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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

LILY V. AVALOS,

Case No. C 12-5290 RS

Plaintiff,

v.

**ORDER DENYING PLAINTIFF'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT**

UNIVERSITY OF SAN FRANCISCO,  
SCHOOL OF NURSING AND HEALTH  
PROFESSIONS (USF), a private university;  
PATRICIA LYNCH, Associate Dean;  
MARY SEED, Department Chair; JOAN  
MERSCH, Clinical Professor; STANFORD  
HOSPITAL AND CLINICS; a corporate  
entity of unknown form; and DOES 1  
through 50, inclusive,

Defendants.

I. INTRODUCTION

Plaintiff Lily Avalos contends that she was discriminated against on the basis of her learning disabilities while attending the Clinical Nurse Leader graduate program at the University of San Francisco (USF), School of Nursing and Health Professions. Avalos alleges that while participating in a clinical practice lab at Stanford Hospital, USF Clinical Professor Joan Mersch refused to accommodate her disabilities, which ultimately led to her dismissal from the graduate program.

Pertinent to this motion, Avalos brings Fair Employment and Housing Act (FEHA) claims for relief

1 against Defendants University of San Francisco and Stanford Hospital and Clinics for wrongful  
2 termination in violation of public policy based on discrimination, failure to take reasonable steps to  
3 prevent discrimination, retaliation, failure to accommodate a disability, failure to engage in the  
4 interactive process, and harassment. *See* Cal. Govt. Code § 12900.

5 USF and Stanford Hospital each assert an affirmative defense for all FEHA claims stating  
6 that Avalos was not an employee of either of them. Avalos moves for partial summary judgment on  
7 these affirmative defenses. She claims that she is entitled to judgment as a matter of law that she  
8 was an employee of either or both USF and Stanford Hospital.<sup>1</sup> For the following reasons, Plaintiff's  
9 motion for partial summary judgment will be denied.

## 10 II. BACKGROUND

11 Avalos was enrolled in the Clinical Nurse Leader graduate program at the University of San  
12 Francisco. Upon enrolling in the program, Avalos met with Student Disability Services (SDS),  
13 where she requested certain accommodations for various learning disabilities. SDS provided Avalos  
14 with a letter for her to give to her professors listing a number of recommended accommodations.

15 Avalos took two types of classes in the nursing program: didactic courses and clinical  
16 courses. Since USF does not have its own hospital, it contracts with local hospitals to act as hosts  
17 for clinical courses. The courses are taught and supervised by USF faculty members. During the fall  
18 semester of 2010, Avalos was enrolled in clinical course NURS 619 – Medical Surgical One  
19 Clinical Lab. USF assigned Avalos to the Stanford Hospital location for the course. The class met  
20 once per week on Mondays and was led by Professor Joan Mersch. Professor Mersch is a faculty  
21 member and employee of USF; she is not employed by Stanford Hospital. During the Monday  
22 clinical sessions, Avalos interacted with patients at Stanford Hospital and performed various nursing  
23 related functions: changing IV bags, administering medication, and utilizing the electronic medical  
24 record system. At all times, students were supervised by either Professor Mersch or a nurse  
25 preceptor: Stanford-Hospital-employed nurses who were specially certified to work with student

26  
27 <sup>1</sup> In the alternative, Avalos asks the Court, pursuant to F.R.C.P. 56(g), to treat the material fact of  
28 whether she is an employee of either party as established. Since the motion for partial summary  
judgment on that issue will be denied, this fact cannot be treated as established.

1 nurses. Students were also required to review patient records at Stanford Hospital on Sundays in  
2 preparation for class. The parties agree that students did not receive any monetary compensation  
3 from USF or Stanford Hospital while participating in the NURS 619 course.

4 During the NURS 619 orientation, Avalos told Professor Mersch about her learning  
5 disability and furnished the SDS prepared accommodations letter. Professor Mersch, allegedly,  
6 would not accept the letter and refused to make accommodations for Avalos consistent with the SDS  
7 recommendations. Avalos claims that Professor Mersch then harassed and intimidated her because  
8 of her learning disability. Avalos ultimately received a failing grade in NURS 619. The following  
9 year, Avalos received another failing grade in a separate course. In January 2012, Avalos was  
10 disqualified from the nursing program because of the two failing grades on her transcript. Avalos  
11 argues that Professor Mersch's conduct constitutes discrimination and harassment because of her  
12 disability in violation of FEHA. USF and Stanford Hospital argue that Avalos is not entitled to  
13 protection under FEHA because she was not employed by either party.

