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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

WESLEY REED, JR.,	)	CV 16-5483-RSWL-FFMx
	)	
Plaintiff,	)	
	)	
v.	)	<b>ORDER re: Defendant's</b>
	)	<b>Motion for Summary</b>
	)	<b>Judgment, or in the</b>
	)	<b>Alternative, Partial</b>
	)	<b>Summary Judgment [28]</b>
FIRST STUDENT, INC.,	)	
	)	
Defendant.	)	
	)	
	)	
	)	
	)	

Plaintiff Wesley Reed, Jr. ("Plaintiff") brings the following Action against Defendant First Student, Inc. ("Defendant"), a school bus transportation company, for alleged age discrimination. Plaintiff claims that Defendant did not hire him because he was seventy-six years old at the time he applied to be a bus driver. Compl. ¶ 8, ECF No. 1-1, Ex. A.

Currently before the Court is Defendant's Motion

1 for Summary Judgment, or in the Alternative, Partial  
2 Summary Judgment ("Motion") [28]. Based on the  
3 evidence presented, there is a genuine issue of  
4 material fact as to whether Defendant discriminated and  
5 failed to prevent discrimination against Plaintiff  
6 based on his age; however, punitive damages are  
7 unwarranted as a matter of law. Having reviewed all  
8 papers submitted pertaining to this Motion, the Court  
9 **NOW FINDS AND RULES AS FOLLOWS:** the Court **GRANTS in**  
10 **part and DENIES in part** Defendant's Motion [28].

## 11 I. BACKGROUND

### 12 A. Factual Background

13 Plaintiff is a Los Angeles resident, who was  
14 seventy-six years old at the time of the events giving  
15 rise to Plaintiff's causes of action. Compl. ¶¶ 1, 8;  
16 Decl. of Wesley Reed Jr. ("Reed Decl.")<sup>1</sup> ¶¶ 1, 3.  
17 Defendant is a transportation company providing school  
18 bus services nationwide, including in Los Angeles.  
19 Decl. of Dedra Valentine ("Valentine Decl.") ¶ 2, ECF  
20 No. 28-2.

21 In order to drive for Defendant, applicants must  
22 submit the following documentation: (1) a driver's  
23 license; (2) a medical clearance form; (3) a first aid  
24 card; and (4) a school bus certificate. Id. ¶ 4; Decl.

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26 <sup>1</sup> Defendant incorrectly argues that Plaintiff's Declaration  
27 must be disregarded because he failed to sign the document under  
28 penalty of perjury. See Def.'s Evid. Objs. 2:17-19, ECF No. 30-  
4. On the contrary, Plaintiff signed his Declaration under oath,  
so the Court may properly consider it. Reed Decl. 4:7-15.

1 of Christina H. Hayes ("Hayes Decl."), Ex. B  
2 ("Valentine Dep.") at 35:15-36:6, ECF No. 28-1. To  
3 obtain school bus certificates, individuals must pass a  
4 written test and a behind-the-wheel test administered  
5 by the California Highway Patrol ("CHP"), as well as  
6 pass a medical examination. Valentine Decl. ¶ 5;  
7 Valentine Dep. 35:15-36:1. Defendant claims to hire  
8 every applicant who submits these four documents.  
9 Valentine Dep. 36:2-6, 42:5-9.

10 On August 8, 2014, Plaintiff filled out an  
11 application to become a bus driver for Defendant. Reed  
12 Decl. ¶ 4, Ex. A. Plaintiff completed Defendant's  
13 requisite training for the CHP's written and behind-  
14 the-wheel tests in November 2014. Id. ¶¶ 5-6.  
15 Plaintiff passed both examinations that month.  
16 Valentine Decl. ¶¶ 9, 11. However, the CHP informed  
17 Plaintiff it could not issue him a school bus  
18 certificate because the Department of Motor Vehicles  
19 needed to clear his background check first. Hayes  
20 Decl., Ex. A ("Reed Dep.") at 90:22-91:8. In January  
21 or February 2015, Plaintiff finally received his school  
22 bus certificate (the "School Bus Certificate"). Id. at  
23 97:12-16.

