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# [***Barnes v. Jfk Mem. Hosp., Inc.***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RKP-XYN1-F81W-2005-00000-00&context=)

United States District Court for the Central District of California

August 28, 2017, Decided; August 28, 2017, Filed

EDCV 17-681 JGB (SPx)

**Reporter**

2017 U.S. Dist. LEXIS 217140 \*

H. Christopher Barnes v. JFK Memorial Hospital, Inc.

**Prior History:** [*Barnes v. JFK Mem. Hosp., Inc., 2017 U.S. Dist. LEXIS 217138 (C.D. Cal., Aug. 28, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RKP-XYN1-F81W-200B-00000-00&context=)

**Core Terms**

alleges, harassment, on-call, patients, competitor, infer, complaints, services, retaliation, bylaws, plausibly, days, assignments, investigate, privileges, fails, hostile work environment, relevant market, argues, cause of action, providers, adverse employment action, surgical services, rule of reason, deprivation, Hospital's, horizontal, uninsured, patient safety, state action

**Counsel:** **[\*1]**For H. Christopher Barnes, MD, an individual, Plaintiff: Donald Aquinas Lancaster, Jr, Lancaster Law Group, Alameda, CA.

For JFK Memorial Hospital, Inc., Defendant: John R Tate, Terri D Keville, LEAD ATTORNEYS, Karen A Henry, Davis Wright Tremaine LLP, Los Angeles, CA.

**Judges:** JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE.

**Opinion by:** JESUS G. BERNAL

**Opinion**

CIVIL MINUTES—GENERAL

**Proceedings: Order: GRANTING in part and DENYING in part Defendant's Motion to Dismiss (Dkt. No. 17) (IN CHAMBERS)**

Before the Court is Defendant's Motion to Dismiss. (Dkt. No. 17.) After considering all the papers timely filed in support of, and in opposition to the Motion, and the parties' arguments at the August 28, 2017 hearing, the Court GRANTS in part and DENIES in part Defendant's Motion to Dismiss.

**I. BACKGROUND**

**A. Procedural History**

On April 10, 2017, Plaintiff filed a complaint against JFK Memorial Hospital, Inc. ("JFK" or "Defendant") and Does 1 through 10. (Dkt. No. 10.) On June 8, 2017, Plaintiff filed a First Amended Complaint ("FAC"), attaching forty-six exhibits. (Dkt. No. 15; Dks. Nos. 15-1 through 15-52.) Plaintiff alleges the following claims against JFK in the FAC: (1) violation of [*California Health and Safety Code section 1278.5*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NTY-35P2-8T6X-70PH-00000-00&context=); (2) hostile work environment under the California**[\*2]** Fair Employment and Housing Act ("FEHA"), [*Cal. Gov. Code § 12940(j)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NW6-RN52-D6RV-H1NH-00000-00&context=); (3) age discrimination under FEHA, (4) harassment by inadequate investigation under FEHA; (5) race discrimination under FEHA, (6) violation of the Sherman Act, *15 U.S.C. § 1*, (7) violation of *42 U.S.C. section 1981* ("*Section 1981*"), and (8) violation of *42 U.S.C. section 1983* ("*Section 1983*").

Defendant filed a Motion to Dismiss on June 29, 2017, ("Motion," Dkt. No. 17), attaching the Declaration of Karen A. Henry (Henry Decl., Dkt. No. 17-1), and four accompanying exhibits. (Exs. A through D, Dkt. Nos. 17-2 through 17-6.) Plaintiff opposed Defendant's Motion on July 25, 2017. ("Opposition," Dkt. No. 21.) On August 7, 2017, Defendant filed its Reply. ("Reply," Dkt. No. 22.)

**B. Factual Allegations**

Plaintiff, alleges that he began working as a surgeon at JFK, a 145-bed acute-care hospital, in 2004. (FAC ¶¶ 4, 12, 60.) In 2011, JFK, through its Medical Staff Executive Committee ("MEC"), allegedly required Plaintiff to sign a Professional Services Agreement ("Agreement") with Emergency Associates Corporation ("EA"), a California Professional Medical Corporation. (Id. at ¶¶ 9, 12.) The EA Agreement provides emergency on-call physicians seven days a week, twenty-four hours a day, to provide services for unassigned and uninsured patients**[\*3]** admitted to JFK. (Id. at ¶ 13.) The assignments are governed by a schedule allegedly prepared by JFK ("Call List"). (Id.) Plaintiff alleges that because JFK has the sole right, responsibility and obligation to select physicians to work under the Call List, "the distinction between EA Health and JFK is a legal fiction." (Id.)

Plaintiff alleges he was forced to enter into the Agreement by Dan Bowers in October 2011. (Id. at ¶ 14.) When Plaintiff allegedly refused to enter into the Agreement, Mr. Bowers allegedly threatened to not compensate him if he did not sign. (Id.) Plaintiff, therefore, maintains that he entered the Agreement under duress. (Id.) In fact, Plaintiff claims to have indicated on the Agreement that he was signing under protest. (Id. at ¶ 15.) Mr. Bowers allegedly threatened Plaintiff again, this time with a revocation of privileges, which culminated in Plaintiff entering a new EA Professional Services Agreement omitting the written protest language. (Id.)

Plaintiff alleges that his on-call days were substantially reduced for a number of impermissible reasons. Specifically, Plaintiff alleges that he was assigned an average of ten on-call days per month in 2014, fourteen**[\*4]** on-call days per month in 2015, but only seven on-call days per month in 2016, which is after he lodged a number of complaints related to patient safety. (Id. at ¶¶ 16, 18, 30, 44.) In December of 2016, Plaintiff's on-call days per month were allegedly reduced to five. (Id. at ¶ 56.) As a result of JFK's reduction of Plaintiff's on-call assignments, Plaintiff's on-call pay has decreased. (Id. at ¶ 58.) The alleged reasons for the reduction of Plaintiff's on-call assignments forms the basis for Plaintiff's claims.

The FAC alleges that JFK through the MEC, informed third parties, such as Kaiser Permanente and the California Department of Corrections to refer all patients to a physicians' group managed by Dr. Johnson (the "Johnson Group"). (Id. at ¶ 59.) Plaintiff alleges that this practice of referring patients to the Johnson Group, and thus, to physicians who are less experienced and who do not belong to a protected class—instead of doctors who are over sixty, Jewish, Asian-American, female, or African American—constitutes purposeful discrimination. (Id. at ¶ 60.)

