disability. Even if the comment were about disability, it was a nonactionable stray remark. *Phelps v. GSA*, No. C 07-01055 JSW, 2010 WL 1610070, at *6 n.3 & 7 n.4 (N.D. Cal. 2012), *aff'd*, 469 F. App'x 548 (9th Cir. 2012). (At oral argument, the plaintiff said that this was his weakest claim.)

Second, at the time of the alleged harassment, Dr. Spatz was a student. FEHA applies to employees. Cal. Gov't Code § 12940(j)(1); *Khoiny*, 76 Cal. App. 5th at 399.

Third, as to the alleged failure to prevent discrimination and retaliation, the claim is derivative of the underlying claims and thus fails. *Trujillo v. N. Cnty. Transit Dist.*, 63 Cal. App. 4th 280, 289 (1998).

The final claim is a claim for a violation of California Health & Safety Code § 1278.5, which prohibits discrimination and retaliation for complaints about unsafe patient practices. As set forth in the Statement, no one in the selection process knew about the complaints, which were in any event anonymous.

CONCLUSION

The court grants the defendant's motion for summary judgment: the plaintiff has undisputed academic ability, but the decision about the medical residency was an employment practice not covered by the federal Age Discrimination Act and in any event, was based on his performance as a clinician. Even if the Act applied, and even if there was no waiver of the state claims, there are no disputes of fact that preclude summary judgment.

This resolves ECF No. 99.

IT IS SO ORDERED.

Dated: April 11, 2024

/s/ Laurel Beeler
LAUREL BEELER
United States
Magistrate Judge

Appendix D
[Filed: Apr. 12, 2024]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JORDAN SPATZ Ph. D., M.D., Plaintiff, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant.	Case No. 21-cv-09605-LB **JUDGMENT**

On April 11, 2024, the court granted defendant's motion for summary judgment. Pursuant to Federal Rule of Civil Procedure 58, the court hereby enters judgment in favor of the Regents of the University of California and against Jordan Spatz. The court directs the Clerk of Court to close the file in this matter.

IT IS SO ORDERED.

Dated: April 11, 2024

/s/ Laurel Beeler
LAUREL BEELER
United States
Magistrate Judge