24 Plaintiff and Defendant dispute what happened  
25 next—although it is undisputed that Defendant never  
26 hired Plaintiff. Valentine Dep. 86:6-11. Plaintiff  
27 claims he brought the School Bus Certificate, as well  
28 as the other required documents, to Defendant in March

1 2015. Reed Decl. ¶ 7, Ex. B. Defendant's Safety  
2 Supervisor, Dedra Valentine ("Valentine")—who was also  
3 responsible for hiring drivers—contends that she does  
4 not recall Plaintiff ever submitting the School Bus  
5 Certificate, and there is no record of one in his file.  
6 Valentine Decl. ¶ 12; Pl.'s Stmt. of Undisputed Facts  
7 ("Pl.'s SUF") ¶ 8, ECF No. 30-3.

## 8 **B. Procedural Background**

9 On June 16, 2016, Plaintiff filed his Complaint in  
10 the Los Angeles County Superior Court [1-1]. Defendant  
11 removed the case to this Court on July 22, 2016 [1].  
12 Plaintiff alleges the following claims against  
13 Defendant: (1) age discrimination in violation of the  
14 Fair Employment and Housing Act ("FEHA"); (2) age  
15 discrimination in violation of public policy; and  
16 (3) failure to do everything reasonably necessary to  
17 prevent discrimination, harassment, and retaliation  
18 from occurring in violation of FEHA. Compl. ¶¶ 16-52.

19 Defendant filed the instant Motion on August 8,  
20 2017 [28-3]. Plaintiff filed his Opposition on August  
21 22, 2017 [29]. Defendant's Reply followed on August  
22 29, 2017 [30].

## 23 **II. DISCUSSION**

### 24 **A. Legal Standard**

25 Federal Rule of Civil Procedure 56(a) states that a  
26 "court shall grant summary judgment" when the movant  
27 "shows that there is no genuine dispute as to any  
28 material fact and the movant is entitled to judgment as

1 a matter of law." The party moving for summary  
2 judgment has the initial burden of proof to show "no  
3 genuine dispute as to any material fact." Id.; see  
4 also In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387  
5 (9th Cir. 2010)(citing Celotex Corp. v. Catrett, 477  
6 U.S. 317, 323 (1986)). "A party asserting that a fact  
7 cannot be . . . genuinely disputed must support the  
8 assertion by: citing to particular materials in the  
9 record." Fed. R. Civ. P. 56(c)(1)(A). "In determining  
10 any motion for summary judgment . . . , the Court may  
11 assume that the material facts as claimed and  
12 adequately supported by the moving party are admitted  
13 to exist without controversy except to the extent that  
14 such material facts are (a) included in the 'Statement  
15 of Genuine Disputes' and (b) controverted by  
16 declaration or other written evidence filed in  
17 opposition to the motion." C.D. Cal. R. 56-3.

18 Where the non-moving party bears the burden of  
19 proof at trial, the moving party need only prove that  
20 there is an absence of evidence to support the non-  
21 moving party's case. In re Oracle, 627 F.3d at 387.  
22 If the moving party meets this burden, the burden then  
23 shifts to the non-moving party to produce admissible  
24 evidence showing a triable issue of fact. Id.; Nissan  
25 Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099,  
26 1102-03 (9th Cir. 2000).

27 //

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1 **B. Discussion**

2 1. Evidentiary Objections

3 a. *Plaintiff's Evidentiary Objections*

4 Plaintiff objects to portions of the Declaration of  
5 Dedra Valentine [28-2] and Defendant's Statement of  
6 Undisputed Facts [28-4]. ECF No. 29-5. First,  
7 Plaintiff objects that Valentine lacks personal  
8 knowledge as to when the CHP issues school bus  
9 certificates to drivers and to Valentine's and her co-  
10 worker McGee's positions at Defendant's company. Pl.'s  
11 Evid. Objs. ¶¶ 1-2, 6, ECF No. 29-5. To the extent  
12 Valentine asserts what typically or generally happens  
13 with respect to the CHP's issuance of school bus  
14 certificates, Valentine Decl. ¶¶ 5, 10, the Court  
15 **SUSTAINS** Plaintiff's objections because Valentine lacks  
16 personal knowledge of the usual procedures since she  
17 does not work for the CHP, Pl.'s Evid. Objs. ¶¶ 1-2;  
18 Fed. R. Evid. 602. On the other hand, Valentine has  
19 personal knowledge and foundation about her own job  
20 duties, as well as her co-worker's, such as not being  
21 an officer, director, or manager of Defendant. See  
22 Valentine Decl. ¶ 15; Self-Realization Fellowship  
23 Church v. Anada Church of Self-Realization, 206 F.3d  
24 1322, 1330 (9th Cir. 2000) ("Personal knowledge can be  
25 inferred from an affiant's [employment] position."  
26 (citations omitted)). As such, the Court **OVERRULES**  
27 Plaintiff's objections to this evidence. Pl.'s Evid.  
28 Objs. ¶ 6. Plaintiff also objects to Valentine's

