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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOSEPH A. COLLINS,

Plaintiff,

v.

RICHARD V. SPENCER,

Defendant.

AND ALL CONSOLIDATED CASES

Case No.: 17-CV-1723 JLS (KSC)

**ORDER (1) DENYING PLAINTIFF’S
REQUEST FOR ORAL ARGUMENT,
(2) OVERRULING PLAINTIFF’S
EVIDENTIARY OBJECTIONS, AND
(3) GRANTING DEFENDANT’S
MOTION FOR SUMMARY
JUDGMENT**

(ECF Nos. 21, 26)

Presently before the Court is Defendant Richard V. Spencer’s Motion for Summary Judgment (“Def.’s Mot.,” ECF No. 21), as well as Plaintiff Joseph A. Collins’ Opposition (“Opp’n,” ECF No. 24) and Defendant’s Reply (“Reply,” ECF No. 25). Also before the Court are Plaintiff’s Evidentiary Objections (ECF Nos. 24-2, 24-3, 24-4, 24-5) and Request for Oral Argument on Defendant’s Reply to Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment (“Pl.’s Mot.,” ECF No. 26). Having carefully considered the Parties’ arguments, the evidence, and the law, the Court **DENIES** Plaintiff’s Motion,¹ **OVERRULES** Plaintiff’s Evidentiary Objections, and **GRANTS** Defendant’s Motion.

¹ Plaintiff “requests the opportunity to dispute the credibility of the Supplemental Declaration of Fredrick Asuncion” and “believes that the Court’s decision-making process would be significantly aided by oral argument.” Pl.’s Mot. at 1–2. The Court does not make credibility determinations in ruling on a motion

BACKGROUND

I. Undisputed Facts

Plaintiff is a white male born on October 27, 1951. Def.'s Separate Stmt. of Undisputed Facts in Support of Def.'s Mot. ("Def.'s Facts," ECF No. 21-2) No. 1; Opp'n at 3. On January 31, 2011, the United States Department of the Navy (the "Navy") hired Plaintiff as a civilian employee for the position of Sheet Metal Worker. Def.'s Facts No. 2; Opp'n at 3.

On January 29, 2012, the Navy temporarily promoted Plaintiff to Aircraft Sheet Metal Repair Inspector. Def.'s Facts No. 3; Opp'n at 4. The Navy permanently promoted Plaintiff to that position on March 10, 2013. *Id.* Plaintiff declined the promotion for personal reasons. Opp'n at 4.

In May 2014, Plaintiff filed an Equal Employment Opportunity ("EEO") complaint, Case No. 14-65888-01141. Decl. of Sara Salas ("Salas Decl.," ECF No. 21-10) ¶ 2. Plaintiff alleged "[n]epotism in selection for Aircraft Examiner Position" and that he was "[w]ritten up for not wearing [personal protective equipment and] . . . disruptive behavior." *Id.*

In March 2015, Plaintiff served as an Aircraft Sheetmetal Repair Inspector for the Vertical Lift Program CH-53 platform at the Naval Air Station North Island. Decl. of Joseph A. Collins ("Collins Decl.," ECF No. 24-6) ¶ 2. In April 2015, Gary Thompson, Aircraft Overhaul & Repair Supervisor, and Jesse Tran, Aircraft Sheetmetal Work Leader, were assigned as Plaintiff's supervisor and work leader, respectively. *Id.* ¶ 3. Plaintiff

for summary judgment. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Further, where, as here "a party has [had] an adequate opportunity to provide the trial court with evidence and a memorandum of law, there is no prejudice [in a refusal to grant oral argument]." *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998) (alterations in original) (quoting *Lake at Las Vegas Investors Grp, Inc. v. Pac. Malibu Dev. Corp.*, 933 F.2d 724, 729 (9th Cir. 1991)); *accord Singh v. U.S. Postal Serv.*, 713 F. App'x 661 (9th Cir.) (affirming district court's denial of request for oral argument where the plaintiff "submitted arguments in his opposition to defendant's motion for summary judgment"), *cert. denied*, 139 S. Ct. 446 (2018); *see also* Fed. R. Civ. P. 78(b); S.D. Cal. CivLR 7.1(d)(1). The Court therefore **DENIES** Plaintiff's Motion.

1 claims that Mr. Thompson and Mr. Tran created a hostile work environment. *See* Def.’s
2 Facts No. 6; Collins Decl. ¶ 4; First Am. Compl. (“FAC,” ECF No. 11) at 2–4. Specifically,
3 Plaintiff alleges that Mr. “Tran placed the Plaintiff under constant surveillance in an
4 attempt to intimidate the Plaintiff”; Mr. “Tran[] and [Mr.] Thompson attempt[ed] to
5 provoke the Plaintiff into a confrontation that would result in a progressive disciplinary
6 action”; and, “[o]n July 6, 2015, Plaintiff received a Letter of Reprimand from
7 [Mr.] Thompson for inappropriate behavior towards [Mr.] Tran.” FAC at 3. Additionally,
8 at his deposition, Plaintiff testified that Mr. Tran had mocked him about his age, calling
9 him an “old man” and “over the hill.” Dep. of Joseph Collins (“Collins Dep.,” ECF No.
10 21-13) at 61:1–15. Plaintiff also testified that Mr. Tran stopped calling him “old man” in
11 “March or April of 2015,” *id.* at 66:13–19, and “over the hill” in 2014. *Id.* at 68:1–4.
12 Additionally, Mr. Thompson, who is black, *see id.* at 102:3, referred to white people as
13 “crackers” and “honky,” *id.* at 108:1–12, although Plaintiff did not hear him make such
14 comments after 2012. *Id.* at 110:3–21.

15 Plaintiff initiated EEO Case No. 15-65888-01875 on April 24, 2015, which
16 concerned the “[p]romotion of Jesse Tran to Work Leader.” Salas Decl. ¶ 2. On May 6,
17 2015, Plaintiff and the Navy entered into a Settlement Agreement of EEO Case Nos. 14-
18 65888-01141 and 15-65888-0175. Def.’s Facts No. 7; *see also* Def.’s Ex. 1, ECF No. 21-
19 12. In paragraph 3 of the Settlement Agreement, Plaintiff agreed to “release the Agency
20 from any and all claims or demands he may have with the Agency occurring prior to the
21 effective date of this Agreement. . . . [including] a release of any rights under Title VII of
22 the Civil Rights Act of 1964. . . ; [and] the Age Discrimination in Employment Act.” Def.’s
23 Facts No. 8; *see also* Def.’s Ex. 1 at 1.

24 From August 9 through December 5, 2015, Plaintiff was temporarily detailed to an
25 Aircraft Examiner position pursuant to the Settlement Agreement. Def.’s Facts No. 4;
26 Collins Decl. ¶ 8. On September 8, 2015, Plaintiff filed EEO Case No. 15-65888-02321,
27 alleging “[h]arassment by Jesse Tran (Sheet Metal Mechanic Leader) and Gary Thompson
28 (Aircraft Overhaul and Repair Supervisor).” Salas Decl. ¶ 2. The Navy’s EEO Office

1 ruled against Plaintiff on July 10, 2017, concluding “that management articulated
2 legitimate, nondiscriminatory reasons for its actions, and that the preponderance of the
3 evidence does not support Complainant’s claims of unlawful discrimination.” Def.’s Ex.
4 14, ECF No. 21-25, at 29.

