UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

LAVON RAMSEY,

Plaintiff,

v.

SISKIYOU HOSPITAL, INC. D/B/A FAIRCHILD MEDICAL CENTER, and DOES 1 through 10, inclusive,[1]

Defendants.

No. 2:14-cv-01908-KJM-CMK

ORDER

Plaintiff Lavon Ramsey filed this action against defendant Siskiyou Hospital, Inc. d/b/a Fairchild Medical Center ("Fairchild" or "Hospital") in August 2014, alleging defendant terminated her employment on the basis of her age in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.*, and the California Fair

[1] The Ninth Circuit provides, "'[Plaintiffs] should be given an opportunity through discovery to identify [] unknown defendants'" "in circumstances . . . 'where the identity of the alleged defendant[] [is] not [] known prior to the filing of a complaint.'" *Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir. 1999) (quoting *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980)) (modifications in original). Federal Rule of Civil Procedure 4(m), as recently amended, provides for dismissal of defendants not served within ninety days of filing of the complaint unless the plaintiff shows good cause. *See Glass v. Fields*, No. 09-00098, 2011 U.S. Dist. LEXIS 97604 (E.D. Cal. Aug. 31, 2011); *Hard Drive Prods. v. Does*, No. 11-01567, 2011 U.S. Dist. LEXIS 109837, at *2–4 (N.D. Cal. Sept. 27, 2011). Plaintiff will be ordered to show cause in the parties' joint pretrial statement why the court should not dismiss the "Doe" defendants.

Employment and Housing Act ("FEHA"), Cal. Gov't Code § 12900 *et seq.* This matter is before the court on defendant's motion for summary judgment or, alternatively, partial summary judgment. ECF No. 21 ("Mem. P. &. A."). Plaintiff opposes the motion. ECF No. 31 ("Opp'n"). The court held a hearing on the matter on January 29, 2016, at which John Kelley appeared for Ramsey and Andrea Fellion appeared for Fairchild. As explained below, the court DENIES defendant's motion.

I. EVIDENTIARY OBJECTIONS

Plaintiff includes a separate Statement of Disputed Facts in support of her opposition to defendant's motion for summary judgment, in which she lists eighty-three "disputed" facts. Separate Statement of Disputed Facts (SDF), ECF No. 31-4. Defendant objects to seventy-one of those facts, and objects to many of the facts on multiple grounds. ECF No. 36.

Many of defendant's objections are merely "boilerplate recitations of evidentiary principles or blanket objections without analysis applied to specific items of evidence," *Stonefire Grill, Inc. v. FGF Brands, Inc.*, No. 11-8292, 2013 WL 6662718, at *4 (C.D. Cal. Aug. 16, 2013) (quoting *Doe v. Starbucks, Inc.*, No. 08-0582, 2009 WL 5183773, at *1 (C.D. Cal. Dec. 18, 2009)). Accordingly, the court declines to scrutinize each of defendant's individual objections or fully analyze identical objections raised as to each fact. *See Mayes v. Kaiser Found. Hosps.*, No. 12-1726, 2014 WL 2506195, at *2–3 (E.D. Cal. June 3, 2014); *Stonefire Grill, Inc.*, 2013 WL 6662718, at *4; *Capitol Records, LLC v. BlueBeat, Inc.*, 765 F. Supp. 2d 1198, 1200 n.1 (C.D. Cal. 2010) ("In motions for summary judgment with numerous objections, it is often unnecessary and impractical for a court to methodically scrutinize each objection and give a full analysis of each argument raised." (citation omitted)).

To the extent defendant objects on the basis of relevance, such objections "are all duplicative of the summary judgment standard itself . . . [The court] cannot rely on irrelevant facts, and thus relevance objections are redundant." *Burch v. Regents of Univ. of Cal.*, 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006). The court similarly overrules defendant's objections relating to undue prejudice, confusion, or waste of time.

Defendant's numerous hearsay objections also will not be sustained at this stage. *Quanta Indem. Co. v. Amberwood Dev. Inc.*, No. 11–01807, 2014 WL 1246144, at *3 (D. Ariz. Mar. 26, 2014) ("[E]vidence containing hearsay statements is admissible only if offered in opposition to the motion."). On summary judgment, "objections to the *form* in which the evidence is presented are particularly misguided where, as here, they target the non-moving party's evidence." *Burch*, 433 F. Supp. 2d at 1119 (emphasis in original). Moreover, most of the challenged evidence appears to be admissible under Federal Rule of Evidence 801(d)(2)(D), because it consists of statements made by Fairchild's agents or employees during administrative meetings.

II. FACTUAL BACKGROUND

The court has determined the following facts are undisputed, unless otherwise noted. To the extent the court relies on the facts described below, associated evidentiary objections are overruled, as discussed in the previous section.