1 explanation of Defendant's Employee Handbook as  
2 irrelevant. Id. ¶ 5. Because the Employee Handbook  
3 tends to make it less likely that Defendant failed to  
4 take steps to prevent discrimination, it is relevant to  
5 Plaintiff's third cause of action. See Fed. R. Evid.  
6 401. Thus, the Court **OVERRULES** Plaintiff's objection  
7 on relevance grounds.

8 As to Defendant's Statement of Undisputed Facts,  
9 Plaintiff objects to paragraph 23: "Plaintiff admits  
10 that he was not issued a School Bus Certificate by the  
11 CHP due to his failure to clear the background check."  
12 Id. ¶ 7. The Court **SUSTAINS as moot** Plaintiff's  
13 argument that it mischaracterizes the testimony because  
14 the Court only relies on the deposition transcript  
15 itself. Plaintiff also objects on relevance grounds to  
16 Defendant's statement that Plaintiff's trainer, McGee,  
17 was over sixty years old and 35% of individuals hired  
18 as bus drivers for Defendant were over the age of  
19 forty. Id. ¶¶ 8-9; Def.'s SUF ¶¶ 38, 44. The Court  
20 **OVERRULES** these objections because these paragraphs are  
21 relevant to show that age was not a factor in  
22 Defendant's hiring practices.

23 Finally, in his Opposition, Plaintiff objects to  
24 "any new evidence that [D]efendant attempts to submit  
25 in any reply." Pl.'s Opp'n to Def.'s Mot. for Summ. J.  
26 ("Opp'n") 14:4-5, ECF No. 29. Per Local Rule 7-10,  
27 Defendant could file declarations or other rebuttal  
28 evidence in connection with its Reply. With the Reply,

1 Defendant filed the Declaration of O. Mishell P. Taylor  
2 ("Taylor Declaration") [30-1] authenticating and  
3 including Defendant's Response to Plaintiff's Requests  
4 for Admission, Set One. This evidence rebuts  
5 Plaintiff's introduction in his Opposition of  
6 Defendant's Response to Plaintiff's Requests for  
7 Admission, Set Two, by providing a more complete  
8 picture of Defendant's admissions. See Fed. R. Evid.  
9 106. Thus, the Court **OVERRULES** Plaintiff's objection  
10 to the Taylor Declaration.

11 b. *Defendant's Evidentiary Objections*

12 Defendant objects to portions of the following  
13 evidence: (1) the Declaration of Wesley Reed, Jr. [29-  
14 2]; (2) the Deposition of Wesley Reed, Jr. [29-1, Ex.  
15 1]; (3) the Deposition of Dedra Valentine [29-1, Ex.  
16 2]; (4) the Deposition of Cleo McGee [29-1, Ex. 3];  
17 (5) the Deposition of Mustapha Karam [29-1, Ex. 4]; and  
18 (6) the use of Defendant's Supplemental Response to  
19 Plaintiff's Special Interrogatories, Set Two [29-1, Ex.  
20 5]. ECF No. 30-4.