5 On October 17, 2015, Plaintiff applied for a permanent Aircraft Examiner position.
6 Def.’s Facts No. 13; Collins Decl. ¶ 9. The Navy appointed a Selecting Official, Frederick
7 Asuncion, and a three-person Advisory Panel, comprised of Robert Amaichigh, Joey
8 Baesas, and Matt Pendleton, to review the resumes of the applicants and make the
9 selections for the Aircraft Examiner position. Def.’s Facts No. 14. Mr. Asuncion provided
10 the Advisory Panel members with the resumes of all the applicants with their names
11 redacted and replaced by letters and a list of pre-determined Advisory Panel Criteria against
12 which to evaluate the resumes. Def.’s Facts No. 15. Each Advisory Panel member then
13 individually reviewed the redacted resumes and assigned a numerical score for each of the
14 pre-determined Advisory Panel Criteria. Def.’s Facts No. 16. The Advisory Panel
15 members recorded their individual scores for each evaluation criteria on a matrix. Def.’s
16 Facts No. 17. After individually scoring the resumes, the Advisory Panel members met to
17 discuss their individual scores, arrive at a consensus score for each resume, and record the
18 consensus scores on their matrices. Def.’s Facts No. 18.

19 The resume blind-coded as “Applicant K” belonged to Plaintiff and received
20 individual scores of 55 (from Mr. Amaichigh), 50 (from Mr. Baesas), and 40 (from
21 Mr. Pendleton), with a consensus score of 45. Def.’s Facts No. 19. On his separate review
22 of the resumes, Mr. Asuncion awarded Plaintiff an additional 10 points, for a final score of
23 55. Def.’s Facts No. 20. The highest-rated resume for the Aircraft Examiner position in
24 Plaintiff’s platform of experience was “Applicant D” (Tien Bui), who received individual
25 and consensus scores of 70. Def.’s Facts No. 21. Mr. Asuncion agreed with the Advisory
26 Panel’s recommendation and selected the top-ranked candidate, Applicant D, for the
27 Aircraft Examiner position in the platform for which Plaintiff competed. Def.’s Facts No.
28 22.

1 Neither Mr. Baesas nor Mr. Pendleton recognized the resume of Applicant K as
2 belonging to Plaintiff or the resume of Applicant D as belonging to Mr. Bui. Def.’s Facts
3 No. 23. They also did not know of Plaintiff’s prior EEO activity. Def.’s Facts No. 24.
4 Mr. Amaichigh recognized the resume of Applicant K as likely belonging to Plaintiff and
5 also knew that Plaintiff had some prior EEO activity, although he did not know the details
6 of Plaintiff’s EEO acitivity. Def.’s Facts No. 25. Mr. Amaichigh did not recognize the
7 resume of Applicant D as belong to Mr. Bui, whom he did not know and with whom he
8 had never worked. Def.’s Facts No. 27.

9 On November 13, 2015, Plaintiff was scheduled to participate in an Aircraft
10 Examiner training related to the Maintenance and Repair Overhaul (“MRO”) system.
11 Collins Decl. ¶ 11; Affidavit of Arlene Sexton (“Sexton Aff.,” ECF No. 25-4) at 1.
12 Ms. Sexton indicated to Mr. Amaichigh that “it would not make sense for someone who
13 did not have either an MRO log-in, a Made to Order (MTO) log-in, or a completed
14 background investigation to attend” the training. Sexton Aff. at 3. Consequently,
15 Mr. Amaichigh instructed Plaintiff not to attend the training. Def.’s Facts No. 31; Collins
16 Decl. ¶ 11.

17 On November 17, 2015, Mr. Amaichigh announced in front of Plaintiff’s co-workers
18 that Mr. Bui had been selected for the permanent Aircraft Examiner position. Collins Decl.
19 ¶ 12. On April 14, 2016, Plaintiff filed EEO Case No. 16-65888-00881, concerning his
20 “[n]on-selection for Aircraft Examiner and Sheet Metal Mechanic (Aircraft) Leader
21 positions.” Salas Decl. ¶ 2. On July 27, 2017, the Navy’s EEO Office ruled against
22 Plaintiff, finding that “Complainant’s allegations are not supported by the totality of the
23 record and he failed to present any plausible evidence that would demonstrate that
24 management’s reasons for its actions were factually baseless or not its actual motivation.”
25 Def.’s Ex. 15, ECF No. 21-26, at 21.

26 Since December 6, 2015, Plaintiff has worked as an Aircraft Sheet Metal Inspector.
27 Def.’s Facts No. 5.

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1 **II. Procedural Background**

2 Following the EEO Office’s denial of his claims, Plaintiff filed two complaints in
3 this Court, *Collins v. Spencer*, No. 17-CV-1723 JLS (KSC) (S.D. Cal. filed Aug. 25, 2017),
4 and *Collins v. Spencer*, No. 17-CV-1724 JLS (KSC) (S.D. Cal. filed Aug. 25, 2017). On
5 a joint request by the Parties, *see* ECF No. 8, the Court consolidated the two actions. *See*
6 ECF No. 9.

7 On January 24, 2018, Plaintiff filed the operative First Amended Complaint, alleging
8 two claims for relief. *See generally* ECF No. 11. In “Allegation I,” Plaintiff alleges that
9 he “was subjected to a hostile work environment and in retaliation for participating in
10 protected activities.” *See id.* at 1; *see also generally id.* at 2–4. In “Allegation II,” Plaintiff
11 claims that he was not “select[ed] for a promotion and . . . deni[ed] . . . a training course in
12 retaliation for participating in protected activities.” *See id.* at 1; *see also generally id.* at
13 4–7.

14 After engaging in discovery, *see* ECF Nos. 16, 18, Defendant filed the instant
15 Motion for Summary Judgment on March 25, 2019. *See generally* ECF No. 21. On
16 April 2, 2019, the Court issued an Order setting a briefing schedule on Defendant’s Motion,
17 advising Plaintiff of his obligations under Federal Rule of Civil Procedure 56, and taking
18 Defendant’s Motion under submission on the papers pursuant to Civil Local Rule 7.1(d)(1).
19 *See generally* ECF No. 22. Plaintiff filed his Motion requesting oral argument on May 20,
20 2019. *See generally* ECF No. 26.

21 **LEGAL STANDARD**

22 Under Federal Rule of Civil Procedure 56(a), a party may move for summary
23 judgment as to a claim or defense or part of a claim or defense. Summary judgment is
24 appropriate where the Court is satisfied that there is “no genuine dispute as to any material
25 fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a);
26 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Material facts are those that may affect
27 the outcome of the case. *Anderson*, 477 U.S. at 248. A genuine dispute of material fact
28 exists only if “the evidence is such that a reasonable jury could return a verdict for the

1 nonmoving party.” *Id.* When the Court considers the evidence presented by the parties,
2 “[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be
3 drawn in his favor.” *Id.* at 255.

4 The initial burden of establishing the absence of a genuine issue of material fact falls
5 on the moving party. *Celotex*, 477 U.S. at 323. The moving party may meet this burden
6 by identifying the “portions of ‘the pleadings, depositions, answers to interrogatories, and
7 admissions on file, together with the affidavits, if any,’” that show an absence of dispute
8 regarding a material fact. *Id.* When a plaintiff seeks summary judgment as to an element
9 for which it bears the burden of proof, “it must come forward with evidence which would
10 entitle it to a directed verdict if the evidence went uncontroverted at trial.” *C.A.R. Transp.*
11 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (quoting *Houghton*
12 *v. South*, 965 F.2d 1532, 1536 (9th Cir. 1992)).

13 Once the moving party satisfies this initial burden, the nonmoving party must
14 identify specific facts showing that there is a genuine dispute for trial. *Celotex*, 477 U.S.
15 at 324. This requires “more than simply show[ing] that there is some metaphysical doubt
16 as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,
17 586 (1986). Rather, to survive summary judgment, the nonmoving party must “by her own
18 affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’
19 designate ‘specific facts’” that would allow a reasonable fact finder to return a verdict for
20 the non-moving party. *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 248. The non-
21 moving party cannot oppose a properly supported summary judgment motion by “rest[ing]
22 on mere allegations or denials of his pleadings.” *Anderson*, 477 U.S. at 256.

23 ANALYSIS

24 Defendant seeks summary judgment as to all claims alleged in Plaintiff’s First
25 Amended Complaint. *See* ECF No. 21 at 1. The Court therefore analyzes each of
26 Plaintiff’s claims after addressing Plaintiff’s evidentiary objections.