A. Background

Ramsey was born on April 28, 1944, and has been a registered nurse since 1967. Ramsey Decl. ¶¶ 1–2, ECF No. 31-2. She began working at Fairchild as a registered nurse in October 2000. Ramsey Dep. 84, Fellion Decl. Ex. 1, ECF No. 25. Fairchild is a twenty-five bed, critical access hospital in Yreka, California. Sarmento Decl. ¶ 2, ECF No. 26. In January 2014, Ramsey's title at Fairchild was Employee Health Nurse, and her job duties included giving all employees an annual tuberculosis (TB) skin test. Ramsey Decl. ¶ 2; Ramsey Dep. 140; Pimintel Decl. ¶ 3, Ex. A, ECF No. 28. To perform a TB skin test, a small bubble of purified protein derivative fluid is injected under the employee's forearm skin. Ramsey Dep. 142. The test is read forty-eight to seventy-two hours later by looking at the injection site. *Id.* at 142–43. If the injection site is hardened or "indurated," the test is positive, which requires further testing, such as a blood test, health questionnaire, or a chest x-ray. *Id.* at 141–44; Pimintel Decl. Ex. A.

Fairchild is subject to the Health Information Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. 104-191 (codified at 42 U.S.C. § 300gg, 29 U.S.C. § 1181 *et seq.*, and 42 U.S.C. § 1320d *et seq.*). Madden Dep. 12–13, Fellion Decl. Ex. 2, ECF No. 25; Madden Decl.

¶ 2, ECF No. 27. HIPAA generally prohibits certain medical care providers, or "covered entities," from disclosing a patient's protected health information beyond what is necessary to provide care for the individual, including the billing, diagnosis, or treatment. Madden Decl. ¶¶ 2, 3, Ex. B; Ramsey Dep. 104–05. Covered entities may be subject to fines and criminal penalties for the HIPAA violations of their employees. Madden Decl. ¶ 2. For example, unintentional HIPAA violations may subject Fairchild to a maximum penalty of $50,000 per violation. *Id.*

Fairchild's Human Resources Manager, Joann Sarmento, provides all Fairchild employees with a copy of Fairchild's employee handbook. Sarmento Decl. ¶ 3. Fairchild's 2009 employee handbook included privacy and confidentiality policies, which provide, in part,

> All information concerning patients is to be held in the strictest confidence. Medical records and information regarding a patient's care may be read, shared, or discussed only within the following guidelines:
>
> - It must be for reasons specific to the treatment plan of the patient;
> - It must involve only those individuals delivering or assessing the care of patients; . . . .
>
> The Hospital complies with both Federal and State regulations concerning the privacy of our patient's information . . . . If the employee suspects that they or others have violated our patient's privacy, they need to contact their Supervisor or HIPAA Privacy Officer . . . .

Id. ¶ 3, Ex. A at 1–2. Sarmento also provides Fairchild employees with a copy of Fairchild's Confidentiality Agreement. *Id.* ¶ 3. Ramsey signed the 2009 Confidentiality Agreement, which prohibits employees from making use of the Hospital's confidential information "except for the purposes specified by the Hospital or required to perform employee's job for the Hospital." *Id.* ¶ 3, Ex. B.

Fairchild provided its employees with annual, mandatory, in-person and online training on its privacy and confidentiality policies. Madden Dep. 20–22. Mike Madden, Fairchild's HIPAA Privacy Officer since 2000, oversees Fairchild's privacy and confidentiality training and is responsible for investigating possible HIPAA violations. *Id.* at 28; Madden Decl.

¶¶ 3, 5. Pursuant to this training, Ramsey signed a written acknowledgment of Fairchild's HIPAA Notice, which provided,

> **Acknowledgement** - I understand and agree that in the performance of my duties as an employee in the Nursing Department, I am expected to treat all information as confidential and that I must ensure the patients' rights to privacy of information.
>
> Any inappropriate use and disclosure of [protected health information] will be immediately investigated by the Hospital's HIPAA Privacy Officers. I further understand that any violation of HIPAA may result in disciplinary action including termination of employment . . . .

Madden Decl. ¶¶ 3, 6, Ex. B.

In January 2014, Ramsey received her annual evaluation. Her overall score was in the "commendable range," the second highest category. Howell Dep. 30–32, Kelley Decl. Ex. 9, ECF No. 31-1. Under management comments, her evaluation stated, "Lavon continues to perform the Employee Health Nurse role extremely well and has been able to complete employee test requirements in a timely manner." *Id.* at 32. In the categories related to patient privacy rights and HIPAA compliance, Ramsey received scores in the highest category. *Id.* at 15–19.