In addition to the alleged race- and age-based reasons for Plaintiff's dissimilar treatment, Plaintiff alleges that JFK reduced**[\*5]** his on-call assignments in retaliation for complaints he lodged under [*California Health and Safety Code section 1278.5*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NTY-35P2-8T6X-70PH-00000-00&context=). (Id. at ¶ 64.) Plaintiff allegedly lodged a series of complaints in 2015, relating to "surgical hygiene, the lack of proper surgical equipment, biased treatment favoring individuals deemed very important by virtue of their race, financial standing and community stature[,]" among others. (Id. at ¶ 65); (see, e.g., id. at ¶ 66)(referring to a January 28, 2015 complaint regarding improper use of surgical masks by hospital staff); (id. at ¶ 67)(referring to a February 23, 2015 complaint regarding lack of proper equipment for surgeries); (id. at ¶ 68)(referring to a complaint regarding preferential treatment given to certain patients); (id. at ¶ 69)(referring to a complaint regarding unavailability of operating room and anesthesiologist). On July 22, 2015, Plaintiff allegedly sent correspondence to JFK stating that the medical staff subjected him to retaliation, a hostile work environment, and racial discrimination. (Id. at ¶ 70.) In 2016, Plaintiff alleges he lodged more patient safety complaints, regarding "improper scheduling, inadequate skilled nursing, noxious odors and a hostile work environment." (Id. at ¶ 71);(**[\*6]**see, e.g., id. at ¶¶ 72-80)(referring to complaints spanning August to November 2016 regarding improper scheduling of surgeries, incompetent nurses and inadequate nursing services, noxious odors, misdiagnoses by radiologists, cleanliness, improper communication to patients, and among others, failing to follow post-operative orders)

Furthermore, the FAC alleges that JFK, through the MEC, retaliated against Plaintiff in a multitude of ways, including, for example, attempting to initiate adverse actions against him through "sham investigatory proceedings and findings allegedly warranting reprimand." (Id. at ¶ 81.) On April 23, 2016, Plaintiff, through his counsel, allegedly responded "to a claimed yet unproduced, Letter of Reprimand dated April 2015, supposedly sent to [Plaintiff]." (Id. at ¶ 82.) Plaintiff was allegedly requested to voluntarily meet with the MEC. (Id.) When Plaintiff declined because, in his view, this meeting violated JFK's bylaws, a representative of the MEC stated that Plaintiff's purported "disruptive behavior" warranted Plaintiff agreeing to participate in a Progressive Discipline Program. (Id. at ¶¶ 84, 95.) Plaintiff alleges that this request was made without any**[\*7]** investigation, it was disciplinary in nature, and constituted harassment. (Id. at ¶ 83, 85.)

Plaintiff, through his counsel, sent a letter addressing the MEC's refusal to identify JFK's committee chairs, the application of [*California Evidence Code section 1157*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NXY-2DT2-D6RV-H4YN-00000-00&context=), the ongoing harassment, and the MEC's failure to provide Plaintiff an opportunity to respond to the "unverified complaints." (Id. at ¶ 86.) Plaintiff alleges, moreover, that on July 6, 2016, MEC hired EXTII, an outside company, to interview Plaintiff regarding his conduct under the pretense of investigating Plaintiff's patient safety complaints. (Id. at ¶ 88.) In fact, throughout this process, Plaintiff alleges that neither JFK nor the MEC, ever indicated whether the proceeding was instigated under JFK's bylaws, what exactly JFK was investigating or any other information regarding the alleged complaints. (Id.) On those bases, Plaintiff allegedly declined EXTII's attempts to interview him until JFK and the MEC confirmed whether this investigation complied with the Bylaws or Business and Professions Code section 809. (Id. at ¶ 90.)

Plaintiff, through his counsel, sent repeated letters to JFK asking that the harassment cease and desist. (Id. at ¶ 99.) Even so, the JFK Quality**[\*8]** Management Department, "at the direction of JFK and its MEC," issued a Patient Care Evaluation and two letters reprimanding Plaintiff. (Id. at ¶¶ 92, 93.) On September 22, 2016, Plaintiff alleges JFK issued another Peer Review Rating in violation of its Bylaws and Business and Professions Code section 809. (Id. at ¶ 94.) Plaintiff alleges that JFK never investigated his patient safety complaints after repeated requests to do so and instead, reprimanded him. (Id. at ¶ 95.) Still, Plaintiff alleges JFK approved his reappointment to the Active Staff with privileges through September 14, 2018. (Id. at ¶ 96.)

On February 10, 2017, Plaintiff alleges JFK sent a letter informing Plaintiff that he would not be invited to an interview of the corrective action investigatory committee, but that this committee concluded that Plaintiff engaged in disruptive behavior. (Id. at ¶ 100.) Plaintiff alleges that JFK then attempted to force him to participate in the University of California San Diego PACE Program ("PACE") and sign a Progressive Discipline Procedures Form. (Id. at ¶ 100.) Thereafter, JFK sent a series of letters regarding what Plaintiff alleges are unsubstantiated complaints. (Id. at ¶ 102.) In response,**[\*9]** Plaintiff repeated the refrain that JFK was violating its own bylaws and that its conduct constituted harassment. (Id.) Finally, on March 20, 2017, JFK allegedly sent a letter to Plaintiff stating that his failure to voluntarily participate in the PACE program and sign a Progressive Discipline Agreement, would result in his termination. (Id. at ¶ 103.) Plaintiff continued to file patient safety complaints through March 27, 2017. (Id. at ¶ 104.) On April 4, 2017, Plaintiff exhausted his administrative remedies by obtaining a right to sue letter from the California Department of Fair Employment and Housing. (Id. at ¶ 105.)

**II. LEGAL STANDARD**

[*Federal Rule of Civil Procedure 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) allows a party to bring a motion to dismiss for failure to state a claim upon which relief can be granted. [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) is read in conjunction with [*Rule 8(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=), which requires only a short and plain statement of the claim showing that the pleader is entitled to relief. [*Fed. R. Civ. P. 8(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=); [*Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-J5D0-003B-S1MW-00000-00&context=) (holding that the Federal Rules require that a plaintiff provide "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests") (quoting [*Fed. R. Civ. P. 8(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=)); [*Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=). When evaluating a [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion, a court must accept all material allegations**[\*10]** in the complaint—as well as any reasonable inferences to be drawn from them—as true and construe them in the light most favorable to the non-moving party. See [*Doe v. United States, 419 F.3d 1058, 1062 (9th Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4GX1-WDP0-0038-X2D6-00000-00&context=); [*ARC Ecology v. U.S. Dep't of Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4GDC-R9S0-0038-X2R0-00000-00&context=); [*Moyo v. Gomez, 32 F.3d 1382, 1384 (9th Cir. 1994)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3SM0-003B-P3NG-00000-00&context=).

"While a complaint attacked by a [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." [*Twombly, 550 U.S. at 555*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=) (citations omitted). Rather, the allegations in the complaint "must be enough to raise a right to relief above the speculative level." Id.

Surviving a motion to dismiss requires a plaintiff to allege "enough facts to state a claim to relief that is plausible on its face." [*Twombly, 550 U.S. at 570*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=); [*Ashcroft v. Iqbal, 556 U.S. 662, 697, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" [*Iqbal, 556 U.S. at 678*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=) (quoting [*Twombly, 550 U.S. at 556*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=)). The Ninth Circuit has clarified that (1) a complaint must "contain sufficient allegations of underlying facts**[\*11]** to give fair notice and to enable the opposing party to defend itself effectively," and (2) "the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." [*Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:53D4-3NY1-JCNJ-417W-00000-00&context=). In the ***antitrust*** context, "a court must determine whether an ***antitrust*** claim is 'plausible' in light of basic economic principles." [*William O. Gilley Enters., Inc v. Atl. Richfield Co., 588 F.3d 659, 662 (9th Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7X76-9P80-YB0V-P080-00000-00&context=) (citing [*Twombly, 550 U.S. at 556*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=)).

Although the scope of review on a [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion to dismiss is limited to the contents of the complaint, the Court may consider certain materials, such as documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice. [*United States v. Ritchie, 342 F.3d 903, 907-08 (9th Cir. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:49CV-VR00-0038-X0H8-00000-00&context=). Under the incorporation by reference doctrine, the Court may consider documents not attached to the pleading if: (1) those documents are referenced extensively in the complaint or form the basis of the plaintiff's claim; and (2) if no party questions their authenticity. [*Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4F5V-FHR0-0038-X300-00000-00&context=).