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1 **I. Plaintiff’s Evidentiary Objections**

2 Plaintiff filed oppositions to the Declarations of Fredrick Asuncion (ECF No. 24-2),
3 Robert Amaichigh (ECF No. 24-3), Joey Baesas (ECF No. 24-4) and Matt Pendleton (ECF
4 No. 24-5) (together, the “Evidentiary Objections”).

5 **A. The “H53/V22” Objection**

6 Generally, the Evidentiary Objections claim that the statements concerning the
7 recommendation of Applicant D (Mr. Bui) as having the highest score for the Vertical Lift
8 H53 platform are false because the Advisory Panel actually recommended Applicant D for
9 the V22 platform. *See generally* ECF Nos. 24-2–5. In support of this contention, Plaintiff
10 relies on Document USA-01899 (“Def.’s Ex. 16,” ECF No. 25-3), a Memorandum from
11 the Advisory Panel dated “November XX, 2015,” with a handwritten ranking indicating
12 that “Bui, Tien” was “recommend[ed]” for the “V22 (Miramar)” and that
13 “Khamsingsavath, Khamphet” was recommended for the “H53” platform. *See* Def.’s Ex.
14 16.

15 On reply, Defendant explains that “Exhibit 16 accurately identifies the individuals
16 selected for the two Vertical Lift Aircraft Examiner positions (i.e., Mr. Bui and
17 Mr. K[ha]msingsavath), but has a handwritten notation that incorrectly suggests that
18 Mr. K[ha]msingsavath was assigned to the H53 platform.” Reply at 4 n.2 (citing ECF No.
19 25-1 ¶ 7). Defendant also clarifies that “Mr. Bui was assigned to the V22 platform in
20 January 2016 to meet the then-existing operation needs of the Navy.” *Id.* at 3 (citing ECF
21 No. 25-1 ¶ 6).

22 Based on the foregoing, the Court **OVERRULES** Plaintiff’s objection. The
23 Certificate Coding, Resume Grading Sheets, and declarations and affidavits of the
24 Selecting Official and Advisory Panel members all reflect that Mr. Bui was being
25 considered for the Vertical Lift H53 platform. *See* ECF Nos. 21-6–9, 21-17–24. A single,
26 handwritten notation on what appears to be a draft memorandum does not raise a dispute
27 of fact, much less a material one.

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1 **B. *The “Applicant B” Objection***

2 Plaintiff also notes that Mr. Amaichigh declared in paragraph 12 of his declaration
3 that the panel recommended that Mr. Asuncion select Applicant B, who was selected for
4 the TACAIR platform but whose name does not appear on the Recommendation
5 Memorandum. *See generally* ECF No. 24-3. This was clearly a mistake—paragraph 12
6 of the Amaichigh Declaration notes that, “[b]ased on the consensus scores, the panel
7 recommended to Mr. Ascuncion that he select Applicant B, Tien Bui, for the Vertical Lift
8 platform.” ECF No. 21-7 ¶ 12. It is clear that Mr. Amaichigh is referring to Mr. Bui,
9 whom the evidence indicates was “Applicant D.” *See id.* ¶ 9. Applicant B is nowhere
10 discussed in the Parties’ briefing and appears to hold no relevance to the instant dispute.
11 The Court therefore **VERRULES** Plaintiff’s objection to paragraph 12 of the Amaichigh
12 Declaration.

13 **II. Allegation I**

14 Plaintiff’s claims in Allegation I allege “a hostile work environment” and
15 “retaliation.” *See* FAC at 1. In addition to the allegations in his First Amended Complaint,
16 *see* FAC at 2–4, Plaintiff testified at his deposition to conduct that may have constituted a
17 hostile work environment. *See, e.g.,* Collins Dep. at 61:1–15, 66:7–19, 68:1–4, 108:1–12,
18 110:3–21.

19 **A. *Hostile Work Environment***

20 “To prevail on a hostile workplace claim premised on . . . race . . . , a plaintiff must
21 show: (1) that he was subjected to verbal or physical conduct of a racial . . . nature; (2) that
22 the conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive
23 to alter the conditions of the plaintiff’s employment and create an abusive work
24 environment.” *Vasquez v. Cty. of Los Angeles*, 349 F.3d 634, 642 (9th Cir. 2003), *as*
25 *amended* (Jan. 2, 2004). Similarly, “[t]o prevail on an age-based hostile
26 workplace/harassment claim, [the plaintiff] must show that [h]e was subjected to verbal or
27 physical conduct of an age-related nature, that the conduct was unwelcome, and that the
28 conduct was sufficiently severe or pervasive to alter the conditions of h[is] employment

1 and create an abusive work environment.” *Cozzi v. Cty. of Marin*, 787 F. Supp. 2d 1047,
2 1069 (N.D. Cal. 2011) (citing *Vasquez*, 349 F.3d at 642). “[C]ommonly necessary
3 personnel management actions such as hiring and firing, job or project assignments, . . .
4 promotion or demotion, [and] performance evaluations, . . . do not come within the
5 meaning of harassment.” *Lawler v. Montblanc N. Am., LLC*, 704 F.3d 1235, 1244 (9th Cir.
6 2013) (quoting *Reno v. Baird*, 18 Cal. 4th 640, 646–47 (1998)).

7 *1. Conduct Alleged in Plaintiff’s Amended Complaint*

8 In his Amended Complaint, Plaintiff alleges that Work Leader (“WL”) Jesse Tran
9 and Production Supervisor (“PS”) Gary Thompson created a hostile work environment.
10 *See* FAC at 1, 2–4. Specifically, Plaintiff alleges that Mr. “Tran placed the Plaintiff under
11 constant surveillance in an attempt to intimidate the Plaintiff and report his findings to
12 [Production Supervisor] Thompson” after Plaintiff had “voiced his concerns . . . in regards
13 to past conflicts with WL Tran and PS Thompson and their bias[ed] attitudes toward
14 Plaintiff in regards to Plaintiff’s race and age.” *Id.* at 2–3. Further, “WL Tran[] and PS
15 Thompson attempted to provoke the Plaintiff into a confrontation that would result in a
16 progressive disciplinary action.” *Id.* at 3. Finally, “[o]n July 6, 2015, Plaintiff received a
17 Letter of Reprimand from PS Thompson for inappropriate behavior towards WL Tran,”
18 who “accused Plaintiff of using inappropriate language when WL Tran asked the Plaintiff
19 if he had submitted a leave request for an upcoming vacation.” *Id.* at 3–4.

20 Defendant contends that “[t]he conduct alleged in Plaintiff’s Amended Complaint
21 does not satisfy the elements of a legally cognizable hostile work environment claim”
22 because “[n]othing about the conduct alleged is racial . . . or age-related in nature.” Def.’s
23 Mot. at 5–6. Rather, “[a]ll of [Plaintiff’s] allegations relate to ‘business or personnel
24 management,’ and, therefore, ‘do not come within the meaning of harassment.’” *Id.* at 6
25 (quoting *Lawler*, 704 F.3d at 1244).

26 Plaintiff does not oppose this argument. *See generally* Opp’n. Under Ninth Circuit
27 precedent, the Court may therefore dismiss Allegation I, to the extent it is predicated on
28 the allegations in Plaintiff’s First Amended Complaint, as abandoned. *See, e.g., Jenkins v.*

1 *Cty. of Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005) (dismissing causes of action as
2 abandoned where plaintiff did not oppose dismissal in her opposition to motion for
3 summary judgment).