B. Ramsey's Alleged HIPAA Violation

On January 21, 2014, Ramsey gave Fairchild employee Doe[2] his annual TB skin test. Ramsey Dep. 150, 171. After about fifteen minutes, Doe returned to Ramsey and told her he was afraid he had TB. *Id.* at 171. Ramsey explained to Doe he was likely having a hyper-allergic reaction to his TB test and instructed him to go to the emergency room to be evaluated. *Id.* Forty-eight hours later, on January 23, Ramsey read Doe's skin test and determined it was negative, because his skin was not indurated. *Id.* at 150.

Before Ramsey had read the results, however, Doe went to his private physician, Dr. Steven Kolpacoff, and asked him to order a blood test known as a QuantiFERON gold test or

[2] As the parties jointly requested, ECF No. 20, and as provided by Local Rule 140, the court authorized the parties to refer to this patient as "John Doe" or "Doe" in briefing and to redact this patient's name from documents publicly filed with the court. ECF No. 30. The court likewise refers to this patient as "Doe."

"Q-Gold test," to see if he had TB or if he was having an allergic reaction. *Id.* at 171–75. Dr. Kolpacoff ordered the test on January 23, before Ramsey read Doe's TB skin test results. *Id.* at 163. A copy of Doe's Q-Gold test results was delivered to Ramsey's office in late January 2014 and showed he tested "high" positive for TB. Ramsey Decl. ¶ 3; Ramsey Dep. 175–76. Because the Q-Gold test was fairly new at the time, Ramsey conducted research to understand the positive result and the allergic reaction. Ramsey Decl. ¶ 3; Ramsey Dep. 176. Although Ramsey believed the test was inaccurate due to Doe's allergic reaction, she reported the positive reaction to the Public Health Department, as she was required to do with any suspicious TB situation. Ramsey Decl. ¶ 3; Ramsey Dep. 176. When she spoke with representatives at the Public Health Department, she discussed her research with them and asked for advice on how long to wait before recommending Doe take another Q-Gold test. Ramsey Dep. 176. Ramsey then talked to Doe about the January test results and the new information she obtained through her research. Ramsey Decl. ¶ 3.

On March 18, 2014, Doe obtained a second Q-Gold test from his private physician. *Id.* ¶ 4. Doe's March Q-Gold test was also positive for TB, but the value had decreased from the January test. *Id*. A hard copy of his second lab results was delivered to Ramsey's office on Friday, March 21. *See* Madden Dep. 33, 74; Madden Decl. ¶ 5, Ex. E at 1. Elizabeth Pimintel, the Infection Control Nurse, initially received the results because she shared her office and mailbox with Ramsey. Ramsey Dep. 163–66; Ramsey Decl. ¶ 4. On Monday, March 24, Pimintel handed the results to Ramsey and asked her to handle it. Ramsey Dep. 165. Ramsey opened Doe's electronic file on her computer to refresh her memory on his first test results. *Id.* at 183–84.

That same day, on March 24, Ramsey spoke with the head of Fairchild's lab, Jane Vanover. Ramsey Decl. ¶ 4. She asked Vanover if Vanover had seen Doe's test results and told Vanover she thought it was an allergic reaction. Vanover Decl. ¶ 3, ECF No. 29. According to Ramsey, she spoke with Vanover to get a better understanding of the test results, which was a common practice followed by Hospital Infection Control Nurses and Employee Health Nurses. Ramsey Decl. ¶ 4. Ramsey also called the TB Hotline, and spoke with Dr. Chris Smithers, in

conducting research on "the correct thing to do in a situation like that for [her] own learning." Ramsey Dep. 178–79. Dr. Smithers told her she needed to communicate certain information to the physician who ordered the tests, because the physician probably was not aware that the test should not have been run so close in time to the allergic reaction. *Id.* at 178. Dr. Smithers delineated the next steps she should take and provided treatment options for Doe. *Id.* at 178–82.

The next day, Tuesday, March 25, Ramsey spoke again with Doe about his test results. *Id.* at 177–81. In her declaration, Ramsey states she viewed this follow-up as part of her job duties at Fairchild. Ramsey Decl. ¶ 4. Ramsey then spoke with Doe's private doctor, Dr. Kolpacoff, about the results and what she had learned from the TB Hotline. Ramsey Dep. 177–81. At some point, Ramsey also reported Doe's second test results to the County Health Department. Ramsey Decl. ¶ 4.

C. Fairchild's Investigation and Termination of Ramsey

In the meantime, after Ramsey discussed the lab results with Vanover on Monday, March 24, Vanover had reported the conversation to Fairchild's HIPAA Privacy Officer, Madden, as a potential HIPAA violation. Madden Dep. 25–27; Vanover Decl. ¶ 4; Madden Decl. ¶ 5, Ex. E at 1. In a declaration, Vanover states she was uncomfortable with her conversation with Ramsey, because she was not involved in Doe's medical care, and also felt Ramsey did not need to know Doe's test results. Vanover Decl. ¶¶ 3–4.