**III. DISCUSSION**

**A. Federal Claims**

**1. Sherman Act Claim**

Defendant argues that the FAC fails to allege sufficient facts to support a Sherman Act claim, and therefore, the Sixth Cause of Action should**[\*12]** be dismissed with prejudice. (Mot. at 5.) Specifically, Defendant argues that: (1) the allegations indicate that the Hospital was acting alone in selecting the physicians to work on the on-call panel, which fails to allege any contract, combination or conspiracy, (2) the allegation that the Hospital "informed" Kaiser and others to refer patients to the Johnson Group fails to satisfy the statutory requirements of mutual accord (id. at 7-8), (3) since Plaintiff fails to allege that he is unable to practice medicine or even denied the ability to participate on the Hospital's on-call panel, and the Hospital has no authority to either require patients to retain Plaintiff or prevent him from utilizing his privileges at other healthcare facilities in the service area, he cannot plausibly allege a "restraint of trade," (id. at 8), and (4) Plaintiff cannot allege an ***antitrust*** injury because he does not allege a *per se* violation or satisfied the rule of reason test. (Id. at 9.)

In addition, Defendant maintains that the FAC fails to include allegations that satisfy the "rule of reason" test because: (a) Plaintiff does not define the service market with sufficient specificity, and (b) he fails to indicate the percentage**[\*13]** of uninsured or unassigned patients that are typically obtained through referrals or on-call days (or how that compares with the total number of surgical patients in the entire geographic market). (Id. at 9-10). Defendant further asserts that Plaintiff cannot show an ***antitrust*** injury because "[i]t is not an injury to *competition* to reduce one surgeon's on-call days when participation in the Hospital's on-call program is open to all physicians with staff privileges." (Id. at 10.) To the contrary, Defendant maintains that redistributing on-call assignments to a larger group of physicians "does not injure competition," because reducing the number of a physician's on-call days in one hospital does not affect a physician's on-call days at other hospitals. (Id.)

Plaintiff counters that "[b]y seeking to prevent future patients from being referred to [Plaintiff] by third-party providers and referring JFK patients to the Johnson Group, JFK had a[n] agreement with the Johnson Group to materially diminish [Plaintiff's] ability to practice his profession in the Coachella Valley." (Opp'n at 5.) Relying on [*Carter v. Variflex, Inc., 101 F. Supp. 2d 1261 (C.D. Cal. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YXH-FCR0-0038-Y37Y-00000-00&context=), Plaintiff maintains that application of the *per se* rule is proper because he alleges that JFK discouraged other**[\*14]** providers from using his services, which decreased his on-call hours. (Opp'n at 6.) Plaintiff argues that in any event, the allegations are sufficient under the Rule of Reason because the practical effect of JFK's actions—"the unfair reduction of surgical services and the lack of competition"—allows for the plausible inference that the market has been adversely affected. (Id. at 7.)

**a. Legal Standard**

*Section 1* of the Sherman Act, *15 U.S.C. § 1*, prohibits "[e]very contract, combination ... or conspiracy, in restraint of trade or commerce among the several States." [*Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 996 (9th Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XGN-9VF0-YB0V-P06T-00000-00&context=) A claim under *section 1* of the Sherman Act, therefore, requires proof of three elements: that the defendant (1) engaged in a conspiracy (2) that unreasonably restrained trade under either a per se or rule of reason analysis (3) in a particular market. [*Bell Atl. Corp. v. Twombly, 550 U.S. 544, 548, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=).

Courts assess whether concerted action restrains trade unreasonably by use of the "rule of reason," weighing all the circumstances of the case, unless the contract, combination or conspiracy falls within one of the categories of per se unreasonableness—conduct so pernicious and devoid of redeeming virtue that it is condemned without inquiry into the effect on the market in the particular case at hand. See [*Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-F6K0-003B-44B6-00000-00&context=). Determining**[\*15]** which standard applies is far from clear. See [*Northwest Wholesale Stationers, Inc. v. Pacific Stationary and Printing Co., 472 U.S. 284, 294, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B5B0-0039-N4PD-00000-00&context=); [*American Ad Management, Inc. v. GTE Corp., 92 F.3d 781, 784 (9th Cir. 199)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1J70-006F-M2VG-00000-00&context=). Market allocation agreements among competitors are per se illegal. [*Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 49-50, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4B90-003B-409V-00000-00&context=). Exclusive dealing arrangements,[[1]](#footnote-0)1 on the other hand, are not generally analyzed under the per se approach. "[T]he per se approach can only be applied to an agreement which 'facially appears to be one that would always or almost always tend to restrict competition and decrease output.'" [*American Ad Management, Inc., 92 F.3d at 787*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1J70-006F-M2VG-00000-00&context=).

**b. Analysis**

Plaintiff adequately alleges a "contract, combination ... or conspiracy." See [*Pinhas v. Summit Health, Ltd., 894 F.2d 1024, 1033 (9th Cir. 1989)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B100-003B-54NP-00000-00&context=)("Any action taken by a medical staff satisfies the 'contract, combination or conspiracy' requirement."). Plaintiff alleges that JFK, conspired with its MEC and members of its medical staff to enter into an agreement with Plaintiff's competitor, the Johnson Group, to allocate assignments for on-call services to unassigned and uninsured patients to Plaintiff's competitor. [*Oltz v. St. Peter's Community Hosp., 861 F.2d 1440, 1449-50 (9th Cir. 1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XHP0-001B-K2HM-00000-00&context=)(recognizing that a hospital and member of its medical staff may under certain circumstances constitute separate entities for purposes of adequately pleading a *section 1* conspiracy).

Plaintiff alleges that the relevant market is "general surgical services for the service area of JFK Memorial Hospital." (FAC ¶ 155.) This is sufficient to allege**[\*16]** a relevant market at the pleading stage. [*Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1044 (9th Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4RNG-82F0-TXFX-D2PV-00000-00&context=). A product market comprises "products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." [*United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 406, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-J8H0-003B-S4P3-00000-00&context=); see also [*Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H870-003B-S01T-00000-00&context=) ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."). Pursuant to these guidelines, "the relevant market must include 'the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business.'" [*Newcal Indus., 513 F.3d at 1045*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4RNG-82F0-TXFX-D2PV-00000-00&context=). That said, there is no requirement that these elements of the ***antitrust*** claim be pled with specificity. See [*Cost Management Services, Inc. v. Washington Natural Gas Co., 99 F.3d 937, 950 (9th Cir.1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-YXX0-006F-M02H-00000-00&context=). The definition of "relevant market" is typically a factual rather than a legal inquiry. Id. ("And since the validity of the "relevant market" is typically a factual element rather than a legal element, alleged markets may survive scrutiny under [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) subject to factual testing by summary judgment or trial."). An ***antitrust*** complaint therefore survives a [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion unless it is apparent from the face of the complaint that the alleged market suffers a fatal legal defect. [*Newcal Indus., Inc., 513 F.3d at 1045*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4RNG-82F0-TXFX-D2PV-00000-00&context=). In other words,**[\*17]** a complaint will only be dismissed under [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) where "the complaint's 'relevant market' definition is facially unsustainable." Id.

Plaintiff alleges that the Johnson Group was his direct competitor. (Id.) The FAC allows for the Court to plausibly infer that Plaintiff's and the Johnson Group's services are readily interchangeable: they both offer general surgical services to the same consumers, and they both compete for on-call assignments to provide services to uninsured and unassigned patients residing in the Coachella Valley area.