4 The Court recognizes, however, that “public policy favor[s] disposition of cases on
5 their merits.” *Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir. 1998). Defendant
6 is correct that Plaintiff has introduced no evidence raising a genuine dispute of material
7 fact that any of the alleged conduct in Allegation I rises to the level of age-based or racial
8 harassment as opposed to “[c]ommonly necessary personnel management actions.”
9 *Lawler*, 704 F.3d at 1244. Summary judgment is therefore proper. *See, e.g., id.* (affirming
10 district court’s decision to grant summary judgment in favor of the defendant where the
11 plaintiff alleged discrimination based on the defendant “question[ing] her appearance,
12 criticiz[ing] the display of merchandise, instruct[ing] her to perform work-related
13 assignments, and disagree[ing] with the way she stored repair parts”); *Velente-Hook v. E.*
14 *Plumas Health Care*, 368 F. Supp. 2d 1084, 1103 (E.D. Cal. 2005) (granting summary
15 judgment in favor of the defendant on the grounds that the plaintiff had failed to make a
16 prima facie case of harassment).

17 2. *Conduct Described in Plaintiff’s Deposition*

18 During his deposition, Plaintiff testified that Mr. Tran “liked to mock” Plaintiff
19 regarding Plaintiff’s age, “calling [him] . . . old man and over the hill,” Collins Dep. at
20 61:1–15, although Mr. Tran stopped referring to him as “over the hill” in 2014, *id.* at
21 68:1–4, and “old man” in “March or April of 2015.” *Id.* at 66:7–19. Plaintiff also testified
22 that Mr. Thompson, who is black, *see id.* at 102:3, referred to white people as “crackers”
23 and “honky,” *id.* at 108:1–12, although Plaintiff did not hear him make such comments
24 after 2012. *Id.* at 110:3–21.

25 Defendant contends that, “based on Plaintiff’s deposition testimony, his only
26 possible race or age-based harassment claim ended no later than April 19, 2015 (i.e., the
27 date on which Tran was promoted to work leader.” Def.’s Mot. at 7. “Plaintiff’s hostile
28 work environment claim, therefore, falls within the broad release of all employment-related

1 claims in his May 6, 2015 Settlement Agreement with the Navy,” *id.*, which provided that
2 “Complainant agrees to release the [Department of Navy] from any and all claims or
3 demands he may have with the Agency occurring prior to the effective date of this
4 Agreement, . . . [including] a release of any rights under Title VII of the Civil Rights Act
5 of 1964 . . . ; [and] the Age Discrimination in Employment Act.” *Id.* (quoting Def.’s Ex. 1
6 at 1 ¶ 3).

7 “Plaintiff acknowledges that a Settlement Agreement was signed by Plaintiff and
8 [Fleet Readiness Center Southwest (“FRCSW”)] on May 6, 2015, for EEO Case Nos. 14-
9 65888-01141 and 15-65888-01875,” but “Plaintiff has never been provided a copy of Case
10 No. EEO 15-65888-01875 which was initiated on April 24, 2015,” and therefore
11 “request[s] that the Court grant the Plaintiff a copy of EEO 15-65888-01875 from the
12 Defendant” pursuant to Rule 56(d).² *See* Opp’n at 10. In any event, “a claimant can[not]
13 waive future claims (only settle past ones).” *Id.* at 13. Additionally, “Plaintiff lodged a
14 formal complaint with FRCSW EEO declaring a breach of the Settlement Agreement” and
15 “[n]o formal outcome or decision was ever reached.” *Id.* Finally, Plaintiff has established
16 a prima facie case of retaliation because he engaged in protected activity when he filed
17 Case No. 15-65888-01875 on April 24, 2015, and suffered actionable injury when FRCSW
18 failed to protect him from Mr. Tran’s and Mr. Thompson’s retaliatory actions. *Id.* at 12.
19 A causal connection between the protected activity and the adverse employment action can
20 also been seen by the temporal proximity between those events. *See id.* at 12. Mr. Tran
21

22
23 ² To the extent Plaintiff seeks relief pursuant to Rule 56(d), that request is **DENIED**. Not only did Plaintiff
24 himself initiate Case No. 15-6588-01875, but he has failed to “identify specific facts to be obtained in
25 discovery that [a]re essential to oppose summary judgment.” *See Leonard v. Baker*, 714 F. App’x 718,
26 719 (9th Cir. 2018) (citing *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp.*, 525 F.3d 822,
27 827 (9th Cir. 2008)). Further, “[t]he failure to conduct discovery diligently is grounds for the denial of a
28 Rule 56([d]) motion.” *Pfingston v. Ronan Eng’g Co.*, 284 F.3d 999, 1005 (9th Cir. 2002) (citing *Mackey*
v. Pioneer Nat’l Bank, 867 F.2d 520, 524 (9th Cir. 1989); *Landmark Dev. Corp. v. Chambers Corp.*, 752
F.2d 369, 372 (9th Cir. 1985)). Here, Plaintiff conducted no discovery, *see* Def.’s Mot. at 4; fact discovery
closed on October 5, 2018, *see* ECF No. 18 ¶ 2; and Plaintiff waited five-and-a-half weeks after Defendant
filed his Motion to request Case No. 15-6588-01875. Accordingly, additional discovery is neither needed
nor warranted here.

1 also admitted that he knew that Plaintiff “had multi[ple] EEO complaints” and
2 Mr. Thompson’s denial that he was aware that Plaintiff had any prior EEO complaints or
3 activity “is a blatantly implausible claim.” *Id.* at 13.

4 Defendant responds that, “[c]onsistent with his deposition testimony, Plaintiff’s
5 Opposition does not present any evidence that he was subjected to any post-Settlement
6 Agreement conduct that meets the elements of a hostile work environment claim.” Reply
7 at 1. The Court must agree with Defendant. By signing the Settlement Agreement, Plaintiff
8 waived any claims based on retaliation, discrimination, or hostile work environment based
9 on conduct predating the May 6, 2015 Settlement Agreement. *See* Def.’s Ex. 1 at 1 ¶ 3.
10 Plaintiff has introduced no evidence that he was subjected to unwanted verbal or physical
11 conduct of an age-related or racial nature after May 6, 2015.³ Accordingly, Plaintiff has
12 failed to raise a genuine issue of disputed fact as to his hostile work environment claim.
13 *See, e.g., Campbell v. Hagel*, 536 F. App’x 733, 734 (9th Cir. 2013) (“The district court
14 properly granted summary judgment on [the plaintiff]’s discrimination and retaliation
15 claims arising from events occurring before October 8, 2003, because those claims are
16

17 ³ Plaintiff argues in his Opposition—without introducing any supporting evidence—that Defendant
18 breached the Settlement Agreement by providing a resume review session with Lydia Ensor rather than
19 James Compagnon, the Aircraft Production Competency Leader, as specified in the Settlement
20 Agreement. *See* Opp’n at 5–6, 10; *see also* Def.’s Ex. 1 at 2 ¶ 5(b). Not only has Plaintiff failed to
21 introduce evidence in support of this argument, but the Court lacks jurisdiction to determine whether
22 Defendant breached the Settlement Agreement, *see, e.g., Munoz v. Mabus*, 630 F.3d 856, 864 (9th Cir.
23 2010); Def.’s Ex. 1 at 4 ¶ 7(b), and Plaintiff’s only remedies would appear to be to “request that the terms
24 of settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for
25 further processing from the point processing ceased,” 29 C.F.R. § 1614.504(a), as opposed to rescission.
26 Further, under California and Federal contract law, a partial breach does not give the non-breaching party
27 the right to cancel the contract. *See, e.g., Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1289
28 n.12 (9th Cir. 2009) (under California law, material breach may allow non-breaching party to cancel the
contract, while partial breach limits non-breaching party to damages); *Old Stone Corp. v. United States*,
450 F.3d 1360, 1371–72 (Fed. Cir. 2006) (“When one party commits a material breach of contract, the
other party has a choice between two inconsistent rights—he or she can either elect to allege a total breach,
terminate the contract and bring an action [for restitution], or, instead, elect to keep the contract in force,
declare the default only a partial breach, and recover those damages caused by that partial breach.”)
(quoting 13 *Williston* § 39:32 (4th ed. 2000)). Accordingly, even if Plaintiff had introduced evidence that
Defendant had breached the Settlement Agreement, the Court concludes that Defendant’s purported
breach does not preclude granting summary judgment in favor of Defendant.