In response to Vanover's report, Madden immediately launched an investigation. Madden Dep. 25–26; Madden Decl. ¶ 5, Ex. E at 1. Madden first interviewed Jodi Gretzke, Fairchild's Business Office Manager, to determine who had ordered the Q-Gold tests. Madden Dep. 31. Madden reviewed documents provided by Gretzke and found that Dr. Kolpacoff had ordered both Q-Gold tests. *Id.* at 31–32. Madden also determined that the tests had been billed to Doe's private medical insurance, and not to the Employee Health Department, as they would have been had Fairchild ordered the tests. *Id.* at 32; Madden Decl. ¶ 5. Madden spoke with Vanover to ask when the test results were received. Madden Dep. 33; Madden Decl. ¶ 5, Ex. E at 1. Madden then interviewed Doe to determine whether he had purposefully shared the results with Ramsey. Madden Dep. 34–35. According to Madden, Doe reported he had not shared the results

with Ramsey and had not yet received the results from his provider. Madden Dep. 33–36; Madden Decl. ¶ 5. Madden then went to Joan Munson, Fairchild's HIPAA Security Officer and information systems manager, to review Ramsey's computer access to Fairchild's laboratory information system. Madden Dep. 38; Madden Decl. Ex. E at 1. Munson reported that Ramsey had accessed her computer and viewed electronic copies of both of Doe's Q-Gold test results at approximately 8:00 a.m. that morning. Madden Dep. 38–40.

Madden prepared summaries of his investigation and his findings. Madden Decl. ¶¶ 5–6, Exs. E & F. Madden did not report Ramsey's HIPAA violation to the California Department of Public Health, because Doe's information was contained within the Hospital and had a low probability of being compromised. Madden Decl. II ¶ 6.

The next day, Tuesday, March 25, Madden met with Kathy Shelvock, Fairchild's head nurse and co-Assistant Administrator, and John Andrus, Fairchild's Chief Executive Officer, to discuss Ramsey's conduct. Madden Dep. 56–57; Madden Decl. ¶ 6. They went over Madden's findings from the investigation, decided the evidence showed Ramsey had accessed and disseminated Doe's test results without his authorization in violation of Fairchild's policies, and concluded termination was therefore warranted. Madden Dep. 56–59, 92; Madden Decl. ¶ 6, Ex. F at 1.

On Wednesday, March 26, Madden and Shelvock met with Ramsey to discuss the matter. Ramsey Dep. 156. Madden told her they had evidence she committed a HIPAA violation, and she said, "No. Someone gave me that hard copy result." *Id.* at 187. Madden then said, "Well, we have evidence that you viewed it online." *Id.* Prior to the meeting, Madden had not learned that a paper copy of the lab results was sent to Ramsey's office, and he did not at any point investigate why the paper results were sent to Ramsey's office or why there was cursive writing on the paper results routing them to Infection Control. Madden Dep. 46, 51–55. Ramsey testified at her deposition that she was not allowed to give her side of the story at the meeting, and was only able to interject that she did not know why she was there, and that it was a HIPAA violation for Vanover to have told them the details. Ramsey Dep. at 187. During the meeting,

Madden and Shelvock terminated Ramsey's employment with Fairchild. *Id.* at 158, 163. At the time she was terminated, Ramsey was sixty-nine years and eleven months old. Ramsey Decl. ¶ 1.

Approximately three months after Ramsey's termination, Fairchild replaced her with Peggy Amaral, Ramsey's former manager who had twenty-four years of experience at Fairchild. Sarmento Decl. ¶ 9. Amaral was fifty-six years old at the time of the transition. *Id.* At the time of Ramsey's termination, Fairchild employed 433 employees, sixty-seven of whom were age sixty or older (15%), with 200 age fifty or older (46%), and 288 age forty or older (67%). *Id.* ¶ 10.

D. Pendergrass and Scott Testimony

Laura Pendergrass worked as an administrator for Fairchild from November 2009 to May 2013. Pendergrass Dep. 6. In her role, Pendergrass attended administrative leadership team meetings, where the team examined the Hospital's spending. *Id.* at 19–20. The weekly administrative team meetings included Andrus, Madden, Sarmento, and Shelvock, among others. *Id.* At the meetings, the administration used a spreadsheet to compare employees' ages to their insurance premiums and use of the insurance. *Id*. at 24. Pendergrass testified that during the discussions, administrators made comments such as "we need to get rid of older people" and "we need to get people to retire." *Id*. at 19–22. While it was not always the focal point of discussion, the administration regularly expressed a desire to get rid of older employees due to the cost. *Id*. at 22–23. Pendergrass testified that Ramsey was one of the employees targeted in the meetings for her high health costs. *Id*. at 73–75, 79.