21 The Court can overrule Defendant's evidentiary  
22 objections because they "are boilerplate and devoid of  
23 any specific argument or analysis as to why any  
24 particular exhibit or assertion in a declaration should  
25 be excluded." United States v. HIV Cat Canyon, Inc.,  
26 213 F. Supp. 3d 1249, 1257 (C.D. Cal. 2016); see also  
27 Stonefire Grill, Inc. v. FGF Brands, Inc., 987 F. Supp.  
28 2d 1023, 1033 (C.D. Cal. 2013)(refusing to "scrutinize

1 each objection and give a full analysis of identical  
2 objections"); Amaretto Ranch Breedables v. Ozimals,  
3 Inc., 907 F. Supp. 2d 1080, 1081 (N.D. Cal. 2012)  
4 ("This Court need not address boilerplate evidentiary  
5 objections." (citation omitted)); Capitol Records, LLC  
6 v. BlueBeat, Inc., 765 F. Supp. 2d 1198, 1200 n.1 (C.D.  
7 Cal. 2010)(noting that "it is often unnecessary and  
8 impractical" to scrutinize "boilerplate recitations of  
9 evidentiary principles or blanket objections" (citation  
10 omitted)). Moreover, upon review of the objected-to  
11 evidence and Defendant's bases for its objections,  
12 Defendant's evidentiary objections are **OVERRULED** [30-4]  
13 either because the objections are without merit or  
14 because the Court does not rely on the objected-to  
15 evidence. Where the Court relies on particular  
16 evidence, the reasons for overruling the pertinent  
17 objections will be delineated.

18 2. Defendant's Motion is **GRANTED in part and**  
19 **DENIED in part** [28]

20 Defendant seeks summary judgment in its favor as to  
21 all three of Plaintiff's causes of action. Def.'s Mot.  
22 for Summ. J. ("Mot.") 1:25-27, ECF No. 28-3. In his  
23 Complaint, Plaintiff alleges the following claims:  
24 (1) age discrimination in violation of FEHA; (2) age  
25 discrimination in violation of public policy; and  
26 (3) failure to prevent discrimination, harassment, and  
27 retaliation in violation of FEHA. Compl. ¶¶ 16-52.  
28 The Court discusses each in turn.

1           a.   *Age Discrimination in Violation of FEHA*

2           Under California's burden-shifting framework for  
3 FEHA claims,<sup>2</sup> the plaintiff must first establish a prima  
4 facie case of discrimination by showing the following:  
5 (1) the plaintiff is within a protected class; (2) the  
6 plaintiff applied for and was qualified for the job;  
7 (3) the plaintiff suffered an adverse employment  
8 action, such as denial of an available job; and  
9 (4) other circumstances giving rise to an inference of  
10 age discrimination. Guz v. Bechtel Nat'l Inc., 8 P.3d  
11 1089, 1113 (Cal. 2000). If the plaintiff satisfies the  
12 prima facie case, the defendant must rebut the  
13 presumption of discrimination with a legitimate,  
14 nondiscriminatory reason for the action. Id. at 1114  
15 (citations omitted). Then, the plaintiff may attack  
16 the defendant's proffered reasons as pretextual or  
17 offer other evidence of discriminatory motive. Id.  
18 (citations omitted).

19           i.   *Plaintiff's Prima Facie Case*

20           Here, Plaintiff was seventy-six years old when he  
21 applied to be a bus driver for Defendant, Reed Decl.  
22 ¶ 3, placing him within a protected class because he  
23 was over forty years old, see Schechner v. KPIX-TV, 686  
24

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25           <sup>2</sup> "California courts interpreting FEHA often look to federal  
26 cases interpreting the Age Discrimination in Employment  
27 Act . . . and Title VII of the Civil Rights Act." Nidds v.  
28 Schindler Elevator Corp., 113 F.3d 912, 916 (9th Cir. 1996).  
Accordingly, this Court relies "on such cases where helpful."  
Id.

1 F.3d 1018, 1023 (9th Cir. 2012)(citation omitted).

2 Thus, Plaintiff has satisfied the first prima facie  
3 element.

4 Second, Plaintiff applied to become a bus driver  
5 for Defendant. Reed Decl. ¶ 4, Ex. A; Valentine Decl.  
6 ¶ 6. The parties agree that to qualify for the bus  
7 driver position, Plaintiff needed to submit his School  
8 Bus Certificate. Mot. 6:14-16; Opp'n 10:26-3.