### 14 III. LEGAL STANDARD

15 Summary judgment is proper "if the pleadings and admissions on file, together with the  
16 affidavits, if any, show that there is no genuine issue as to any material fact and that the moving  
17 party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The purpose of summary  
18 judgment "is to isolate and dispose of factually unsupported claims or defenses." *Celotex v. Catrett*,  
19 477 U.S. 317, 323-24 (1986). The moving party "always bears the initial responsibility of  
20 informing the district court of the basis for its motion, and identifying those portions of the  
21 pleadings and admissions on file, together with the affidavits, if any which it believes demonstrate  
22 the absence of a genuine issue of material fact." *Id.* at 323 (citations and internal quotation marks  
23 omitted). If it meets this burden, the moving party is then entitled to judgment as a matter of law  
24 when the non-moving party fails to make a sufficient showing on an essential element of the case  
25 with respect to which he bears the burden of proof at trial. *Id.* at 322-23. A party may move for  
26 partial summary judgment on only a "part of each claim or defense." Fed. R. Civ. P. 56(a).

27 The non-moving party "must set forth specific facts showing that there is a genuine issue for  
28 trial." Fed. R. Civ. P. 56(e). The non-moving party cannot defeat the moving party's properly

1 supported motion for summary judgment simply by alleging some factual dispute between the  
2 parties. To preclude the entry of summary judgment, the non-moving party must bring forth  
3 material facts, *i.e.*, “facts that might affect the outcome of the suit under the governing law. . . .  
4 Factual disputes that are irrelevant or unnecessary will not be counted.” *Anderson v. Liberty Lobby,*  
5 *Inc.*, 477 U.S. 242, 247-48 (1986). The opposing party “must do more than simply show that there  
6 is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio,*  
7 475 U.S. 574, 588 (1986).

8 The court must draw all reasonable inferences in favor of the non-moving party, including  
9 questions of credibility and of the weight to be accorded particular evidence. *Masson v. New Yorker*  
10 *Magazine, Inc.*, 501 U.S. 496 (1991) (*citing Anderson*, 477 U.S. at 255); *Matsushita*, 475 U.S. at  
11 588 (1986). It is the court’s responsibility “to determine whether the ‘specific facts’ set forth by the  
12 nonmoving party, coupled with undisputed background or contextual facts, are such that a rational  
13 or reasonable jury might return a verdict in its favor based on that evidence.” *T.W. Elec. Service v.*  
14 *Pacific Elec. Contractors*, 809 F.2d 626, 631 (9th Cir. 1987). “[S]ummary judgment will not lie if  
15 the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury  
16 could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248. However, “[w]here the  
17 record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there  
18 is no ‘genuine issue for trial.’” *Matsushita*, 475 U.S. at 587.

19 IV. DISCUSSION

20 A. Employee Definition Under FEHA

21 Under FEHA, it is unlawful for an employer to “discharge [a] person from employment [or]  
22 . . . discriminate against [a] person in compensation or in terms, conditions, or privileges of  
23 employment” because of her disability. *See* Cal. Gov. Code § 12940(a). “In order to recover under  
24 the discrimination in employment provisions of FEHA, the aggrieved plaintiff must be an  
25 employee” of the defendant company or organization. *Shephard v. Loyola Marymount Univ.*, 102  
26 Cal. App. 4th 837, 842 (2002). The FEHA, however, does not clearly define who is considered an  
27 employee; instead, FEHA simply lists individuals who cannot be considered employees: people  
28 employed by parents, spouses, or children and people working under a special license in a nonprofit

1 sheltered workshop or rehabilitation facility. *See* Cal. Govt. Code § 12926(c). At the most basic  
2 level, “FEHA requires ‘some connection with an employment relationship,’ although the connection  
3 ‘need not necessarily be direct.’” *Vernon v. State*, 116 Cal. App. 4th 114, 123 (2004) (citing *Lutcher*  
4 *v. Musicians Union Local 47*, 633 F.2d 880, 883 (9th Cir.1980). This lack of definitional clarity has  
5 led courts to look to other statutes and regulations to determine the appropriate test for identifying  
6 employees. *See Mendoza v. Town of Ross*, 128 Cal. App. 4th 625, 632-33 (2005) (“Because the  
7 antidiscrimination objectives and relevant wording of title VII of the Civil Rights Act of 1964 are  
8 similar to those of the FEHA, California courts often look to federal decisions interpreting these  
9 statutes for assistance in interpreting FEHA” (internal quotation marks omitted).); *Vernon*, 116 Cal.  
10 App. 4th at 124-26 (Title VII).<sup>2</sup>