Based on the alleged agreement, however, the Court finds the per se approach improper. The third requirement to state a Sherman Act Claim, however, is lacking. An exclusive dealing arrangement only violates *Section 1*, if its effect is to "foreclose competition in a substantial share of the line of commerce affected." [*Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP, 592 F.3d 991, 998 (9th Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XGN-9VF0-YB0V-P06T-00000-00&context=). While market allocation agreements among competitors are per se illegal, [*Palmer, 498 U.S. at 49-50*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4B90-003B-409V-00000-00&context=), and if properly alleged, do not require Plaintiff to satisfy the rule of reason, Plaintiff does not allege an agreement to allocate the market between competitors. Here, we do not have an agreement between more than one competitor at the same level. JFK is not a competitor of the**[\*18]** Johnson Group so their alleged conspiracy does not allege a horizontal agreement, which may warrant the per se analysis—rather, the allegations allege conduct more akin to an agreement between a supplier and a distributor. This would constitute a vertical restraint of trade, which is not per se illegal under *section 1* of the Sherman Act unless it includes some agreement on price or price levels. [*Sharp Electronics Corp., 485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-F6K0-003B-44B6-00000-00&context=)(describing that restraint is not horizontal because it has horizontal effects, but rather because it is the product of a horizontal agreement).

Further, even if Plaintiff's allegations allowed for the inference of a group boycott against Plaintiff—because of the alleged involvement of third-parties at different levels of the distribution chain—this would not excuse Plaintiff from satisfying the rule of reason. Contra [*Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HYS0-003B-S3FH-00000-00&context=)(finding per se approach proper where plaintiff alleged a boycott arranged by a single competitor of the victim retailer, but carried out by a "wide combination" consisting of manufacturers and distributors, as well as the competing retailer, led to per se liability). Group boycotts are only per se illegal if they involve "joint efforts by a firm or firms to disadvantage competitors by**[\*19]** either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." [*Northwest Stationers, 472 U.S. at 294*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B5B0-0039-N4PD-00000-00&context=). The FAC does not allege that Plaintiff *needs* to work at JFK to practice his profession or to service uninsured or unassigned patients. Further, involvement by one competitor of the victim does not alone make a horizontal restraint; there must be an agreement between more than one competitor at the same level to make a horizontal restraint. See [*NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 223, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3V9V-W320-004B-Y00G-00000-00&context=); [*Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 730 n. 4, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-F6K0-003B-44B6-00000-00&context=)(emphasizing that "a restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement."). Here, there are no allegations of an agreement between competitors at the same level. While Plaintiff alleges that JFK encouraged other hospitals to refer patients to the Johnson Group, this does not allege an actual agreement. Thus, the allegations fall short of alleging the type of restraint or agreement that may qualify for the per se analysis. The Court will therefore apply the rule of reason.[[2]](#footnote-1)2 In other words, merely alleging an intent to restrain trade is not sufficient—Plaintiff must allege an actual adverse effect on competition and JFK's power in**[\*20]** the relevant market. [*Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 734-35 (9th Cir. 1987)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6V20-001B-K26X-00000-00&context=).

As to adverse effect, Plaintiff alleges that Defendant's conduct harmed competition "insofar as patients in need of general surgical services and emergency surgical services were relegated to receiving said services from only one surgical group. . . to the detriment of patients of JFK Memorial Hospital, Inc." (Id. at ¶ 156.) While the market's loss of one competitor is not sufficient to demonstrate an impact on competition, [*829 F.2d 729, 734-35*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6V20-001B-K26X-00000-00&context=), in Pinhas, 894 F.2d, the Ninth Circuit found the revocation of a doctor's hospital privilege sufficient to allege an ***antitrust*** injury, reasoning that "the preclusion of [plaintiff] from practicing could conceivably injure competition by allowing other similar doctors to charge higher prices for their services." [*Id. at 1032*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B100-003B-54NP-00000-00&context=) ("[Plaintiff] may show that his preclusion otherwise substantially reduced total competition from the market."). Thus, at the pleading stage, Plaintiff's allegations could plausibly allege that JFK's practice of diverting on-call assignments to one group of doctors limits the pool of surgeons, and thereby, reduces the options available to unassigned and uninsured patients. Taking as true Plaintiff's allegation that his co-workers**[\*21]** at JFK gave preferential treatment to patients based on their race and social status, removing general surgeons who provide their services in an even-handed manner could injure competition to the detriment of all consumers. That said, the Court finds the allegations in the FAC insufficient to infer that JFK has sufficient market power in the relevant market.

As discussed, intent to restrain trade is not enough to state a *Section 1* claim—there must be the potential for an adverse effect on the market, which requires a showing that JFK has sufficient market power within the relevant market. Encouraging third-party providers to refer uninsured and unassigned patients to the Johnson Group does not allege that third-party providers were contractually obligated to refer such patients to the Johnson Group. Nothing in the FAC allows for the plausible inference that these providers could not just choose to forego JFK's recommendation. See [*Allied Orthopedic Appliances Inc., 592 F.3d at 999*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XGN-9VF0-YB0V-P06T-00000-00&context=) ("The 'easy terminability' of an exclusive dealing arrangement 'negate[s] substantially [its] potential to foreclose competition."). From the FAC alone, the Court cannot ascertain JFK's market share to plausibly infer it has sufficient market power in the provision**[\*22]** of general surgical services in the Coachella Valley for purposes of finding an adverse effect on that market. [*Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1391 (9th Cir. 1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XHN0-003B-G393-00000-00&context=). Further, if Plaintiff "can reach the ultimate consumers of [his services] by employing existing or potential alternative channels of distribution, it is unclear whether such restrictions foreclose from competition *any* part of the relevant market." [*Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1163 (9th Cir. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RHD-RB00-0038-X2V2-00000-00&context=).

While Plaintiff alleges that JFK sought to influence its competitors—e.g., the California Department of Corrections and Kaiser Permanente—to allocate the market to the Johnson Group, Plaintiff does not allege whether this practice has had an actual anticompetitive effect. From the FAC alone, it is unclear JFK's competitors have actually heeded JFK's recommendations. If Plaintiff alleged that these third-party providers actually ceased using the Johnson Group's competitors' services, then perhaps, JFK's market power could be inferred. Although Plaintiff alleges that his on-call hours were decreased, this is insufficient to plausibly infer a causal nexus between the alleged Sherman Act violation and harm to the market as a whole. [*Sharda v. Sunrise Hospital and Medical Center, LLC, No. 2:16-cv-2233-JCM (GWF), 2017 U.S. Dist. LEXIS 103554, 2017 WL 2870086 (D. Nev. July 3, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5NYD-0311-F04D-Y4X1-00000-00&context=)(dismissing Sherman Act claim against**[\*23]** hospital because plaintiff did not define relevant market and injury to competition apart from the revocation of one doctor's medical privileges).

As mentioned above, actual adverse effect to one competitor is insufficient to infer market power. Courts typically look to the defendant's market share, the ease of entry into the market by new firms, and the level of competition in the market. [*Carter, 101 F. Supp. 2d 1261, 1267 (C.D. Cal. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YXH-FCR0-0038-Y37Y-00000-00&context=). "Even where the defendant's market share is substantial, the absence of barriers to entry by new firms or expansion by existing firms can deprive a defendant of market power." Id. While the Court can infer that barriers to entry are high for those desiring to establish a hospital that provides surgical services, if Plaintiff can perform his practice at other hospitals in the relevant market—i.e., the alleged anticompetitive conduct only effects the offering of surgeons within JFK Memorial Hospital—then the Court cannot assume that competition has been substantially foreclosed. To find an adequately stated Sherman Act claim, there needs to be some indication of JFK's market share in the provision of general surgical services to uninsured and unassigned patients. Without any bases to infer that JFK's**[\*24]** actions have an appreciable effect on the market for general surgical services in the Coachella Valley as a whole, Plaintiff fails to adequately allege a *section 1* Sherman Act claim. As such, the Court GRANTS Defendant's Motion as to the Sixth Cause of Action.