9 Plaintiff attests that he delivered the School Bus  
10 Certificate to Defendant's employee, Valentine, who was  
11 in charge of hiring trainees, in March 2015. Reed  
12 Decl. ¶ 7, Ex. B; Reed Dep. 98:25-101:3. In contrast,  
13 Valentine asserts that to her knowledge, Plaintiff  
14 never submitted a school bus certificate to Defendant,  
15 let alone returned after completing the behind-the-  
16 wheel test in November 2014. Valentine Decl. ¶ 12;  
17 Valentine Dep. 146:6-22. The Court cannot assess the  
18 credibility of or weigh this evidence but must draw all  
19 inferences in the light most favorable to Plaintiff to  
20 determine whether there is a genuine issue of material  
21 fact. Soremekun v. Thrifty Payless, Inc., 509 F.3d  
22 978, 984 (9th Cir. 2007). When drawing all inferences  
23 in Plaintiff's favor, the Court finds no genuine issue  
24 of material fact for trial; rather, Plaintiff submitted  
25 his School Bus Certificate even though Valentine does  
26 not remember as much. Thus, Plaintiff was qualified  
27 for the position.

28 As to the third prima facie element, Plaintiff

1 admits that Defendant offered him a conditional offer  
2 of employment, contingent on Plaintiff's receipt of a  
3 school bus certificate. Reed Dep., Ex. 3 at 5 (checked  
4 box showing Defendant made a conditional employment  
5 offer); Pl.'s Resp. to Def.'s Stmt. of Undisputed Facts  
6 ("Pl.'s Resp. to Def.'s SUF") ¶ 14, ECF No. 29-3.

7 Nevertheless, Plaintiff claims that when he followed up  
8 on his application with Valentine after providing his  
9 School Bus Certificate, she abruptly said, "Mr. Reed, I  
10 have your paperwork. I'll call you." Reed Dep. 60:7-  
11 61:16, 63:9-21. Although Defendant did not explicitly  
12 reject Plaintiff, Valentine admitted in her deposition  
13 that Defendant did not hire Plaintiff. Valentine Dep.  
14 86:6-11. Plaintiff has established this element by  
15 showing he was not hired for the available position.

16 Lastly, Plaintiff offers evidence that the oldest  
17 employee Defendant *hired* between August 4, 2014 and  
18 April 20, 2015 was thirteen years younger than  
19 Plaintiff.<sup>3</sup> Decl. of Mark Weidmann, Ex. 5, ECF No. 29-  
20 1. The Ninth Circuit has considered a potential  
21 thirteen-year age gap between the plaintiff and his

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22  
23 <sup>3</sup> Defendant objects to Plaintiff's inclusion of this  
24 evidence with his Opposition as irrelevant and unauthenticated.  
25 Def.'s Evid. Objs. ¶ 33. It is relevant because it supports  
26 Plaintiff's claim that Defendant did not hire Plaintiff based on  
27 his age. Moreover, the evidence is Defendant's interrogatory  
28 answers, and Defendant "does not dispute the preparation of the  
interrogatories." *Id.* at 30 n.1. The document also appears to  
be what Plaintiff's attorney claims it to be in his Declaration.  
Fed. R. Evid. 901. Because parties may rely on "materials in the  
record, including . . . interrogatory answers," Fed. R. Civ. P.  
56(c)(1)(A), Defendant's objections are **OVERRULED**.

1 replacement as support for the fourth element of the  
2 FEHA prima facie case. Santillan v. USA Waste of Cal.,  
3 Inc., 853 F.3d 1035, 1044 (9th Cir. 2017). "The fact  
4 that one person in the protected class has lost out to  
5 another person in the protected class is thus  
6 irrelevant, so long as he has lost out *because of his*  
7 *age.*" O'Connor v. Consol. Coin Caterers Corp., 517  
8 U.S. 308, 312 (1996). Defendant counters with evidence  
9 that Defendant *employed* an employee over the age of  
10 sixty-nine within that time frame. Decl. of O. Mishell  
11 P. Taylor, Ex. A, ECF No. 30-1. The inference most  
12 favorable to Plaintiff is that Defendant discriminated  
13 on the basis of age in its *hiring*, despite not  
14 retention, decisions. Defendant also argues its  
15 conditional offer of employment to Plaintiff undermines  
16 any claim that Defendant did not want to hire Plaintiff  
17 based on his age. Def.'s Reply in Supp. of Def.'s Mot.  
18 for Summ. J. ("Reply") 4:17-19, ECF No. 30. But again,  
19 when considered in the light most favorable to  
20 Plaintiff, this could have been an empty promise to  
21 hire him.<sup>4</sup>