1 waived by the settlement agreement.”) (citing *Stroman v. W. Coast Grocery Co.*, 884 F.2d
2 458, 461–63 (9th Cir.1989)).

3 **B. Retaliation**

4 “To establish a *prima facie* case of retaliation, a plaintiff must demonstrate: (1) a
5 protected activity; (2) an adverse employment action; and (3) a causal link between the
6 protected activity and the adverse employment action.” *Cornwell v. Electra Cent. Credit*
7 *Union*, 439 F.3d 1018, 1034–35 (9th Cir. 2006) (citing *Steiner v. Showboat Operating*
8 *Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994)). To establish an “adverse employment action,”
9 “a plaintiff must show that a reasonable employee would have found the challenged action
10 materially adverse, which in this context means it well might have dissuaded a reasonable
11 worker from making or supporting a charge of discrimination.” *Burlington N. & Santa Fe*
12 *Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (quoting *Rochon v. Gonzales*, 438 F.3d 1211,
13 1219 (D.C. Cir. 2006)) (internal quotation marks omitted). “[C]ausation sufficient to
14 establish the third element of the *prima facie* case may be inferred from . . . the proximity
15 in time between the protected action and the allegedly retaliatory employment
16 decision.” *Cornwell*, 439 F.3d at 1035 (quoting *Yartzoff v. Thomas*, 809 F.2d 1371, 1376
17 (9th Cir. 1987)). “Alternatively, the plaintiff can prove causation by providing direct
18 evidence of retaliatory motivation.” *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 731
19 (9th Cir. 1986).

20 “Once a plaintiff establishes a *prima facie* case, the burden of production shifts to
21 the employer to articulate a legitimate, non-retaliatory explanation for the action.” *Id.*
22 (citing *Wrighten v. Metro. Hosps., Inc.*, 726 F.2d 1346, 1354 (9th Cir. 1984)). “To satisfy
23 this burden, the employer ‘need only produce admissible evidence which would allow the
24 trier of fact rationally to conclude that the employment decision had not been motivated by
25 discriminatory animus.’” *Id.* (quoting *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S.
26 248, 257 (1981)) (citing *Lowe v. City of Monrovia*, 775 F.2d 998, 1007 (9th Cir. 1985)).

27 “If the employer successfully rebuts the inference of retaliation that arises from
28 establishment of a *prima facie* case, then the burden shifts once again to the plaintiff to

1 show that the defendant’s proffered explanation is merely a pretext.” *Id.* (citing
2 *Wrighten*, 726 F.2d at 1354).

3 Defendant argues that, to the extent Plaintiff’s Allegation I alleges retaliation (or
4 discrimination), he “cannot prevail” because he has not established an adverse employment
5 action. *See* Def.’s Mot. at 6 n.4. According to Defendant, “[n]either being placed under
6 ‘constant surveillance,’ nor attempting to ‘provoke the Plaintiff into a confrontation’
7 constitute adverse employment actions.” *Id.* (citing *Burlington N.*, 548 U.S. at 68; *Munday*
8 *v. Waste Mgmt. of N. Am., Inc.*, 126 F.3d 239, 243 (4th Cir. 1997)). “A Letter of Reprimand
9 also does not constitute an adverse employment action unless it resulted in an employment
10 consequence, which Plaintiff does not allege here.” *Id.* (citing *Thomas v. Spencer*, 294 F.
11 Supp. 3d 990, 999–1000 (D. Haw. 2018)). Further, “Plaintiff admitted to engaging in the
12 conduct that formed the basis of the censure.” *Id.* (citing Collins Dep. at 134:23–137:11).

13 Again, Plaintiff does not respond to Defendant’s argument, *see generally* Opp’n,
14 thereby waiving any retaliation (or discrimination) claims alleged in Allegation I. *See, e.g.*,
15 *Jenkins*, 398 F.3d at 1095 n.4. Nonetheless, considering Defendant’s Motion on the merits,
16 the Court must agree with Defendant that Plaintiff has failed to establish a *prima facie* case
17 by failing to introduce evidence of an adverse employment action.⁴

18 In certain circumstances, surveillance can be an adverse employment action. *See*,
19 *e.g.*, *Marceau v. Idaho*, No. 1:09-CV-00514-N-EJL, 2011 WL 3439178, at *13 (D. Idaho
20 Aug. 5, 2011) (concluding the plaintiff established that she had been subject to an adverse
21 employment action because “targeted surveillance of an employee might reasonably deter
22 that employee from engaging in protected activity, especially when the employee believes,
23 as [the plaintiff] did, that the surveillance is being conducted specifically for the purpose
24 of ‘justifying [the employee’s] termination’”); *but cf. Mendoza v. Sysco Food Servs. of*
25

26
27 ⁴ To the extent Plaintiff’s Allegation I alleges a claim for discrimination, that claim would fail for the same
28 reason. *See Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1123 (9th Cir. 2000) (requiring a
plaintiff claiming employment discrimination to demonstrate that “he was subject to an adverse
employment action”).

1 *Ariz., Inc.*, 337 F. Supp. 2d 1172, 1192 (D. Ariz. 2004) (“[U]nder the Ninth Circuit analysis,
2 [surveillance] does not itself qualify as an adverse employment action.”). Here, however,
3 Plaintiff introduces no evidence of subsequent discipline resulting from the increased
4 surveillance. *See Yartzoff*, 809 at 1377. Similarly, it is possible that “provocation efforts
5 [could] amount to a ‘pattern of antagonism’ that could constitute an adverse employment
6 action,” *see Negley v. Judicial Council of Cal.*, 458 F. App’x 682, 685 (9th Cir. 2011), but
7 Plaintiff testified at his deposition that Mr. Tran acted similarly “with quite a few other
8 people,” *see Collins Dep.* at 54:20–24, and “had a tendency to do that to everybody.” *See*
9 *id.* at 56:7–13. Finally, Defendant is correct that a letter of reprimand does not constitute
10 an adverse employment action where, as here, Plaintiff has failed to introduce any evidence
11 that the letter of reprimand resulted in any employment consequences.⁵ *See, e.g., Thomas*,
12 294 F. Supp. 3d at 999–1000 (granting summary judgment in favor of the defendant where
13 the plaintiff “d[id] not provide any evidence that there was any other employment
14 consequence as a result of the reprimand letter” and the plaintiff did not dispute that he
15 engaged in the conduct forming the basis of the reprimand). Accordingly, the Court
16 concludes that Plaintiff has failed to adduce evidence establishing a *prima facie* case of
17 retaliation based on the allegations contained in Allegation I of his First Amended
18 Complaint.

19 **III. Allegation II**

20 In Allegation II, Plaintiff alleges claims for discrimination and retaliation. *See FAC*
21 *at 1–2, 4–7.* The Court outlined the elements for a retaliation claim above. *See supra*
22 *Section II.* “[A] plaintiff alleging disparate treatment under Title VII . . . must show that
23 (1) he belongs to a protected class; (2) he was qualified for the position; (3) he was subject
24 to an adverse employment action; and (4) similarly situated individuals outside his
25 _____

26 ⁵ Plaintiff has not alleged—much less introduced evidence supporting—that the Letter of Reprimand in
27 any way contributed to his non-selection for the permanent Aircraft Examiner position. In any event,
28 Plaintiff also has failed to raise a dispute of material fact that the Navy did not use a blinded review of
resumes against a pre-determined set of criteria in evaluating the Aircraft Examiner applicants. *See infra*
Section III.A.