**2. *Section 1981* Claim**

Defendant argues that Plaintiff's *Section 1981* claim fails for a number of reasons. First, Defendant argues that because there is no contract between Plaintiff and the Hospital and no claim against EA, there can be no claim under *Section 1981*. (Id. at 12.) Second, Defendant maintains that the contract in question cannot violate *Section 1981* because: (a) EA is not the exclusive source of physicians wishing to assume on-call duties, and (b) a specific number of oncall days is not guaranteed to any physician by EA or JFK. (Id.) Plaintiff, on the other hand, argues that a contractual relationship can be established between himself and JFK by resort to the privileges afforded to Plaintiff in JFK's Bylaws. (Opp'n at 8)(citing [*Janda v. Madera Community Hospital, 16 F. Supp. 2d 1181, 1187 (E.D. Cal. 1998))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3V49-Y650-0038-Y058-00000-00&context=). On that basis, Plaintiff maintains that he can state a claim under *42 U.S.C. section 1981* "to enforce the non-discriminatory provision in the JFK Bylaws." (Id.)

**a. Legal Standard**

*Section 1981* prohibits racial discrimination in making contracts even in the absence of action under color of**[\*25]** state law. [*Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BS80-003B-S2KH-00000-00&context=); [*Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FHV0-003B-S04N-00000-00&context=). *Section 1981* provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens...." *42 U.S.C. § 1981(a)*. *Section 1981*, therefore, prohibits discrimination on the basis of race, ethnicity, or other protected status by private actors. See *42 U.S.C. § 1981(c)*; [*Saint Francis College v. Al—Khazraji, 481 U.S. 604, 613, 107 S. Ct. 2022, 95 L. Ed. 2d 582 (1987)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HDP0-003B-40FY-00000-00&context=); [*Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 470 F.3d 827, 835-837 (9th Cir. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4MH9-1FF0-0038-X0J1-00000-00&context=) (en banc); [*Sagana v. Tenorio, 384 F.3d 731, 739-740 (9th Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4D8F-XKC0-0038-X0MK-00000-00&context=). To prove a violation of *Section 1981*, a plaintiff must show that the defendant acted with an intent to discriminate on the basis of race or other protected status. [*General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 391, 102 S. Ct. 3141, 73 L. Ed. 2d 835 (1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5FD0-003B-S4DT-00000-00&context=); [*Evans v. McKay, 869 F.2d 1341, 1344 (9th Cir. 1989)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CRV0-003B-5365-00000-00&context=). Further, allegations that are speculative or conclusory are insufficient to state a claim for "purposeful, invidious discrimination." [*Iqbal, 556 U.S. at 682*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=).

**b. Analysis**

Plaintiff's theory of recovery under *Section 1981* is that by entering into an employment relationship with JFK, governed by JFK's bylaws, the parties entered into an implied contract. As part of that contract, JFK promised Plaintiff to abide by the antidiscrimination provisions of its bylaws. Since JFK has allegedly engaged in discriminatory conduct—diverting patients from Plaintiff to younger,**[\*26]** less experienced surgeons who do not belong to a protected class and pursuing investigations and disciplinary measures to which other similarly situated surgeons are not subjected for the purpose of harassing Plaintiff—Plaintiff argues that his *Section 1981* claim is adequately alleged. (FAC ¶¶ 161, 162.)

As a threshold matter, Plaintiff must adequately allege the existence of a contract to state a claim for contractual impairment. The Court finds the allegations sufficient, at the pleading stage, to infer a mutual exchange of promises implied by virtue of the parties' employment relationship and JFK's bylaws. See [*Janda v. Madera Community Hosp., 16 F. Supp. 2d 1181, 1188 (E.D. Cal. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3V49-Y650-0038-Y058-00000-00&context=) (finding Hospital's bylaws, which were "an integral element of the parties' contractually bargained-for employment relationship" and enforceable by "both the Hospital and the physician" sufficient to allege the existence of a contract). Plaintiff alleges a multitude of discriminatory acts taken by JFK that: (a) impaired his rights under JFK's bylaws, and (b) interfered with his own performance of his contractual duties as an employee at the hospital. The Court also finds the allegations sufficient to infer purposeful discrimination. Plaintiff alleges that "JFK purposely placed physicians**[\*27]** . . . on the Call List who were less experienced, younger and not belonging to a protected class." (FAC ¶ 60.) The inference of intentional discrimination can be inferred based on the actual reduction of Plaintiff's on-call days, as well as the other forms of harassment and disparate treatment for which Plaintiff alleges he was singled out. Plaintiff also alleges that JFK discriminates on the basis of race in its provision of services. These allegations together allow for a plausible inference of intentional racial discrimination in the making and performance of contracts. [*Scott v. Eversole Mortuary, 522 F.2d 1110 (9th Cir. 1975)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2VS0-0039-M0D5-00000-00&context=). Accordingly, the Court DENIES Defendant's Motion to Dismiss Plaintiff's Seventh Cause of Action.

**3. *Section 1983* Claim**

Defendant argues that Plaintiff's *Section 1983* claim fails as a matter of law because Plaintiff did not and cannot allege facts demonstrating that JFK, a private hospital, was "acting under color of state law." (Motion at 13.) Defendant similarly claims that no allegations contained in the FAC support a plausible inference that JFK engaged in a "public function" or "joint action" with a state actor in conducting its peer review activities. (Id. at 13-14.) Finally, Defendant argues that Plaintiff does not allege any facts demonstrating**[\*28]** a governmental nexus or entwinement. (Id. at 16.)

Plaintiff makes a number of arguments in favor of inferring state action. Essentially, Plaintiff argues that since JFK works with the UCSD in administering the PACE program, and the PACE Agreement deprives Plaintiff of certain due process protections, there is significant entanglement between JFK and a state entity. (Opp'n at 9.) Plaintiff also alleges these acts constitute racial discrimination, and in cases where racial discrimination is alleged, "state action may be found more easily." (Opp'n at 9.) In other words, Plaintiff maintains that he does not seek to challenge JFK's peer review process, which has not been commenced, but rather, seeks to challenge "the discriminatory manner in which JFK attempted to compel him to participate in a state-sanctioned program, and efforts by JFK to abdicate his rights to a fair procedure, because he exercised his rights under Health and Safety Code [*section 1278.5*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NTY-35P2-8T6X-70PH-00000-00&context=) and because of his race and age." (Id. at 10.)

**a. Legal Standard**

A *Section 1983* plaintiff bears the burden of pleading two essential elements: (1) conduct that deprived plaintiff of a right, privilege, or immunity protected by the Constitution or the laws of the United States; and**[\*29]** (2) the alleged deprivation was committed by a person acting under the color of state law. [*Johnson v. Knowles, 113 F.3d 1114, 1119 (9th Cir. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RJP-N0F0-00B1-D122-00000-00&context=). State action may exist when private parties are "willful participant[s] in joint activity with the State or its agents that effects a constitutional deprivation." [*Johnson, 113 F.3d at 1119*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RJP-N0F0-00B1-D122-00000-00&context=). Plaintiff must allege a "sufficiently close nexus between the State and the challenged action of the ***regulated*** entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974)*. Plaintiff can also satisfy the state action requirement by alleging the state "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." [*Blum v. Yaretsky, 457 U.S. 991, 1004, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5FP0-003B-S4K3-00000-00&context=). "State ***regulation*** of a private entity, however, is not enough to support a finding of state action." [*Pinhas, 894 F.2d at 1034*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B100-003B-54NP-00000-00&context=). Whether Plaintiff can maintain his *Section 1983* claim turns on whether JFK's alleged conduct can be "fairly attributable" to the state. [*Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5FN0-003B-S4K1-00000-00&context=).