11 Title VII-based tests defining what qualifies as an employment relationship require  
12 consideration of the “‘totality of circumstances’ that reflect upon the nature of the work relationship  
13 of the parties, with emphasis upon the extent to which the defendant controls the plaintiff’s  
14 performance of employment duties.” *Vernon*, 166 Cal. App. 4th at 124 (citing *Lambertsen v. Utah*  
15 *Dept. of Corrections*, 79 F.3d 1024, 1028 (10th Cir. 1996); *see also Graves v. Lowery*, 117 F.3d  
16 723, 729 (3rd Cir. 1997) (“[T]he precise contours of an employment relationship can only be  
17 established by a careful factual inquiry.”).<sup>3</sup> In addition, California courts have relied on  
18 interpretations of Title VII for the proposition that in order to be considered an employee under  
19 FEHA, the plaintiff must prove she was hired by the employer. *See Mendoza*, 128 Cal. App. 4th at  
20 625. “[T]o satisfy the hiring prong, a purported employee must establish the existence of  
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23 <sup>2</sup> Avalos alleges discrimination based on disability. The Americans with Disabilities Act defines  
24 employee as does Title VII: “[A]n individual employed by an employer.” *See* 42 U.S.C. § 12111.

25 <sup>3</sup> The different factors that should be taken into account when assessing the relationship of the two  
26 parties are: payment of salary or other employment benefits; ownership of the equipment needed to  
27 perform the job; location where the work is performed; obligation of training; authority of defendant  
28 to hire, transfer, promote, discipline, or discharge the employee; authority to establish work  
schedules and assignments; determination of compensation; skill required to perform the work and  
the extent to which it is done under the direction of a supervisor; whether the work is part of  
defendant’s regular business; and duration of the relationship. *Vernon*, 116 Cal. App. 4th at 124.

1 remuneration, in some form, in exchange for work.” *Id.* at 636.<sup>4</sup> Remuneration does not have to take  
2 the form of a direct salary but instead, substantial indirect compensation can qualify. *Id.* Indirect  
3 compensation, however, cannot merely be incidental to the activity performed. *Id.* Examples of  
4 benefits that might qualify as substantial indirect compensation are: disability pensions, survivors’  
5 benefits, group life insurance, and scholarships for children of deceased workers. *Id.*

6 Avalos urges the Court to adopt a broader interpretation of “employee” under FEHA. Avalos  
7 points to *Shephard*, where the court relied on “persuasive decisional authority” in the workers’  
8 compensation liability scheme to determine the definition of “employee” under FEHA. *See*  
9 *Shephard*, 102 Cal. App. 4th at 842. The *Shephard* court determined that because the Workers’  
10 Compensation Act (WCA) and FEHA were both enacted to promote the welfare of employees, the  
11 statutes must be harmonized insofar as possible. *Id.* at 845-46 (citing *Chevron U.S.A., Inc. v.*  
12 *Workers’ Comp. Appeals Bd.*, 19 Cal. 4th 1182, 1195 (1999)). Thus, Avalos identifies two Workers’  
13 Compensation cases that stand for the proposition that unpaid student nurses and student medical  
14 assistants, working in hospital settings as part of their degree programs, are employees of the  
15 hospital under the WCA. *See Barragan v. Workers’ Comp. Appeals Bd.*, 195 Cal. App. 3d 637  
16 (1987); *Anaheim Gen. Hosp. v. Workmen’s Comp. Appeals Bd.*, 3 Cal. App. 3d 468 (1970).

17 These cases both focus on the broad coverage supplied by workers’ compensation  
18 protections, particularly, Labor Code § 3357, which states, “[a]ny person rendering service for  
19 another, other than as an independent contractor, or unless expressly excluded herein, is presumed to  
20 be an employee.” *See Anaheim*, 3 Cal. App. 3d at 472-73; *Barragan*, 195 Cal. App. 3d at 642. In  
21 order to rebut this presumption a defendant can show that no employment contract existed between  
22 the parties by demonstrating a lack of (1) consent of the parties, (2) consideration for the services  
23 rendered, and (3) control by the employer over the employee. *See Barragan*, 195 Cal. App. 3d at

24 \_\_\_\_\_  
25 <sup>4</sup> In *Mendoza*, the court also looked to the definition of employee expressed in the regulations  
26 enacted by the Department of Fair Employment and Housing. *Id.* Those regulations define an  
27 employee as “[a]ny individual under the direction and control of an employer under any  
28 appointment or contract of hire or apprenticeship, express or implied, oral or written.” *Id.* (citing  
Cal. Code Regs., tit. 2, § 7286.5, subd. (b)). The court, however, held that even if the plaintiff could  
establish that he was working under contract, as an apprentice, or pursuant to an appointment,  
because he was not receiving remuneration for his services, he could not be an employee under  
FEHA. *Id.* at 637.