1 protected class were treated more favorably.” *Chuang*, 225 F.3d at 1123 (citing *McDonnell*
2 *Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). To establish an “adverse employment
3 action,” the plaintiff must demonstrate “a significant change in employment status, such as
4 hiring, firing, failing to promote, reassignment with significantly different responsibilities,
5 or a decision causing a significant change in benefits.” *Burlington Indus., Inc. v. Ellerth*,
6 524 U.S. 742, 761 (1998) (citing *Crady v. Liberty Nat’l Bank & Trust Co.*, 993 F.2d 132,
7 136 (7th Cir. 1993)). “The burden of production, but not persuasion, then shifts to the
8 employer to articulate some legitimate, nondiscriminatory reason for the challenged
9 action.” *Chuang*, 225 F.3d at 1123–24 (citing *McDonnell Douglas Corp.*, 411 U.S. at
10 802). “If the employer does so, the plaintiff must show that the articulated reason is
11 pretextual ‘either directly by persuading the court that a discriminatory reason more likely
12 motivated the employer or indirectly by showing that the employer’s proffered explanation
13 is unworthy of credence.’” *Id.* at 1124 (quoting *Burdine*, 450 U.S. at 256).

14 **A. *Discrimination and Retaliation in Non-Selection as Aircraft Examiner***

15 Plaintiff alleges that he was not selected for the permanent Aircraft Examiner
16 position as a result of racial and age-based discrimination and retaliation for his prior EEO
17 activity. *See* FAC at 4–7. Defendant contends that “[t]he undisputed facts establish that
18 the Navy had legitimate, nondiscriminatory reasons for selecting another candidate for th[e]
19 Aircraft Examiner] position, which Plaintiff cannot establish were pretexts for
20 discrimination or retaliation.” Def.’s Mot. at 9–10. This is because “[t]he Navy followed
21 an established, objective, and documented procedure for evaluating the numerous
22 applicants for the Aircraft Examiner position.” *Id.* at 10. Specifically, “the Navy based its
23 selections for the Aircraft Examiner position on a blind review of resumes against
24 objective, pre-determined evaluation criteria.” *Id.* at 11. Plaintiff cannot “demonstrate that
25 the Navy’s selection procedure was somehow a pretext for discrimination,” *see id.* (citing
26 *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir. 1998)), because Plaintiff
27 admitted he had no such proof at his deposition:

28 ///

1 Plaintiff admitted in his deposition that he has no evidence that
2 his non-selection had anything to do with his age or race:

3 Q. Other than the age difference, do you have
4 any other facts to show they chose Mr. Bui
5 over you because of Mr. Bui's age?

6 A. No.

7 Q. Do you have any reason to believe they did
8 not choose you because you're white?

9 A. I have no – no.

10 *Id.* at 11–12 (quoting Collins Dep. at 148:4–10). According to Defendant, “Plaintiff also
11 cannot establish that the Navy’s selection procedure was a pretext for retaliation” because
12 only one member of the Advisory Panel, Mr. Amaichigh, “recognized [Applicant K’s]
13 resume as likely belonging to Plaintiff[] and was generally aware that Plaintiff had some
14 prior EEO activity, [although] Mr. Amaichigh did not know any of the details of Plaintiff’s
15 prior EEO activity because he was not involved in it.” *Id.* at 12 (citing Decl. of Robert
16 Amaichigh (“Amaichigh Decl.,” ECF No. 21-7) ¶ 7). “And[,] further confirming that
17 Mr. Amaichigh was not motivated by any retaliatory animus, he gave Plaintiff’s resume a
18 higher overall score than the other two members who did not recognized Plaintiff’s resume
19 and knew nothing about Plaintiff’s EEO activity.” *Id.* (citing ECF Nos. 21-20, 21-22, 21-
20 24).

21 Plaintiff counters that “[t]he selection process used is simply a resume writing
22 contest” and “[n]o independent verification of applicants['] claims to knowledge or skills
23 is conducted.” Opp’n at 16. Further, “[p]oints given during the resume grading and scoring
24 process are totally subjective” and “[n]o interviews were conducted.” *Id.* “Plaintiff[]
25 adamantly disputes the Defendant’s claim that the resume grading and scoring process was
26 performed by the panel members anonymously” or that the selection process was “platform
27 specific.” *Id.* at 16–17. “Plaintiff claims [Mr.] Amaichigh unequivocally knew which
28 redacted resume belonged to the Plaintiff and due to a close association with Gary

1 Thompson . . . [and Mr.] Amaichigh was made aware of the details of Plaintiff’s prior EEO
2 activity by [Mr.] Thompson.” *Id.* at 18. Further, Mr. “Amaichigh manipulated the
3 selection process to ensure that the preferred applicant was selected.” *Id.* “The selecting
4 official for this selection was Fredrick Asuncion[,] who was also the selection official in
5 one of Plaintiff’s prior EEO complaints[,] Case No. 14-65888-01141.” *Id.* at 19. “[O]nly
6 3 applicant resumes out of a total of 33 were identified and placed in the H-53 platform
7 category,” so “it would not take a rocket scientist to figure out who’s resume belonged to
8 whom,” especially given “that the Advisory Panel members were provided a list of the
9 applicant[s’] names to review before the process began.” *Id.* at 21. Further,
10 Mr. “Amaichigh’s Resume Grading Worksheet[.]” contains “the hand-written names of the
11 applicants who were selected” and Mr. Asuncion “is vague . . . in regard to when and how
12 the Advisory Panel w[as] made cognizant of the applicant[s’] redacted names,” leading
13 Plaintiff to “question[] the validity of the selection process in regard to when and how the
14 Advisory Panel members are revealed the redacted names.” *Id.* at 22. Based on
15 Defendant’s Exhibit 16, Plaintiff also “claims . . . Tien Bui (applicant D) was recommended
16 for an Aircraft Examiner position for the V22 platform,” which “is a total contradiction to
17 all the requirements for this position and that of the Declarations/Affidavits of all the
18 Advisory Panel members.” *Id.* at 24.

19 Defendant rejoins that Plaintiff has introduced no evidence that the resume review
20 process was manipulated or that the resumes were not evaluated anonymously. Reply at
21 3. Further, “Plaintiff’s argument that Mr. Bui was ultimately assigned to the V22 Vertical
22 Lift platform does not demonstrate that the Navy’s blind resume review procedure was a
23 pretext for discrimination.” *Id.* at 4.

24 Assuming Plaintiff has established a *prima facie* case for discrimination based on
25 race and age and retaliation for his prior EEO activity, Defendant has articulated legitimate,
26 nondiscriminatory reasons for selecting Mr. Bui for the Aircraft Examiner position. Here,
27 the applicants’ resumes were graded based on five criteria: knowledge of program cell
28 based process and procedures; teaming skills and ability to communicate; working

1 knowledge and application of management information systems; knowledge of safety,
2 environmental, and personal protective equipment policies and procedures, safety
3 regulations, FOD, tool control, hydraulic contaminations, MSDS, Fall Protection, etc.; and
4 knowledge of technical data including schematics, blueprints, engineering specifications,
5 REI/TEI, technical directives, wiring diagrams, AFB's/AFC's/AYC's and maintenance
6 manuals. *See generally* Def.'s Ex. 5, ECF No. 21-16. Each resume was awarded points
7 from three Advisory Panel members based on these criteria, *see* Def.'s Ex. 9, ECF No. 21-
8 20; Def.'s Ex. 11, ECF No. 21-22; Def.'s Ex. 13, ECF No. 21-24, and the three Advisory
9 Panels then met to assign a consensus score for each applicant. *See* Decl. of Frederick
10 Asuncion ("Asuncion Decl.," ECF No. 21-6) ¶ 6. Plaintiff received a consensus score of
11 45, which Mr. Asuncion raised to 55 but which was still 15 points lower than Mr. Bui's
12 consensus score. *See id.* ¶ 10. Because Mr. Bui was the top-ranked candidate for the
13 specific platform for which he and Plaintiff were competing, Mr. Asuncion selected Mr.
14 Bui for the position. *See id.*; *see also* Affidavit of Frederick Asuncion ("Asuncion Aff.,"
15 ECF No. 21-18) at 4–5.