**b. Analysis**

Plaintiff maintains that because the PACE program would deprive him of fair procedure, and JFK attempted to subject him to this program, which is administered by a state-run agency, there is "significant entanglement," and therefore, the state action requirement**[\*30]** has been satisfied. (Opp'n at 9.) The Court finds these allegations insufficient to plausibly allege state action. While UCSD could reasonably constitute an agent of JFK in its administration of the PACE program, the due process violation and discrimination alleged were not compelled, approved, encouraged or in any way resulted from UCSD's administration of this program. Indeed, the FAC only alleges JFK's participation in the deprivation of his rights to notice, a fair hearing, and an opportunity to respond. There is no indication that the UCSD played any role in JFK's alleged abdication of its responsibilities under its Bylaws. In other words, "the acts complained of did not directly occur as a result of the contract between [JFK] and [UCSD]." [*Eversole Mortuary, 522 F.2d at 1115*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2VS0-0039-M0D5-00000-00&context=).

Presumably JFK receives public funds to service uninsured patients. However, this financial benefit does not arise to the level of economic interdependence to find joint action between JFK and the State. [*Sharda v. Sunrise Hospital and Medical Center, LLC, No. 2:16-cv-2233-JCM (GWF), 2017 U.S. Dist. LEXIS 103554, 2017 WL 2870086 (D. Nev. July 3, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5NYD-0311-F04D-Y4X1-00000-00&context=)(dismissing due process claim against private hospital because hospital's decision to revoke plaintiff's medical privileges was not connected to the state). Here, the wrongful**[\*31]** conduct alleged can only be plausibly attributed to "judgments made by private parties." [*Pinhas, 894 F.2d 1024, 1034*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B100-003B-54NP-00000-00&context=). Such judgments, moreover, appear to be at odds with the state-mandated peer review process articulated in [*California Business and Professions Code section 805*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NXY-11S2-D6RV-H49D-00000-00&context=). [*Eversole Mortuary, 522 F.2d at 1116*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2VS0-0039-M0D5-00000-00&context=) ("Nondiscriminatory ***regulation*** does not transform the activities of a private party into state action"). In summary, the FAC contains insufficient allegations to infer adequate state involvement in the alleged constitutional violations perpetrated by JFK to be actionable under *42 U.S.C. section 1983*. The Court, therefore, GRANTS Defendant's Motion to Dismiss Plaintiff's Eighth Cause of Action.

**B. State Law Claims under California's Fair Employment and Housing Act**

Defendant argues that the Second through Fifth causes of action should be dismissed with prejudice on the following grounds: (1) Plaintiff's [*Section 12940*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NW6-RN52-D6RV-H1NH-00000-00&context=) claims, as alleged, only fall within [*subsection (a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NW6-RN52-D6RV-H1NH-00000-00&context=)'s definition of discrimination, not [*subsection (j)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NW6-RN52-D6RV-H1NH-00000-00&context=)'s definition of harassment "as they clearly relate to business assignments and decisions[,]" and (2) the FAC fails to satisfy the requirements of [*subsection (a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NW6-RN52-D6RV-H1NH-00000-00&context=), in that the FAC fails to allege an employment relationship between Plaintiff and the Hospital. (Motion at 17-20.) at 19-20.) Plaintiff's Fourth Cause of Action for harassment in the form of an**[\*32]** inadequate investigation fails because [*Section 12940(j)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NW6-RN52-D6RV-H1NH-00000-00&context=) does not impose an investigation requirement, "let alone define what constitutes an adequate investigation." (Id. at 21.) Further, Defendant asserts that the cases on which Plaintiff relies contemplate the existence of an employment relationship that has been terminated without cause, and here, Plaintiff alleges only that a self-governing medical staff commenced an investigation and recommended corrective actions. (Id.) Finally, Defendant asserts that Plaintiff's hostile work environment claim fails because: (a) the investigatory conduct described was undertaken by the MEC, not the hospital, and in any event, (b) the alleged conduct involves professional practice review and management-type activities, which do not constitute "harassment" under [*Section 12940(j)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NW6-RN52-D6RV-H1NH-00000-00&context=). (Id. at 23.)

The Court agrees with Defendant that Plaintiff's theories of liability are somewhat overlapping and hard to discern. Still, the Court must afford Plaintiff the benefit of every reasonable inference to be drawn from the well-pleaded allegations of the complaint. [*Retail Clerks Int'l Ass'n v. Schermerhorm, 373 U.S. 746, 753 n. 6, 83 S. Ct. 1461, 10 L. Ed. 2d 678 (1963)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H3C0-003B-S2DD-00000-00&context=). As such, the Court ascertains the following distinct claims under FEHA from the allegations contained in the FAC: (a) race-based discrimination, (b)**[\*33]** age-based discrimination, (c) hostile work environment, (d) retaliation, and (e) failure to investigate retaliatory conduct by the MEC. The Court notes, however, that it would be advisable for Plaintiff to amend his FEHA claims to separate the harassment, discrimination, retaliation, and failure to investigate allegations.

As an initial matter, the Court will not dismiss Plaintiff's FEHA claims because Defendant refutes the existence of an employment relationship, as this would be improper at the pleading stage. In any case, the FAC adequately alleges an "employment relationship." Plaintiff alleges that JFK creates the Call List that determines when or if Plaintiff will perform on-call assignments. This is sufficient under Borello, and therefore, passes muster at the pleading stage. [*S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 48 Cal. 3d 341, 256 Cal. Rptr. 543, 769 P.2d 399 (1989)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-C490-003D-J2NY-00000-00&context=).

**1. Discrimination**

FEHA prohibits employers from harassing or discriminating against an employee on the basis of race, disability, or other specified grounds. [*Sanchez v. California, 90 F. Supp. 3d 1036, 1054 (E.D. Cal. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FD6-SX11-F04C-T46D-00000-00&context=).[[3]](#footnote-2)3 Such discrimination is against public policy, and discrimination based on race or in retaliation for opposition to the employer's practice of racial discrimination are unlawful employment practices. [*Cal. Gov. Code §§ 12920*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5J6R-GCG1-66B9-8446-00000-00&context=), [*12940, subds. (a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NW6-RN52-D6RV-H1NH-00000-00&context=) and [*(f)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NW6-RN52-D6RV-H1NH-00000-00&context=); [*Baker v. Children's Hosp. Med. Ctr., 209 Cal. App. 3d 1057, 1061, 257 Cal. Rptr. 768 (1989)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-J5C0-003D-J47X-00000-00&context=). In interpreting analogous statutory provisions**[\*34]** of FEHA, federal courts routinely look to federal authority regarding *Title VII* and similar civil rights statutes. [*Rodriguez v. Airborne Express, 265 F.3d 890 (9th Cir. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4401-R1J0-0038-X1R2-00000-00&context=)(citing Civil Rights Act of 1964, [*§ 701 et seq.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GJ41-NRF4-42B2-00000-00&context=), *42 U.S.C. § 2000e et seq.*; [*Cal. Gov. Code § 12940 et seq.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NW6-RN52-D6RV-H1NH-00000-00&context=)); (see, e.g., [*Janken v. GM Hughes Elecs., 46 Cal. App. 4th 55, 66, 53 Cal. Rptr. 2d 741 (1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-F860-003D-J315-00000-00&context=).