In addition to the administrative team meetings, Pendergrass attended meetings with Madden and Patricia Scott, the Business Office Manager. *Id*. at 39; Scott Dep. 25–26. Both Pendergrass and Scott testified they attended meetings with Madden in which the participants discussed the need to get rid of older employees because of their expensive health insurance. Pendergrass Dep. 39; Scott Dep. 25–26. Scott testified that one particular employee, a registration clerk in the emergency room, was targeted for retirement because she was "too old." Scott Dep. 17–27. Amaral told Scott to micromanage her and to report any error whatsoever that she made on her registrations, because she "[was] just too old and set in her ways, and she

need[ed] to retire." *Id.* at 18. Madden also made several comments that the registration clerk was too old and needed to retire, and Madden had employees direct error reports about the employee to him. *Id*. at 25–27. Scott testified that on other occasions, Madden said a couple of members of the engineering staff were "getting up there in years" and just "needed to think about retiring and making room for younger people." *Id*. at 30. He made similar comments about staff in housekeeping and the dietary department. *Id.*

III. LEGAL STANDARD

A court will grant summary judgment "if . . . there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The "threshold inquiry" is whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Rule 56 also authorizes the granting summary judgment on part of a claim or defense, known as partial summary judgment. *See* Fed. R. Civ. P. 56(a) ("A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought."). The standard that applies to a motion for partial summary judgment is the same as that which applies to a motion for summary judgment. *See State of Cal. ex rel. Cal. Dep't of Toxic Substances Control v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998) (applying summary judgment standard to motion for summary adjudication); *ARC of Cal. v. Douglas*, No. 11-02545, 2015 WL 631426, at *3 (E.D. Cal. Feb. 13, 2015).

The moving party bears the initial burden of showing the district court "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The burden then shifts to the nonmoving party, which "must establish that there is a genuine issue of material fact . . . ." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 (1986). In carrying their burdens, both parties must "cit[e] to particular parts of materials in the record . . . ; or show [] that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1); *see also Matsushita*, 475 U.S. at 586

("[The nonmoving party] must do more than simply show that there is some metaphysical doubt as to the material facts."). Moreover, "the requirement is that there be no *genuine* issue of *material* fact . . . . Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 247–48 (emphasis in original).

In deciding a motion for summary judgment, the court draws all inferences and views all evidence in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587–88; *Whitman v. Mineta*, 541 F.3d 929, 931 (9th Cir. 2008). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)).

IV. DISCUSSION

A plaintiff can defeat a motion for summary judgment on a discrimination claim either by producing direct evidence of discrimination, *see Enlow v. Salem-Keizer Yellow Cab Co.*, 389 F.3d 802, 812 (9th Cir. 2004), or by proceeding under the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Because of the similarity between state and federal employment discrimination laws, California courts look to federal decisions when interpreting FEHA and have expressly adopted the burden-shifting test of *McDonnell Douglas*. *Guz v. Bechtel Nat'l Inc.*, 24 Cal. 4th 317, 354 (2000); *see also Mamou v. Trendwest Resorts, Inc.*, 165 Cal. App. 4th 686, 713–15 (2008). Here, the court addresses plaintiff's FEHA and ADEA claims jointly, because the applicable California and federal rules are functionally equivalent for purposes of this order. The court need not decide whether plaintiff's evidence constitutes direct evidence of discrimination, because the court finds plaintiff has raised triable issues of material fact under the *McDonnell Douglas* test.

Under the *McDonnell Douglas* framework, the plaintiff first has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252–53 (1981). Second, if the plaintiff establishes a prima facie case, the burden shifts to the defendant employer "to articulate some legitimate,

nondiscriminatory reason for the employee's rejection." *Id.* (quoting *McDonnell Douglas*, 411 U.S. at 802). Third, if the defendant sustains this burden, "the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Id.* at 253.

When a defendant employer moves for summary judgment, the burden is reversed: the defendant bears the burden to "show either that (1) plaintiff [can]not establish one of the elements of [the discrimination] claim or (2) there [is] a legitimate, nondiscriminatory reason for its [actions]." *Dep't of Fair Emp't & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 745 (9th Cir. 2011) (citation omitted). "As a general matter, the plaintiff in an employment discrimination action need produce very little evidence in order to overcome an employer's motion for summary judgment." *Chuang v. Univ. of Cal. Davis, Bd. of Trustees*, 225 F.3d 1115, 1124 (9th Cir. 2000). This is because "the ultimate question is one that can only be resolved through a searching inquiry—one that is most appropriately conducted by the factfinder, upon a full record." *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996) (citations and internal quotation marks omitted).