16 The burden therefore shifts to Plaintiff to "show that the articulated reason is
17 pretextual 'either directly by persuading the court that a discriminatory reason more likely
18 motivated the employer or indirectly by showing that the employer's proffered explanation
19 is unworthy of credence.'" *Chuang*, 225 F.3d at 1124 (quoting *Burdine*, 450 U.S. at 256);
20 *accord Miller*, 797 F.2d at 731. Based on a review of the record, the Court concludes that
21 Plaintiff has failed to meet this burden.

22 As for discrimination, Plaintiff has introduced no evidence—aside speculation based
23 on the fact that he is white and older than Mr. Bui, who is Vietnamese—to demonstrate
24 that his non-selection was the result of discrimination. *See* Collins Dep. at 148:4–10; *Risby*
25 *v. Nielsen*, 768 F. App'x 607, 611 (9th Cir. 2019) ("Plaintiff's speculation [that his
26 employer acted on account of race] is insufficient to defeat summary judgment.") (citing
27 *Loomis v. Cornish*, 836 F.3d 991, 997 (9th Cir. 2016)). Further, neither Mr. Baesas nor
28 Mr. Pendleton recognized Applicant K's resume as belonging to Plaintiff during the resume

1 review. *See* Decl. of Joey Baesas (“Baesas Decl.,” ECF No. 21-8) ¶ 7; Decl. of Matt
2 Pendleton (“Pendleton Decl.,” ECF No. 21-9) ¶ 6. And while Mr. Amaichigh recognized
3 Applicant K’s resume as “likely belonging to” Plaintiff, *see* Amaichigh Decl. ¶ 7, he “did
4 not recognize the resume of Applicant D as belonging to Mr. Bui” and, “[i]n fact, . . . did
5 not know who he was.” *Id.* ¶ 9. Further, Mr. Amaichigh also gave Plaintiff’s resume a
6 score of 55, *see id.* ¶ 10, which was higher than the score of 50 give by Mr. Baesas, *see*
7 Baesas Decl. ¶ 10, or of 40 given by Mr. Pendleton. *See* Pendleton Decl. ¶ 9.

8 Similarly, Plaintiff has introduced no evidence—aside speculation—that his non-
9 selection was the result of retaliation for his prior EEO activity. The Selecting Officer and
10 each Advisory Panel member has testified—for the majority, multiple times—that, to the
11 extent they even knew about Plaintiff’s prior EEO activity,⁶ it played no role in the
12 recommendation or selection of applicants for the Aircraft Examiner position. *See*
13 Asuncion Aff. at 6–7 (“[Mr. Asuncion] was aware of Mr. Collins’ prior EEO activity, but
14 that knowledge played no role in [his] selection decisions.”); Amaichigh Decl. ¶ 7
15 (“[Mr. Amaichigh . . . knew that Mr. Collins had some prior EEO activity, but [he] did not
16 know any of the details of his prior EEO activity because [he] was not involved in it.”);
17 Affidavit of Robert Amaichigh (“Amaichigh Aff.,” ECF No. 21-19) at 5 (Mr. Amaichigh’s
18 “knowledge of Mr. Collins’ prior EEO activity [was] in [no] way a factor in [his]
19 evaluation of his application or his ranking score”); Baesas Decl. ¶ 7 (“[Mr. Baesas] . . .
20 had no knowledge that Mr. Collins had participated in any EEO activity.”); Affidavit of
21 Joey Baesas (“Baesas Aff.,” ECF No. 21-21) at 5 (Mr. Baesas was not “aware of
22 Mr. Collins’ prior involvement in protected EEO activity at the time of the selection
23 process” and his signing of his affidavit on June 27, 2016, was “the first [he] ha[d] heard
24 that Mr. Collins had any prior EEO activity”); Pendleton Decl. ¶ 6 (“I had never met
25 Mr. Collins and knew nothing about his EEO activity.”); Affidavit of Matt Pendleton
26

27
28 ⁶ As mentioned above, two of the Advisory Panel members did not recognized Applicant K’s resume as
belonging to Plaintiff and, therefore, would not have associated it with Plaintiff’s prior EEO activity.

1 (“Pendleton Aff.,” ECF No. 21-23) at 7 (Mr. Pendleton was not “aware of Mr. Collins’
2 race, national origin, color, age or prior participation in protected EEO activity at the time
3 of the Advisory Panel’s process” and “factors such as race, national origin, color, age, or
4 prior EEO activity [were not] in any way considered by the Advisory Panel”). Plaintiff’s
5 speculation that Mr. Amaichigh had learned details of his prior EEO activity from
6 Mr. Thompson and that Mr. Asuncion’s selection of Mr. Bui over Plaintiff was influenced
7 by Plaintiff’s prior EEO activity are contradicted by the evidence. *See, e.g.*, Asuncion Aff.
8 at 6–7 (“[Mr. Asuncion] was aware of Mr. Collins’ prior EEO activity, but that knowledge
9 played no role in [his] selection decisions.”); Amaichigh Aff. at 4 (Mr. Amaichigh “was
10 aware Mr. Collins had some EEO activity previously, but [he] was not involved in the
11 matter” and “d[id] not know the details of his previous EEO matter”).

12 Accordingly, Plaintiff has failed to raise a triable issue of material fact that the
13 resume review and selection process for the Aircraft Examiner position was a pretext for
14 race or age-related discrimination or retaliation for his prior EEO activity.

15 ***B. Discrimination and Retaliation in Cancellation of Training***

16 Plaintiff also contends that Mr. Amaichigh “intentionally excluded” Plaintiff from a
17 November 13, 2015 training session because Mr. Amaichigh “was cognizant to the fact
18 that Tien Bui has been selected over the Plaintiff for the position of Aircraft Examiner.”
19 FAC at 6.

20 Defendant first contends that “the cancellation of training is not a legally cognizable
21 adverse employment action.” Def.’s Mot. at 13 (citing *Burlington Indus.*, 524 U.S. at 761;
22 *Brooks v. Firestone Polymers, LLC*, 640 Fed. App’x 393, 397 (5th Cir. 2016)
23 (unpublished); *Del Castillo v. Dep’t of Health & Human Servs.*, 304 Fed App’x 607, 609
24 (9th Cir. 2008) (unpublished); *Roberson v. Game Stop/Babbage’s*, 152 Fed. App’x 356,
25 361 (5th Cir. 2005) (unpublished)). “Regardless, the Navy had a legitimate,
26 nondiscriminatory reason for informing Plaintiff that he could not participate in the
27 computer training: he did not have the necessary log-in and password to access the training
28 system platform on which the trainees needed to work during the training.” *Id.* (citing

1 Amaichigh Aff. at 6–7). And, to the extent Plaintiff claims that he was denied the training
2 because management already knew that he had not been selected for the Aircraft Examiner
3 position, his cancellation of training claim must fail for the same reasons as his non-
4 selection claim. *Id.* at 13–14.

5 Plaintiff responds that Mr. “Amaichigh’s reasons [for telling Plaintiff not to attend
6 the training] stated in his Affidavit . . . are simply a pretext to deflect and conceal his
7 retaliatory animus directed squarely at the Plaintiff.” Opp’n at 25. This is because the
8 training was slide-based and “Plaintiff could have participated in the slide-based training
9 by using Plaintiff’s personal [Common Access Card].” *Id.* In any event, “Plaintiff would
10 have benefitted from the training in regards to future opportunities.” *Id.* at 25–26. Further,
11 Mr. “Amaichigh . . . knew . . . that the Plaintiff was not recommended for the [Aircraft
12 Examiner] position, and arbitrarily decided to deny the training course in unadulterated
13 retaliatory animus.” *Id.* at 26.