22

23 <sup>4</sup> Plaintiff's other evidence proffered in support of his  
24 Opposition is irrelevant. For instance, filing trainees'  
25 applications by date of birth, as opposed to name, does not show  
26 age discrimination because "from birth date to birth date with  
27 [Defendant's] regular drivers you have to have ten hours," so  
28 "it's easier to log that information on their training records."  
Valentine Dep. 63:3-21. Valentine's abrupt or harsh tone of  
voice towards Plaintiff does not show she was discriminating  
against his age either. See Reed Dep. 58:16-62:4. Additionally,  
the fact that Plaintiff's trainer, McGee, walked some trainees,  
but not Plaintiff, around the buses and gave different

1 Based on the foregoing, Plaintiff has established  
2 his prima facie case under FEHA.

3 ii. *Defendant's Legitimate,*  
4 *Nondiscriminatory Reason*

5 If nondiscriminatory, Defendant's reasons for not  
6 hiring Plaintiff need not necessarily be wise or  
7 correct. Guz, 8 P.3d at 1115. Legitimate reasons are  
8 those "*facially unrelated to prohibited bias, and*  
9 *which, if true, would thus preclude a finding of*  
10 *discrimination.*" Id. at 1115-16.

11 Pursuant to California Vehicle Code section  
12 12517(a), "a person may not operate a schoolbus while  
13 transporting pupils unless that person has in his or  
14 her immediate possession . . . a certificate issued by  
15 the department to permit the operation of a schoolbus."  
16 Because Defendant knew the CHP declined to issue  
17 Plaintiff a school bus certificate and had no record  
18 otherwise, Defendant claims it did not hire Plaintiff  
19 as it believed Plaintiff's operation of a bus would be  
20 illegal. Mot. 10:11-18. This reason is legitimate and  
21 nondiscriminatory as it is entirely unrelated to  
22 Plaintiff's age. As such, Defendant has satisfied its

23 \_\_\_\_\_  
24 instructions to Plaintiff and another trainee about how to meet  
25 oncoming traffic does not show that Defendant treated Plaintiff  
26 unfavorably because of his age. See Reed Dep. 70:17-73:20.  
27 Finally, an applicant's, like Plaintiff's, experience as a bus  
28 driver was not part of Defendant's considerations for hiring, as  
Plaintiff admits that Defendant hires all applicants, with the  
exception of Plaintiff, who submit the four required documents.  
Pl.'s Resp. to Def.'s SUF ¶ 7.

1 burden under Guz.

2           iii. *Plaintiff's Pretext and*

3                           *Discriminatory Motive Arguments*

4           "[P]laintiff can survive summary judgment without  
5 producing any evidence of discrimination beyond that  
6 constituting his prima facie case, if that evidence  
7 raises a genuine issue of material fact regarding the  
8 truth of [Defendant's] proffered reasons." Chuang v.  
9 Univ. of Cal. Davis, Bd. of Trs., 225 F.3d 1115, 1127  
10 (9th Cir. 2000)(citing Reeves v. Sanderson Plumbing  
11 Prods., Inc., 530 U.S. 133 (2000)). But there are  
12 instances where no rational juror could conclude the  
13 action was discriminatory although the plaintiff  
14 established a prima facie case and provided sufficient  
15 evidence to reject the defendant's explanation for the  
16 action. Reeves, 530 U.S. at 148. For instance, the  
17 employer would be entitled to summary judgment "if the  
18 record conclusively revealed some other,  
19 nondiscriminatory reason for the employer's decision,  
20 or if the plaintiff created only a weak issue of fact  
21 as to whether the employer's reason was untrue and  
22 there was abundant and uncontroverted independent  
23 evidence that no discrimination had occurred." Id.

