NOT FOR PUBLICATION

FILED

OCT 30 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN TOMA, Plaintiff-Appellant, v. UNIVERSITY OF HAWAII, Defendant-Appellee.	No. 18-16523 D.C. No. 1:16-cv-00499-RLP MEMORANDUM*

Appeal from the United States District Court
for the District of Hawaii
Richard L. Puglisi, Magistrate Judge, Presiding

Submitted October 23, 2019**
University of Hawaii Manoa

Before: GRABER, M. SMITH, and WATFORD, Circuit Judges.

Plaintiff-Appellant John Toma alleged that he was discriminated against on the basis of his disability when he was dismissed from Defendant-Appellant University of Hawaii's (the University) medical school, in violation of the Americans with Disabilities Act and the Rehabilitation Act. 29 U.S.C. § 794; 42

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

U.S.C. § 12132. We assume, without deciding, that Toma's depression qualified as a disability under both statutes.

The district court granted summary judgment for the University, ruling that Toma could not make out a *prima facie* claim of discrimination under either statute. Because of his checkered academic career, Toma could not show that he was otherwise qualified to remain at the school or that his dismissal was solely due to his disability. *See Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 816–17 (9th Cir. 1999); *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1045–46 (9th Cir. 1999). Even considering Toma's allegedly waived arguments and allegedly erroneously excluded evidence, we agree. The facts undisputed by the parties show that Toma was not an otherwise qualified student and that the University did not dismiss him solely because of his disability.

AFFIRMED.