14 Defendant replies that Plaintiff has waived his cancellation of training claim by
15 failing to dispute in his Opposition that cancellation of training is not a legally cognizable
16 adverse employment action. *See* Reply at 5. Further, Ms. Sexton, who was responsible for
17 the training, informed Mr. Amaichigh that “it would not make sense for someone who did
18 not have either an MRO log-in, a Made to Order (MTO) log-in, or a completed background
19 investigation to attend.” *Id.* (quoting Sexton Aff. at 3). Further, “it would not make sense
20 to have someone attend the training if they did not have an MTO log-in at that time, as they
21 would then be spending time being trained on a system that they could not actually use.”
22 *Id.* at 6 (quoting Sexton Aff. at 3).

23 “[E]xclu[sion] from meetings, seminars and positions that would have made [the
24 employee] eligible for salary increases” may qualify as an adverse employment action. *See*
25 *Ray v. Henderson*, 217 F.3d 1234, 1241 (9th Cir. 2000) (citing *Strother v. S. Cal.*
26 *Permanente Med. Grp.*, 79 F.3d 859, 869 (9th Cir. 1996)). Here, Plaintiff claims only that
27 he “would have benefitted from the training in regards to future opportunities,” offering no
28 evidence as to what benefits the training may have conferred. Opp’n at 25–26. Under

1 these circumstances, the Court concludes that Plaintiff has failed to raise a genuine issue
2 of material fact that the denial of training was an adverse employment action.

3 Even if Plaintiff had made such a showing, however, Ms. Sexton's affidavit
4 establishes a legitimate, nondiscriminatory reason for the cancellation of Plaintiff's
5 training: Ms. Sexton, whom Plaintiff neither alleges nor establishes had discriminatory or
6 retaliatory animus toward him, informed Mr. Amaichigh that it would "not make sense"
7 for Plaintiff to participate in the training because he would "be spending time being trained
8 on a system that [he] could not actually use." Sexton Aff. at 3. Plaintiff has introduced no
9 evidence that Ms. Sexton discriminated against him based on his age or race or that she
10 retaliated against him because of his prior EEO activity and, in any event, Ms. Sexton has
11 affirmed that she was not "aware of Mr. Collins' race, national origin, color of age
12 (Caucasian, American, white, born 1951), or of Mr. Collins having previously participated
13 in protected EEO activity, at the time of [her] consultations with Mr. Amaichigh regarding
14 the training in question." *Id.* at 4. Accordingly, Plaintiff has failed to raise a genuine issue
15 of material fact that his exclusion from the November 15, 2015 training was a pretext for
16 discrimination or retaliation.

17 ***C. Discrimination and Retaliation in All-Hands Meeting***

18 Finally, Plaintiff claims that, "[o]n November 17, 2015, . . . [Mr.] Amaichigh
19 willfully embarrassed and humiliated the Plaintiff in front of co-workers when[,] during an
20 all-hands meeting[, he] informed staff that Tien Bui had been selected for the position of
21 Aircraft Examiner." FAC at 6.

22 Defendant contends that Mr. Amaichigh's announcement "fails to constitute an
23 adverse employment action because it did not result in any harm apart from the selection
24 decision itself, which Plaintiff cannot establish was discriminatory or retaliatory." Def.'s
25 Mot. at 14 (citing *Ellerth*, 524 U.S. at 761). Plaintiff responds that, "[w]ithout any
26 consideration for the Plaintiff's feelings in a completely malicious act Amaichigh
27 proceeded to embarrass and further humiliate the Plaintiff in front of his co-workers."
28 Opp'n at 26. Defendant replies that "[h]urt feelings, embarrassment, and humiliation . . .

1 do not satisfy the ‘adverse employment action’ requirement.” Reply at 6 (citing *Nguyen v.*
2 *McHugh*, 65 F. Supp. 3d 873, 893 (N.D. Cal. 2014), *aff’d*, 722 Fed. App’x 688 (9th Cir.
3 2018)). “Moreover, Plaintiff presents no evidence establishing that this all-hands meeting
4 was convened for the purpose of discriminating or retaliating against him.” *Id.* at 7.

5 The Court sympathizes with Plaintiff, but Defendant is correct: “While [Plaintiff]
6 alleges he was humiliated and demeaned by [Mr. Amaichigh]’s conduct at the . . . meeting,
7 the circumstances of that meeting, standing alone, are insufficient to establish a materially
8 adverse employment action.” *Young Bolek v. City of Hillsboro*, No. 3:14-CV-00740-SB,
9 2016 WL 9455411, at *13 (D. Or. Nov. 14, 2016) (citing *Hellman v. Weisberg*, 360 F.
10 App’x 776, 779 (9th Cir. 2009); *Cates v. PERS of Nev.*, 357 Fed. App’x 8, 10 (9th Cir.
11 2009); *Bollinger v. Thawley*, 304 Fed. App’x 612, 614 (9th Cir. 2008)), *report and*
12 *recommendation adopted*, 2017 WL 627218 (Feb. 13, 2017); *Hammond v. Lynwood*
13 *Unified Sch. Dist.*, No. CV0705039DDPCTX, 2008 WL 11337726, at *3 (C.D. Cal. Dec.
14 3, 2008) (“Plaintiff’s expression of humiliation is not sufficient to demonstrate an adverse
15 employment action.”); *see also Pickard v. City of Tucson*, No. CV-16-00729-TUC-RCC,
16 2019 WL 1130095, at *7 (D. Ariz. Mar. 12, 2019) (“Embarrassment [and] harm to
17 reputation . . . d[oes] not impact the terms or conditions of [] employment and are likewise
18 not adverse employment action.”) (collecting cases).

19 Further, Plaintiff has introduced no evidence beyond a conclusory statement in his
20 declaration that Mr. Amaichigh acted with a discriminatory or retaliatory motive in
21 convening the all-hands meeting. *Compare* Amaichigh Aff. at 6 (“[A]ssuming that
22 [Mr. Amaichigh] did in fact eventually announce Mr. Bui’s selection after a final selection
23 decision had been made by the Competency Manager, [his] motivation for doing so would
24 have been to keep [his] employees advised of the changes to [the Navy’s] staff and to ready
25 them to assist in training a new staff member. There would have been no intention
26 whatsoever to embarrass or humiliate Mr. Collins.”), *with* Collins Decl. ¶ 12 (“On
27 November 17, 2015[,] in front of [Plaintiff’s] co-workers[, Plaintiff] was embarrassed[]
28 and humiliated without any consideration for [his] feelings by Robert Amaichigh in

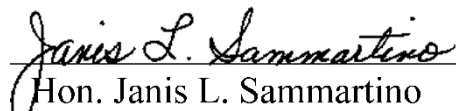
1 retaliatory animus directed squarely at [Plaintiff].”). “Conclusory, speculative testimony
2 in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat
3 summary judgment.” *Himaka v. Buddhist Churches of Am.*, 917 F. Supp. 698, 704 (N.D.
4 Cal. 1995) (citing *Falls Riverway Realty, Inc. v. Niagara Falls*, 754 F.2d 49 (2nd Cir.
5 1985); *Thornhill Pub. Co. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979)).
6 Consequently, even if Plaintiff had established a materially adverse employment action,
7 Mr. Amaichigh has introduced evidence of a non-discriminatory and non-retaliatory reason
8 for the meeting (i.e., advising his employees of a staffing change), and Plaintiff has failed
9 to introduce any evidence that Mr. Amaichigh’s proffered reason was pretextual.
10 Accordingly, summary judgment is appropriate.

11 **CONCLUSION**

12 In light of the foregoing, the Court **DENIES** Plaintiff’s Request for Oral Argument
13 (ECF No. 26), **OVERRULES** Plaintiff’s Evidentiary Objections (ECF Nos. 24-2-5), and
14 **GRANTS** Defendant’s Motion for Summary Judgment (ECF No. 21). Accordingly, the
15 Clerk of the Court **SHALL CLOSE** the files for Case Nos. 17-CV-1723 JLC (KSC) and
16 17-CV-1724 JLS (KSC).

17 **IT IS SO ORDERED.**

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19 Dated: January 30, 2020


20 Hon. Janis L. Sammartino
21 United States District Judge
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