24           As discussed, Plaintiff's only specific evidence of  
25 age discrimination is that Defendant did not hire  
26 Plaintiff despite his qualifications but hired someone  
27 thirteen years his junior. However, Plaintiff also  
28 testified that Valentine told him, "Mr. Reed, I have

1 your paperwork. I'll call you." Reed Dep. 60:7-61:16,  
2 63:9-21. In her deposition, Valentine answered  
3 affirmatively that she "never had a trainee who  
4 submitted a driver's license, a medical clearance form,  
5 and a first aid form without submitting a school bus  
6 certificate that [Valentine] made copies of."<sup>5</sup>  
7 Valentine Dep. 47:9-13. Accordingly, when Valentine  
8 told Plaintiff that she had his "paperwork," the  
9 inference in the light most favorable to Plaintiff is  
10 that she meant the School Bus Certificate too. Based  
11 on this evidence, Plaintiff has raised a direct issue  
12 of fact as to Defendant's nondiscriminatory reason for  
13 not hiring Plaintiff: whether Defendant truly had no  
14 record of the School Bus Certificate. Indeed, the  
15 Court cannot make credibility determinations at the  
16 summary judgment stage. The evidence presented in this  
17 case certainly does not conclusively reveal a  
18 nondiscriminatory reason as a matter of law because  
19 Defendant has not provided, for instance, record of  
20 Plaintiff's incomplete application.

21 In sum, the Court **DENIES** Defendant's Motion as to  
22 Plaintiff's claim for age discrimination in violation

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24 <sup>5</sup> Defendant objects to Plaintiff's use of this testimony as  
25 irrelevant and inadmissible opinion, speculation, and conclusion.  
26 Def.'s Evid. Objs. ¶ 16. However, Valentine's statement is  
27 relevant because it tends to make it more likely Plaintiff  
28 submitted all the required documents. It is not an opinion,  
speculation, or conclusion; rather, it is an assertion of fact  
with respect to actual events, or lack thereof, during the course  
of her employment. Thus, the Court **OVERRULES** Defendant's  
objections and considers the evidence.

1 of FEHA.

2           b. *Age Discrimination in Violation of Public*  
3                           *Policy*

4           Because Plaintiff's public policy cause of action  
5 is based on FEHA and Plaintiff is proceeding on his  
6 FEHA age discrimination claim, the Court **DENIES**  
7 Defendant's Motion as to this cause of action. See  
8 Stevenson v. Superior Court, 941 P.2d 1157, 1175 (Cal.  
9 1997)("[A]ssertion of a common law tort claim for  
10 wrongful discharge in violation of the public policy  
11 against age discrimination as articulated in the FEHA  
12 is consistent with the legislative intent underlying  
13 the FEHA.").<sup>6</sup>

14           c. *Failure to Prevent Discrimination,*  
15                           *Harassment, and Retaliation in Violation*  
16                           *of FEHA*

17           "A plaintiff seeking to recover on a failure to  
18 prevent discrimination claim under FEHA must show that  
19 (1) he was subjected to discrimination; (2) defendant  
20 failed to take all reasonable steps to prevent

---

21  
22           <sup>6</sup> In its Motion, Defendant proposes that "California does  
23 not recognize a common law claim for age discrimination." Mot.  
24 12:12-13. Defendant cites a couple of unpublished federal cases  
25 as well as some cases that are not on all fours, but Strauss v.  
26 A. L. Randall Co., 194 Cal. Rptr. 520, 524 (Ct. App. 1983) is  
27 particularly problematic because the California Supreme Court  
28 rejected the Strauss holding that there is no common law cause of  
action for age discrimination. Stevenson, 941 P.2d at 1169.  
Therefore, Defendant's argument fails. Furthermore, contrary to  
Defendant's assertion, Plaintiff did address the public policy  
claim in his Opposition, so he did not abandon it. See Opp'n  
6:15-16 (noting issues of fact regarding the age discrimination  
*claims*).

1 discrimination; and (3) this failure caused plaintiff  
2 to suffer injury, damage, loss or harm." Achal v. Gate  
3 Gourmet, Inc., 114 F. Supp. 3d 781, 804 (N.D. Cal.  
4 2015)(citation omitted). This claim essentially  
5 derives from a FEHA discrimination claim. Id. Because  
6 Plaintiff's FEHA cause of action survives summary  
7 judgment, the Court **DENIES** Defendant's Motion as to  
8 Plaintiff's failure to prevent discrimination cause of  
9 action as well.<sup>7</sup> Rux v. Starbucks Corp., CV, 2007 WL  
10 1470134, at \*9 (E.D. Cal. May 18, 2007)(denying summary  
11 judgment as to plaintiff's failure to prevent  
12 discrimination claim because plaintiff's FEHA claim  
13 survived summary judgment).