1 643. On the issue of consideration, the courts recognized that while “a person providing purely  
2 gratuitous voluntary service is not an employee . . . it has also long been a rule that for purposes of  
3 workers’ compensation, the consideration or compensation for an employment contract need not be  
4 in the strict form of wages or money.” *Id.* at 646; *Anaheim*, 3 Cal. App. 3d at 473 (“The form of  
5 remuneration is not controlling. . . . Vocational instruction, standing alone, has been regarded as  
6 sufficient consideration to uphold the existence of a contract.” (internal citations and quotation  
7 marks omitted)). Further, the courts determined that since the services being performed by the  
8 students were rendered on the hospital premises and hospital staff supervised the students, the  
9 hospital had exclusive control and direction of the student’s duties. *See Barragan*, 195 Cal. App. 3d  
10 at 646.

11       Such a broad interpretation of employee for FEHA purposes is a stretch too far. While  
12 harmonizing the FEHA with the WCA might have some appeal from a policy perspective, in this  
13 particular context, Title VII is the proper legal analog. The WCA affords broad coverage to  
14 individuals operating in employment settings by adopting a no-fault liability system and presuming  
15 that a person injured on the job is an employee. *See Cal. Labor Code § 3357; Matea v. Workers’*  
16 *Comp. Appeals Bd.*, 144 Cal. App. 4th 1435, 1442-43 (2006). FEHA does not contain such  
17 expansive provisions. Where the WCA was adopted to encourage employers to provide a safe  
18 working environment and bear the costs of failing to do so, FEHA was adopted to help eradicate  
19 discrimination in the workplace, as was Title VII. *See Cal. Govt. Code § 12920; Richards v. CH2M*  
20 *Hill, Inc.*, 26 Cal. 4th 798, 812 (2001); *Matea*, 144 Cal. App. 4th at 1442-43. Therefore, in analyzing  
21 Avalos’ contention that, as a matter of law, she was an employee of the University of San Francisco  
22 or Stanford Hospital, the applicable model is the Title VII-based tests that focus on the extent to  
23 which the organization controlled and directed the means and manner of Avalos’ work and whether  
24 she received sufficient remuneration to qualify as an employee of either organization.

25       B. University of San Francisco

26       Avalos argues the undisputed facts prove she was an employee of USF during the time  
27 period that she was taking classes towards her nursing degree. Yet, Avalos identifies no cases  
28 supporting the proposition that a student is an employee of her school under FEHA.

1 Under the framework outlined above, Avalos would, at a minimum, need to demonstrate that  
2 she received substantial remuneration from USF in order to establish that she was an employee of  
3 that institution. Receiving training or educational credit is not considered remuneration under this  
4 framework. *See Mendoza*, 128 Cal. App. 4th at 636 (“If not direct salary, substantial benefits which  
5 are not merely incidental to the activity performed,” like sick pay, vacation or health insurance, must  
6 be plead to establish an employment relationship.). Further, even graduate students working as  
7 student researchers or graduate student teachers, who receive monetary compensation from the  
8 school where they work, often do not qualify as employees, because the performance of those  
9 services was incidental to the educational program. *See Pollack v. Rice Univ.*, 28 Fair. Empl. Prac.  
10 Cas. (BNA) 1273 (S.D. Tex. 1982) (holding that Title VII does not apply to discrimination in  
11 admissions to a graduate program because the individual will not perform any services during the  
12 program, even if compensated monetarily, that are not “completely incidental to the scholastic  
13 program”).

14 Here, Avalos does not contend she was compensated by USF in any way other than by  
15 receiving educational training and credits towards her degree. She does not allege that she received a  
16 salary, retirement benefits, or anything similar. *See Mendoza*, 128 Cal. App. 4th at 637 (holding that  
17 where plaintiff “concedes that his position was unpaid, and does not allege that he received any  
18 other type of financial benefit he might have received, such as health, insurance, or retirement  
19 benefits,” he is not an employee under FEHA). Accordingly, Avalos has not demonstrated by  
20 undisputed material facts her status as an employee of USF.