To state a prima facie claim for discrimination under FEHA, Plaintiff must demonstrate "(1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggest[ing] discriminatory motive." [*Tumblin v. USA Waste of California, Inc., No. CV162902DSFPLAX, 2016 U.S. Dist. LEXIS 94816, 2016 WL 3922044, at \*7 (C.D. Cal. July 20, 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5K8S-5TX1-F04C-T22F-00000-00&context=)(internal citations omitted)(internal quotation marks omitted). [*Section 12941*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5J6R-GCG1-66B9-845X-00000-00&context=), the specific FEHA provision addressing age discrimination in employment, makes it "an unlawful employment practice for an employer to ... discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age...." [*Esberg v. Union Oil Co., 28 Cal. 4th 262, 267, 121 Cal. Rptr. 2d 203, 47 P.3d 1069 (2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:464J-JFM0-0039-43MX-00000-00&context=). Where the alleged adverse employment action is an employee's termination, the employee must establish that he was "replaced by a substantially younger employee with equal or inferior qualifications." [*Nidds v. Schindler Elevator Co., 113 F.3d 912, 917 (9th Cir. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RKS-C960-006F-M2XJ-00000-00&context=) (quoting [*Wallis v. J.R. Simplot Co., 26 F.3d 885, 891 (9th Cir. 1994)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5RP0-003B-P2KM-00000-00&context=), as amended on denial of reh'g (July**[\*35]** 14, 1994)).

Liability for workplace discrimination under FEHA requires an adverse employment action. [*Moore v. Regents of the Univ. of California, 248 Cal. App. 4th 216, 206 Cal. Rptr. 3d 841 (2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5K2F-G1W1-F04B-N089-00000-00&context=). An adverse employment action is one that materially affects the compensation, terms, conditions or privileges of employment. [*Chuang v. University of California Davis, Bd. of Trustees, 225 F.3d 1115, 1126 (9th Cir. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4139-52S0-0038-X4XR-00000-00&context=). "Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable, but adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion falls within the reach of the antidiscrimination provisions of [*sections 12940(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NW6-RN52-D6RV-H1NH-00000-00&context=) and [*12940(h)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NW6-RN52-D6RV-H1NH-00000-00&context=)." [*Yanowitz v. L'Oreal USA, Inc., 36 Cal. 4th 1028, 1054-55, 32 Cal. Rptr. 3d 436, 116 P.3d 1123 (2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4GVJ-2W20-0039-448C-00000-00&context=).

Plaintiff adequate alleges he is a member of a protected class since he alleges he is an African American male, who is over 40. (FAC ¶ 123.) He also adequately alleges he is qualified to perform on-call surgeries at JFK: he is a licensed physician, certified by the American Board of Surgery, with medical staff privileges at JFK. (Id. at ¶ 124.) The FAC, moreover, alleges his oncall assignments were reduced to favor physicians who were younger**[\*36]** and do not belong to a protected class. Such alleged conduct is sufficient to infer discrimination on the bases of age or race. Furthermore, Plaintiff adequately alleges adverse employment action. Plaintiff was allegedly singled out for an improper investigation, culminating in negative evaluations of his performance. The FAC alleges that these negative evaluations served as JFK's justification for threatening Plaintiff with a termination of his medical staff membership and clinical privileges. (Id. at ¶ 103.) JFK's alleged conduct constitutes adverse treatment since it is "reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion," and therefore "fall[s] within the reach of the antidiscrimination provisions of [the FEHA]." [*Horsford v. Bd. of Trustees of Cal. State Univ., 132 Cal. App. 4th 359, 373, 33 Cal. Rptr. 3d 644 (2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H0T-GJT0-0039-42J1-00000-00&context=). Plaintiff, therefore, adequately alleges his discrimination claims against JFK. Accordingly, the Court DENIES JFK's motion to dismiss these claims.

**2. Hostile Work Environment**

To state a claim of harassment, Plaintiff must allege "(1) he was a member of a protected class; (2) he was subjected to unwelcome ... harassment; (3) the harassment was based on [age/race]; (4) the harassment unreasonably interfered with**[\*37]** his work performance by creating an intimidating, hostile, or offensive work environment; and (5) [the defendants are] liable for the harassment." [*Thompson v. City of Monrovia, 186 Cal. App. 4th 860, 876, 112 Cal. Rptr. 3d 377 (2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YXY-MGN0-YB0K-H071-00000-00&context=). Under FEHA, "harassment in the workplace consists of discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." [*Cofer v. Parker-Hannifin Corp., 194 F. Supp. 3d 1014, 2016 WL 3660845 (C.D. Cal. July 8, 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5K66-N2T1-F04C-T06P-00000-00&context=). Occasional, isolated, sporadic, or trivial harassment is insufficient to allege the harassment created a hostile work environment: Plaintiff must establish a repeated pattern of harassment. [*Thompson, 186 Cal. App. 4th 860, 112 Cal. Rptr. 3d 377*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YXY-MGN0-YB0K-H071-00000-00&context=).

Plaintiff adequately alleges a hostile work environment. Plaintiff alleges JFK ignored his patient safety complaints and failed to provide him with proper surgical equipment. (Id. at ¶ 60.) He alleges that JFK's failure to address his patient safety complaints interfered with his work performance, and by singling him out for surreptitious and unauthorized investigations by EXTII, the Court can plausibly infer JFK's actions "seriously affected the psychological well-being of a reasonable employee." [*Thompson v. City of Monrovia, 186 Cal. App. 4th 860, 877, 112 Cal. Rptr. 3d 377 (2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YXY-MGN0-YB0K-H071-00000-00&context=). The FAC contains sufficient allegations, moreover, to infer**[\*38]** that such harassment was "severe or pervasive." Plaintiff alleges that he consistently was deprived of safe working conditions for his patients and dedicated time for his surgeries. (FAC ¶ 125.) Plaintiff also alleges that JFK threatened him on many occasions spanning over a year with disciplinary proceedings, initiated improper investigations, and attempted to compel him to submit to behavioral monitoring, while at the same time, ignored Plaintiff's repeated requests for adequate notice and fair process. (Id.) Such alleged conduct is not trivial, and assuming the truth of Plaintiff's contentions, adequately state a claim for hostile work environment under FEHA. On that basis, the Court DENIES Defendant's Motion to Dismiss Plaintiff's hostile work environment claim.