14 d. *Punitive Damages*

15 Under California law, a plaintiff must provide  
16 clear and convincing evidence of malice, oppression, or  
17 fraud in order to maintain a claim for punitive  
18 damages. Cal. Civ. Code § 3294(a); Basich v. Allstate  
19 Ins., 105 Cal. Rptr. 2d 153, 158 (Ct. App. 2001). Even  
20 assuming, as in the case at hand, the plaintiff  
21 withstands summary judgment on his underlying claims,

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22  
23 <sup>7</sup> Defendant argues there is no private right of action for  
24 failure to prevent discrimination claims. Mot. 13:19-23. But  
25 numerous cases, including cases Defendant cites in its moving  
26 papers, have involved private individuals enforcing these claims.  
27 See, e.g., Carter v. Cal. Dep't of Veterans Affairs, 135 P.3d  
28 637, 644 n.4 (Cal. 2006)("[C]ourts have required a finding of  
actual discrimination or harassment under FEHA before a plaintiff  
may prevail under [a failure to prevent discrimination claim].");  
Veronese v. Lucasfilm Ltd., 151 Cal. Rptr. 3d 41, 61 (Ct. App.  
2012)(discussing this "statutory tort action" plaintiff prevailed  
on at trial).

1 he is not automatically entitled to punitive damages.  
2 See, e.g., Mathieu v. Norrell Corp., 10 Cal. Rptr. 3d  
3 52, 62, 65 (Ct. App. 2004)(although summary judgment in  
4 defendant's favor was not warranted for plaintiff's  
5 FEHA claim, it was for punitive damages).

6 According to Plaintiff, Defendant failed to meet  
7 its burden as to punitive damages for two reasons:  
8 (1) Defendant did not definitively state no officer,  
9 director, or managing agent was involved in the hiring  
10 decision; and (2) dismissing Plaintiff "because of his  
11 age is clearly oppressive, and malicious and  
12 [D]efendant providing a false reason for the failure to  
13 hire is clearly fraudulent." Opp'n 13:28-14:2.

14 Defendant responds that "there is absolutely no  
15 evidence in the record to establish that any decision  
16 regarding Plaintiff's employment was made by an  
17 officer, director or managing agent" of Defendant.  
18 Reply 12:7-9. Indeed, Plaintiff admits that Valentine,  
19 who is not an officer, director, or managing agent of  
20 Defendant, makes the hiring decisions. Pl.'s SUF ¶ 8.  
21 To the extent Plaintiff claims his trainer, McGee  
22 treated him unfairly, Plaintiff also admits he was not  
23 an officer, director, or managing agent of Defendant.  
24 Pl.'s Resp. to Def.'s SUF ¶ 59. In refuting  
25 Plaintiff's second reason, Defendant notes that  
26 Plaintiff merely speculates that Defendant did not hire  
27 him based on his age. Reply 12:2-3. None of  
28 Defendant's employees ever made age-related comments to

1 Plaintiff, and Plaintiff generally felt his trainers  
2 treated him fairly and that only Valentine spoke  
3 abruptly with him once. Reed Dep. 55:25-56:11, 60:7-  
4 61:16.

5 The foregoing is not clear and convincing evidence  
6 that Defendant acted maliciously, oppressively, or  
7 fraudulently, and as discussed, punitive damages are  
8 not warranted simply because Plaintiff satisfied his  
9 prima facie case. Thus, the Court **GRANTS** Defendant's  
10 Motion as to punitive damages.

11 **III. CONCLUSION**

12 Based on the foregoing analysis, the Court **GRANTS**  
13 **in part and DENIES in part** Defendant's Motion for  
14 Summary Judgment [28]. Specifically, the Court **DENIES**  
15 summary judgment as to Plaintiff's public policy and  
16 FEHA age discrimination and failure to prevent  
17 discrimination causes of action but **GRANTS** summary  
18 judgment for the punitive damages claim.

19 **IT IS SO ORDERED.**

20  
21 DATED: September 26, 2016

s/ RONALD S.W. LEW \_\_\_\_\_

22 **HONORABLE RONALD S.W. LEW**  
23 Senior U.S. District Judge  
24  
25  
26  
27  
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