A. Prima Facie Claim

To establish a prima facie case of discrimination, plaintiff must provide evidence that (1) she was a member of a protected class; (2) she was performing competently in the position she held; (3) she suffered an adverse employment action, such as termination; and (4) some other circumstance suggests discriminatory motive. *Guz*, 24 Cal. 4th at 355; *see also Joaquin v. City of L.A.*, 202 Cal. App. 4th 1207, 1220 (2012). The fourth factor can be established by showing that plaintiff was "replaced by substantially younger employees with equal or inferior qualifications," *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 891 (9th Cir. 1994) (citation omitted), or by showing "that others not in her protected class were treated more favorably," *Washington v. Garrett*, 10 F.3d 1421, 1434 (9th Cir. 1994). *See also Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1281 (9th Cir. 2000). Although there is no bright-line test governing whether an employee is "substantially younger" under the fourth factor, courts have found a ten-year age difference to be substantial. *Brazill v. California Northstate Coll. of*

Pharmacy, LLC, 904 F. Supp. 2d 1047, 1053 (E.D. Cal. 2012) (citing *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1209 (9th Cir. 2008), and *Hartley v. Wis. Bell, Inc.*, 124 F.3d 887, 893 (7th Cir. 1997)). The plaintiff's initial burden in establishing a prima facie case is to show that the adverse action "is more likely than not" based on a prohibited discriminatory reason. *Guz*, 24 Cal. 4th at 355.

Here, the parties dispute only whether plaintiff satisfies the second and fourth elements. The court agrees she falls within the applicable protected class and suffered an adverse employment action, and therefore confines its discussion to those elements, plaintiff's job performance and defendant's discriminatory motive.

1. Job Performance

As to the second element, defendant argues plaintiff was not performing her job satisfactorily for the same reason that allegedly prompted her termination: she violated Fairchild's privacy policy and HIPAA notice. Mem. P. &. A. at 10–11 (citing *Diaz*, 521 F.3d 1201, and *Brokaw v. Saks Fifth Ave.*, No. 92-1477, 1993 WL 87815 (N.D. Cal. Mar. 16, 1993)). In *Diaz*, the Ninth Circuit held that no reasonable juror could find a certain employee's performance was satisfactory when he openly violated a company policy over an extended period of time and continued to do so even after receiving a warning. 521 F.3d at 1208. However, the Ninth Circuit found a triable issue of fact existed as to the performance of the other employees, who "generally performed dependably" and whose deficiencies in performance "were relatively minor and infrequent." *Id.* (describing the occurrence of four incidents over the course of four years as being "relatively infrequent"). In *Brokaw*, the court found the plaintiff employee was not performing her job satisfactorily because she "admittedly . . . and knowingly violated an express, written policy regarding the discounting of merchandise." 1993 WL 87815, at *2.

Here, Ramsey worked at Fairchild as a nurse from 2000 to 2012, and as Employee Health Nurse from early 2012 until her termination in March 2014. To support its position that Ramsey was not performing her job satisfactorily, defendant relies on the single incident with patient Doe in 2014. Plaintiff disputes the incident constituted a violation of HIPAA or Fairchild's privacy policies. She has submitted evidence suggesting she was involved in Doe's

medical care in her role as Fairchild's Employee Health Nurse and used his health information solely with the goal of providing care to Doe, *see* SDF nos. 54–60, 62–69, 72; Ramsey Decl. ¶¶ 2–4; Ramsey Dep. 163–66, 171–84, which is permitted under HIPAA and Fairchild's privacy policies, *see* Madden Decl. ¶¶ 2, 3, 6, Ex. B; Madden Dep. 114; Ramsey Dep. 104–05; Sarmento Decl. ¶ 3, Exs. A & B. In addition, plaintiff has submitted deposition testimony of a designated expert witness, Christine Jones, concluding that Ramsey's conduct did not violate HIPAA.[3] SDF nos. 93 & 94; Jones Dep. 90, 92–93, 103–04, 119, 122–24, 127–28. It is not clear as a matter of law that Ramsey's conduct violated HIPAA or Fairchild's privacy policies, or otherwise rendered her job performance unsatisfactory. Accordingly, the incident with patient Doe in 2014 is distinguishable from the open and extended policy violations of the employee in *Diaz*, and the admitted, knowing policy violation of the plaintiff employee in *Brokaw*.

Moreover, Ramsey has submitted other evidence showing she was performing her job well at the time of her termination. In Ramsey's annual evaluation in late 2014, she received the highest possible score in all categories related to patient privacy rights and HIPAA compliance, received an overall score in the second highest "commendable range," and received comments that she "continue[d] to perform the Employee Health Nurse role extremely well and ha[d] been able to complete employee test requirements in a timely manner." Howell Dep. 32. Plaintiff has raised a triable fact as to whether she was performing her job satisfactorily.