21 Avalos erroneously argues that she is entitled to the protections of FEHA because the Board  
22 of Registered Nursing, which provides licensing for nurses, allows testing accommodations for  
23 applicants pursuant to the requirements of FEHA, a fact of no apparent relevance. USF does not  
24 provide any credentialing services that are required for employment. Although Avalos would  
25 receive a nursing degree from USF upon completion of the program, this degree does not allow her  
26 to practice nursing. Whether the Board of Registered Nursing is required to follow FEHA in the  
27 administration of licensing examinations is inapposite to this motion.

28

1           C. Stanford Hospital and Clinics

2           Avalos contends that Stanford Hospital was her joint or indirect employer, because the  
3 NURS 619 clinical lab class was taught on the hospital premises, she interacted and worked with  
4 Stanford Hospital patients, and at various points during the performance of her duties she was  
5 supervised by Stanford Hospital nurse preceptors. Avalos acknowledges she received no financial  
6 benefit from working at Stanford Hospital. In addition, Avalos does not argue that Stanford Hospital  
7 paid her, provided health insurance or life insurance, or provided retirement benefits.<sup>5</sup> Instead, the  
8 benefit that Avalos received was skills training and course credit needed to complete her graduate  
9 degree. Those benefits are non-monetary and incidental to the activity Avalos performed at the  
10 hospital in order to complete her educational program. *See* Mendoza, 128 Cal. App. 4th at 636. This  
11 lack of remuneration alone, likely serves to preclude Avalos' from attaining employee status.

12           Additionally, however, Stanford Hospital's degree of control over the means and manner of  
13 the work performed is disputed. Avalos contends that most of her work was supervised by nurses  
14 employed by Stanford Hospital. She further alleges that the skills she performed were based on the  
15 needs and requirements of the Stanford Hospital patients and staff. On the other hand, Stanford  
16 Hospital argues that Avalos was supervised by USF Professor Mersch, who was not a hospital  
17 employee. Additionally, they argue that Avalos was assigned nursing tasks based on an established  
18 USF curriculum and was subject to the USF Student Handbook and Policies, as opposed to Stanford  
19 Hospital personnel policies. *See Vernon*, 166 Cal. App. 4th at 127 (holding that plaintiff was not an  
20 employee of the State, in part, because he was not covered by State implemented personnel policies  
21 and the State did not supervise his employment duties). The amount of control and supervision that  
22 Stanford Hospital exercised over Avalos is a genuine dispute on this record as to the material fact of  
23 control over work performance that is a critical factor in establishing the presence of an employment  
24 relationship.

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26 \_\_\_\_\_  
27 <sup>5</sup> Avalos contends that because Stanford required that she pay workers' compensation insurance  
28 premiums in order to participate in the clinical lab class at Stanford Hospital, they assented to her  
status as an employee. As previously discussed in Part IV.A., the workers' compensation payment  
and protection scheme is not dispositive here.

1 Finally, Avalos contends that the inclusion of “apprentices” in the definition of individuals  
2 protected by FEHA entitles her to judgment that she is an employee of Stanford Hospital. *See* Cal.  
3 Code Regs., tit. 2, § 7286.5, subd. (b) (“Any individual under the direction and control of an  
4 employer under any appointment or contract of hire or apprenticeship” is considered an employee  
5 under FEHA.). Avalos’ contention fails because she cannot undisputedly establish on the facts here  
6 that Stanford Hospital directed or controlled her activities, which is required by the clear wording of  
7 the regulation. In addition, Avalos’ broad reading of the word “apprenticeship” is contradicted by  
8 the definitions provided in the regulations. There, “Apprenticeship Training Program” is defined as  
9 “[a]ny apprenticeship program . . . subject to the provision of Chapter 4 of Division 3 of the  
10 California Labor Code, Section 3070, et. seq.” Cal. Code Regs., tit. 2, § 7286.5, subd. (i). There is  
11 no indication that Stanford Hospital operates a qualifying apprenticeship training program under the  
12 regulations, thereby precluding application of apprentice status to Avalos.<sup>6</sup>

13 V. CONCLUSION

14 For the foregoing reasons, Plaintiff’s motion for partial summary judgment is denied.

15  
16 IT IS SO ORDERED.

17  
18 Dated: 4/4/13



19  
20 RICHARD SEEBORG  
UNITED STATES DISTRICT JUDGE

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27 <sup>6</sup> Further, the master’s degree program at USF is not recognized as an apprenticeship training  
28 program, precluding the argument that Avalos is an apprentice because USF administers the  
apprenticeship program, while Stanford simply hosts the apprentices.