**3. Retaliation**

[*Subsection (h) of Section 12940*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NW6-RN52-D6RV-H1NH-00000-00&context=) prohibits any employer, employment agency, or person, from discharging, expelling, or "otherwise discrimat[ing] against any person because the person has opposed any practices forbidden" by the FEHA or "because the person has filed a complaint" under [*California Government Code section 12940*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NW6-RN52-D6RV-H1NH-00000-00&context=). [*Cal. Gov. Code § 12940, subd. (h)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NW6-RN52-D6RV-H1NH-00000-00&context=). To establish a prima facie case of retaliation under FEHA, plaintiff must allege: (1) he or she engaged in a "protected activity," (2) the employer subjected**[\*39]** the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. [*Yanowitz v. L'Oreal USA, Inc., 36 Cal. 4th 1028, 1042, 32 Cal. Rptr. 3d 436, 116 P.3d 1123, 1130 (2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4GVJ-2W20-0039-448C-00000-00&context=). An employer may be found to have engaged in an adverse employment action, and thus liable for retaliation under FEHA, by permitting fellow employees to punish a worker for invoking his rights. [*Kelley v. Conco Companies, 196 Cal. App. 4th 191, 126 Cal. Rptr. 3d 651 (2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:531P-1GB1-F04B-N3DR-00000-00&context=). Further, a "hostile work environment can constitute a retaliatory adverse employment action." [*Yanowitz, 36 Cal. 4th at 1054*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4GVJ-2W20-0039-448C-00000-00&context=). Since the Court previously determined that the FAC adequately alleges Plaintiff was subjected to adverse employment action as well as a hostile work environment, Plaintiff will have adequately stated a retaliation claim under the FEHA as long as the FAC plausibly alleges a causal link between his protected activities and JFK's retaliatory conduct.

Plaintiff alleges that his on-call assignment days were reduced after he began making patient safety complaints in 2015. He also alleges that the allegedly unauthorized and baseless investigations commenced after he sent JFK cease and desist letters, demanding JFK and the MEC stop harassing him and discriminating against him. (FAC ¶ 83.) Furthermore, complaints of Plaintiff's allegedly "disruptive behavior" surfaced for**[\*40]** this first time after he began complaining about the quality of the hospital's staff and JFK's dereliction of its duties. Since Plaintiff alleges his privileges have never been revoked, modified, or restricted in any way during his thirteen years working as a surgeon at JFK, the Court can reasonably infer a causal link between Plaintiff's protected activity and the adverse actions JFK is alleged to have taken thereafter. Thus, Plaintiff states a retaliation claim under [*Section 12940(h)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NW6-RN52-D6RV-H1NH-00000-00&context=). On that basis, the Court DENIES Defendant's Motion to Dismiss this claim.

**4. Failure to Investigate Retaliatory Conduct**

While the FEHA does not explicitly impose an investigation requirement on employers, JFK can be liable under [*Section 12940*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NW6-RN52-D6RV-H1NH-00000-00&context=) for "fail[ing] to take all reasonable steps necessary to prevent discrimination and harassment from occurring." [*Cal. Gov. Code § 12940, subd. (k)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NW6-RN52-D6RV-H1NH-00000-00&context=). "A plaintiff seeking to recover on a failure to prevent discrimination claim under FEHA must show that (1) [he] was subjected to discrimination; (2) defendant failed to take all reasonable steps to prevent discrimination; and (3) this failure caused plaintiff to suffer injury, damage, loss or harm." [*Achal v. Gate Gourmet, Inc., 114 F. Supp. 3d 781, 804 (N.D. Cal. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GFN-15N1-F04C-T3VN-00000-00&context=). Courts have interpreted "a failure to prevent discrimination claim [to be] essentially**[\*41]** derivative of a [FEHA] discrimination claim." Id.; [*Ravel v. Hewlett-Packard Enter., Inc., 228 F. Supp. 3d 1086, 1098 (E.D. Cal. 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MM2-YWT1-F04C-T0KJ-00000-00&context=) ("Retaliation is included within the meaning of 'discrimination' for purposes of [*§ 12940(k)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NW6-RN52-D6RV-H1NH-00000-00&context=).").

As discussed, Plaintiff adequately alleges he experienced discrimination, harassment, and was retaliated against. He alleges, moreover, that on July 22, 2015, he sent JFK correspondence "stating that JFK subjected him to retaliation, a hostile work environment, and racial discrimination." (FAC ¶ 70.) Thus, it can be plausibly inferred that JFK was on notice of what Plaintiff was allegedly experiencing. [*Andrade v. Arby's Rest. Grp., Inc., 225 F. Supp. 3d 1115, 1131 (N.D. Cal. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MCW-S1B1-F04C-T4P5-00000-00&context=)(stating that [*Section 12940(k)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NW6-RN52-D6RV-H1NH-00000-00&context=) "applies to 'an employer who knew or should have known of discrimination or harassment' and 'fail[s] to take prompt remedial action.'). Notice of the harassing conduct "triggers an employer's duty to take prompt corrective action that is reasonably calculated to end the harassment." [*Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864 (9th Cir. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43HM-N0K0-0038-X1FD-00000-00&context=). JFK allegedly failed to take any remedial action in response to Plaintiff's complaints, let alone conduct an adequate investigation. Cf. [*Swenson v. Potter, 271 F.3d 1184, 1193 (2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:44KF-NY30-0038-X379-00000-00&context=)(stating that an employer is obliged to investigate complaint and to present a reasonable basis for its subsequent action)(citing [*Swentek v. USAI, Inc., 830 F.2d 552, 558 (4th Cir. 1987)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6N50-001B-K1NF-00000-00&context=).

The alleged unauthorized investigation of Plaintiff may also give rise to a separate claim**[\*42]** under [*subsection (k) of Section 12940*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NW6-RN52-D6RV-H1NH-00000-00&context=) because Plaintiff adequately alleges he was harmed by JFK's failure to follow its own procedures as set out in its bylaws. See *Fuller v. City of Oakland, 47 F.3d 1522, 1529 (9th Cir. 1995)*(holding that an investigation that is rigged to reach a predetermined conclusion or otherwise conducted in bad faith will not satisfy an employer's remedial obligation). In summary, Defendant's arguments in favor of dismissing Plaintiff's FEHA claims are unavailing. By extension, the Court DENIES Defendant's Motion to Dismiss Plaintiff's claim premised on Defendant's failure to investigate.

**IV. CONCLUSION**

Based on the foregoing, the Court GRANTS in part and DENIES in part Defendant's Motion to Dismiss. Specifically, the Court DENIES Defendant's Motion to Dismiss Plaintiff's Second through Fifth and Seventh causes of action and GRANTS Defendant's Motion to Dismiss Plaintiff's Sixth and Eighth causes of action. Plaintiff's Sixth and Eighth causes of action are DISMISSED WITH LEAVE TO AMEND. Plaintiff shall file an amended complaint, if any, by September 18, 2017.

**IT IS SO ORDERED**.

**End of Document**

1. 1"Exclusive dealing involves an agreement between a vendor and a buyer that prevents the buyer from purchasing a given good from any other vendor." [*Allied Orthopedic Appliances, Inc. v. Tyco Health Care Group, LP, 592 F.3d 991, 996 (9th Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XGN-9VF0-YB0V-P06T-00000-00&context=). [↑](#footnote-ref-0)
2. 2"The rule of reason analysis consists of three components: (1) the persons or entities to the agreement intend to harm or restrain competition; (2) an actual injury to competition occurs; and (3) the restraint is unreasonable as determined by balancing the restraint and any justifications or pro-competitive effects of the restraint." [*Am. Ad Mgmt., Inc. v. GTE Corp., 92 F.3d 781, 789 (9th Cir. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1J70-006F-M2VG-00000-00&context=) [↑](#footnote-ref-1)
3. 3[*Section 12940, subdivision (h)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NW6-RN52-D6RV-H1NH-00000-00&context=) provides in relevant part that it is an unlawful employment practice: "For an employer ... or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age, to harass an employee or applicant. Harassment of an employee or applicant by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action." [*Cal. Gov. Code § 12940 subd. (h)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8NW6-RN52-D6RV-H1NH-00000-00&context=). [↑](#footnote-ref-2)