[3] Defendant objects to this evidence as improper expert testimony under Federal Rule of Evidence 702, because Jones has not served as a HIPAA compliance or security officer and made certain factual mistakes in her notes and testimony, such as incorrectly referring to "HIPAA" as "HIPPA" or the "Health Information Privacy Act." *See* Reply at 8–9, ECF No. 37 (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999)); ECF No. 36 at 35–38. Plaintiff's Designation of Jones as an Expert Witness states Jones has been a healthcare professional for over thirty years, has served as the CEO of a hospital for the past fifteen years, has participated in annual HIPAA compliance trainings, and has provided HIPAA services to healthcare providers. ECF No. 16 at 3; *see also* ECF No. 34-1 at 3. Because it appears Jones' testimony may be admissible at trial, and it is being offered by the non-moving party, the court overrules defendant's objection for purposes of its motion for summary judgment without prejudice to renewal of the objection at trial.

2. Discriminatory Motive

As to the fourth element, defendant argues plaintiff cannot cite evidence of any indicia of age discrimination, for example, that her replacement was substantially younger and had equal or lesser qualifications. Mem. P. &. A. at 11–14. Defendant notes plaintiff's replacement, Amaral, had a combined twenty-four years of management experience at Fairchild and was not placed in the position until almost three months after Ramsey's termination. *Id.* at 11. The court agrees that plaintiff has not submitted evidence showing she was replaced by a substantially younger employee with equal or inferior qualifications. Although Amaral is more than thirteen years younger than Ramsey, which constitutes a substantial age difference, the only evidence plaintiff has submitted to establish Amaral was less qualified is Ramsey's own unsupported opinion. *See* SDF no. 33 (citing Ramsey Decl. ¶ 6).

However, plaintiff has produced other evidence of defendant's discriminatory motive. She has submitted testimony by two former Fairchild administrators, Pendergrass and Scott, that they attended meetings in which the Hospital's administration discussed the need to get rid of older employees. Pendergrass Dep. 19–23, 39; Scott Dep. 17–27. Pendergrass testified that at the weekly administrative leadership team meetings, administration representatives regularly expressed a desire to get rid of older employees due to the cost. Pendergrass Dep. 22–23. Pendergrass further testified that the Hospital targeted Ramsey. *Id*. at 73–75, 79. Scott was directed by Amaral and Madden to micromanage one particular employee because that employee was "too old" and needed to retire. Scott Dep. 17–27. This evidence more than satisfies the "minimal" degree of proof necessary to "give[] rise to an inference of unlawful discrimination." *Wallis*, 26 F.3d at 889 (citations omitted).

B. Non-Discriminatory Reason

Because plaintiff has established a prima facie case of age discrimination for purposes of summary judgment, the burden shifts to the employer to rebut the presumption with admissible evidence of a "legitimate, non-discriminatory reason" for the action. *Texas Dep't of Cmty. Affairs*, 450 U.S. at 253; *Guz*, 24 Cal. 4th at 355–56. Again, Fairchild argues it terminated plaintiff because it believed she violated its HIPAA and privacy policies. This reason is unrelated

to prohibited bias and, if true, would constitute a legitimate, non-discriminatory reason for termination. *Cf. Dumas v. New United Motor Mfg., Inc.*, 305 F. App'x 445, 448 (9th Cir. 2008) (unpublished) (holding violation of company policy requiring written permission for extended leaves of absence constitutes legitimate, non-discriminatory reason for termination); *Schaldach v. Dignity Health*, No. 12-02492, 2015 WL 5896023, at *4 (E.D. Cal. Oct. 6, 2015) (holding plaintiff's repeated violations of company's HIPAA and network usage policies, if true, would preclude a finding of discrimination). Plaintiff acknowledges defendant's proffered reason is, on its face, a non-discriminatory reason. Opp'n at 16.

C. Pretext

Because defendant has provided a legitimate, non-discriminatory reason for the termination, the burden shifts back to plaintiff to show that explanation is pretext. *Texas Dep't*, 450 U.S. at 253; *Guz*, 24 Cal. 4th at 356. Pretext can be shown "(1) directly, by showing that unlawful discrimination more likely than not motivated the employer; or (2) indirectly, by showing that the employer's proffered explanation is unworthy of credence because it is internally inconsistent or otherwise not believable." *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1112–13 (9th Cir. 2011) (citing *Chuang*, 225 F.3d at 1127).

To argue pretext with reliance on indirect evidence, plaintiff "must produce 'specific' and 'substantial' facts to create a triable issue . . . ." *Earl*, 658 F.3d at 1113 (quoting *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998)). *But see Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1029–31 (9th Cir. 2006) (questioning the continued viability of *Godwin* after *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003)). "An employee in this situation can not [sic] simply show the employer's decision was wrong, mistaken or unwise." *Morgan v. Regents of the Univ. of Cal.*, 88 Cal. App. 4th 52, 75 (2000) (citation and internal quotation marks omitted). "Rather, the employee must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence . . . ." *Id.* (citation, emphasis, and internal quotation marks omitted). In contrast, if plaintiff offers direct evidence of discriminatory motive, she can show there is a triable issue as to

the actual motivation of Fairchild, even if the evidence is "very little." *Godwin*, 150 F.3d at 1221 (citation omitted). "Direct evidence is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption." *Id.* (citation omitted) (alteration in original).

Here, plaintiff has raised triable issues as to pretext both through direct and indirect evidence. Much of the evidence discussed above with respect to plaintiff's prima facie case also supports a finding of pretext. The deposition testimony of Scott and Pendergrass, Pendergrass Dep. 19–23, 39; Scott Dep. 17–27, if believed, directly proves that at least Madden exhibited discriminatory animus in connection with employment decisionmaking. *See Brazill v. Cal. Northstate Coll. of Pharmacy, LLC*, 949 F. Supp. 2d 1011, 1022–23 (E.D. Cal. 2013) (finding similar comments, although not directly tied to the plaintiff's termination, "constitute[d] unambiguous evidence of discriminatory animus connected to employment decisionmaking," and were therefore sufficient to create a triable issue as to pretext). Significantly, Madden conducted the investigation into Ramsey's conduct and was involved in the decision to terminate her. *See* Madden Decl. ¶¶ 5–6, Exs. E & F; Madden Dep. 56–59, 92.

In addition, plaintiff has produced facts that undermine Fairchild's proffered reason for terminating Ramsey. As discussed above, Ramsey has offered evidence that her conduct did not violate HIPAA or Fairchild's privacy policies. *See* SDF nos. 54–60, 62–69, 72; Ramsey Decl. ¶¶ 2–4; Ramsey Dep. 163–66, 171–84. Madden acknowledged that Ramsey, in her position as Employee Health Nurse, had the authority to access employee health records if they were relevant to her work, Madden Dep. 114, but he never asked her why she looked at Doe's test results, Ramsey Dep. 187–88. In fact, Madden did not speak with Ramsey at all about the incident before the administration decided to terminate her employment, even though Madden testified he "always" talks to the subject employee before preparing a write up. Madden Dep. 64–66, 132. Madden's two-day investigation consisted solely of interviewing Fairchild's Business Office Manager, speaking with patient Doe, and reviewing Ramsey's computer access. *Id.* at 31–38. Moreover, Madden never investigated why the lab results were sent to Ramsey's office or why there was cursive writing on the lab results routing the test results to Infection Control. *Id.* at

51–55. This evidence, viewed in the light most favorable to Ramsey, raises triable disputes as to whether Fairchild's proffered HIPAA justification is pretext for age discrimination.

The granting of summary judgment in *Schaldach*, 2015 WL 5896023, does not alter the court's conclusion. In *Schaldach*, the district court found the plaintiff employee could not survive summary judgment solely by contesting whether her conduct in fact violated HIPAA, because she was terminated for violating defendant's policies, not HIPAA, and because the relevant question was whether the employer honestly believed the employee violated the policies, not whether the employee in fact violated the policies. *Id.* at *4. *Schaldach* is distinguishable from this case because Ramsey was told she was terminated for violating HIPAA, Ramsey Dep. 187–88, and unlike the employee in *Schaldach*, Ramsey has submitted other evidence of pretext. The evidence that her conduct did not in fact violate HIPAA, together with the evidence of the administration's discriminatory animus and the defects in Madden's investigation, raises a genuine dispute as to whether Fairchild honestly believed Ramsey violated HIPAA, or whether Fairchild's proffered reason was pretext.

Neither is the court persuaded by defendant's citation to *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). In *Hazen*, the Supreme Court held that "an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service." *Id.* at 613. The Court in *Hazen* emphasized the narrow scope of its holding and left open the possibility that pension status may in some cases be a proxy for age, that a termination decision may be motivated both by the employee's age and pension status, and that the outcome may differ where the vesting of pension benefits is determined by the employee's age, rather than the employee's years of service. *Id.* *Hazen* is not applicable here, where plaintiff has submitted evidence of discrimination based on employees' age, such as statements by administrators that certain employees are "too old" and needed to leave to make room for younger people, in addition to evidence of discrimination based on employees' health care costs. *See, e.g.*, Scott Dep. 30.

In sum, Ramsey has produced sufficient evidence to establish a prima facie case of age discrimination and has raised a triable dispute as to whether Fairchild's proffered HIPAA justification for terminating Ramsey was pretext.

V. CONCLUSION

For the foregoing reasons, the court DENIES defendant's motion for summary judgment or, alternatively, partial summary judgment.

Plaintiff is hereby ORDERED to show cause in the parties' forthcoming joint pretrial statement why the court should not dismiss the "Doe" defendants.

IT IS SO ORDERED.

DATED: June 8, 2016.

UNITED STATES DISTRICT JUDGE