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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

HAROLD J. RUCKER JR.,

Plaintiff,

No. 2:09-cv-01673 JAM KJN

vs.

SACRAMENTO COUNTY CHILD  
PROTECTIVE SERVICES,  
SACRAMENTO COUNTY HEALTH  
AND HUMAN SERVICES,

FINDINGS AND RECOMMENDATIONS

Defendants.

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Presently before this court is a motion by defendant County of Sacramento, sued herein as Sacramento County Child Protective Services and Sacramento County Health and Human Services (“County” or “defendant”), to dismiss this action for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiff is proceeding without counsel. The court held proceedings on this motion before Magistrate Judge Gregory G. Hollows on his law and motion calendar of December 17, 2009.<sup>1</sup> The court

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<sup>1</sup> This action proceeds before the undersigned pursuant to Eastern District of California Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1), and was reassigned to the this judge by an order entered February 9, 2010 (Dkt. No. 16.) The undersigned subsequently listened to a

1 considered the merits of defendant’s motion and whether an evidentiary hearing was necessary  
2 on the issue of equitable tolling of the statute of limitations. (Dkt. No. 13.) Following that  
3 hearing, Judge Hollows ordered the plaintiff to submit “any additional correspondence he has  
4 between himself and either the California Department of Fair Employment and Housing or the  
5 Equal Employment Opportunity Commission.” (Id.) In response, plaintiff submitted a lengthy  
6 declaration and points and authorities on December 24, 2009. (Dkt. No. 14.) The undersigned  
7 has considered the parties’ briefs, arguments, and the record in this case and, for the reasons  
8 stated below, recommends that the County’s motion to dismiss be granted.

9 I. Background

10 Plaintiff seeks relief for alleged employment discrimination against his former  
11 employer, the defendant County of Sacramento’s Child Protective Services division (“CPS”).  
12 This action is proceeding on a complaint filed June 17, 2009. Plaintiff generally alleges  
13 disability discrimination, violations of the Americans with Disabilities Act (“ADA”), and  
14 tortious discharge in violation of state law.

15 a. Factual Background

16 Plaintiff alleges that he suffers from organic brain syndrome. He was a  
17 probationary employee with CPS from June 7, 2005, until June 15, 2006. The complaint alleges  
18 that plaintiff previously had arrangements for informal accommodations due to his disability, but  
19 that a new supervisor, Mary Ingram, refused to accommodate him beginning in January 2006.  
20 The accommodations to which he refers include a laptop computer, a part-time schedule, or  
21 reassignment to a different position. (Dkt. No. 1 at 3-4.) Furthermore, he claims that Ingram’s  
22 behavior toward plaintiff was unfair, exacerbated his condition, causing stress, depression and  
23 physical symptoms. As a result, plaintiff claims he took a medical leave of absence around April  
24 7, 2006, and he was terminated around June 16, 2006. (Id. at 2.)

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26 recording of the December 17, 2010 hearing.

1           b. Procedural Background

2           Plaintiff filed a California Department of Fair Employment and Housing  
3 (“DFEH”) and Equal Employment Opportunity Commission (“EEOC”) complaint of  
4 discrimination on April 27, 2006. (Dkt. No. 14, Ex. 2.) The April 27, 2006 complaint described  
5 plaintiff’s employment with defendant and alleged that plaintiff was denied an accommodation  
6 for his disability and refused a transfer. Plaintiff next filed a second complaint of discrimination  
7 with DFEH on July 19, 2006, which he styled as an amended complaint. (Dkt. No. 9, Ex. 1). On  
8 this amended complaint, the box at the bottom of the form which states “I also want this charge  
9 filed with the Federal Equal Opportunity Commission (EEOC)” was not checked, in contrast to  
10 the first version of his discrimination complaint. (Compare Dkt. No. 14, Ex. 2 with Dkt. No. 9,  
11 Ex. 1.) In this July 19, 2006 amended complaint, plaintiff alleged denial of a reasonable  
12 accommodation, failure to reassign and termination of employment. (Id.)

13           On March 2, 2007, DFEH sent plaintiff its decision which stated: “As discussed in  
14 detail with you numerous times, the investigation did not reveal sufficient evidence or  
15 information to establish that a violation of the FEHA occurred.” (Dkt. No. 14, Ex. 1.) DFEH’s  
16 letter stated that plaintiff would have fourteen days from the date of that letter to provide any new  
17 relevant information that plaintiff wanted DFEH to consider. (Id.) It also notified plaintiff that  
18 he could request, within fifteen days, that the EEOC perform a substantial weight review of  
19 DFEH’s findings. (Id.)

20           On March 12, 2007, plaintiff sent a 24-page document to the EEOC explaining his  
21 position and alleged failings of DFEH’s decision. (Dkt. No. 14 at 2.) On March 29, 2007,  
22 plaintiff sent a letter to DFEH explaining that he left out additional allegations from his initial  
23 complaint, namely wrongful termination, retaliation and disparate treatment. (Dkt. No. 14 at 34.)  
24 In that document, plaintiff failed to mention his amended or second filed complaint of July 19,

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1 2006, wherein he raises these additional issues, most notably his termination.<sup>2</sup>

2           Significantly, on May 25, 2007, the EEOC sent plaintiff a right-to-sue letter,  
3 informing plaintiff that it adopted the findings of DFEH, which denied his claim, and that  
4 plaintiff may file a lawsuit in federal or state court. (Dkt. No. 9, Ex. 3.) It further explicitly  
5 instructed plaintiff that his lawsuit “**must be filed WITHIN 90 DAYS of your receipt of this**  
6 **Notice** or your right to sue will be lost” (*Id.* emphasis in original) The EEOC also notified  
7 plaintiff that this notice would be the only notice of dismissal and of plaintiff’s right-to-sue that it  
8 would send. (*Id.*)

9           On May 28, 2008, a full year after receiving the EEOC’s right-to-sue letter,  
10 plaintiff filed a third complaint with the DFEH regarding his former employment with defendant.  
11 (Dkt. No. 9, Ex. 2). Again, the box was unchecked at the bottom of the complaint which, if  
12 checked, would have led to the dual filing of his complaint with the EEOC. (*Id.*) Plaintiff,  
13 however, alleges in opposition to the motion to dismiss, that the “DFEH assured plaintiff they  
14 would forward his May 28, 2008 amended complaint to the other agency (EEOC), pursuant to  
15 the work sharing agreement between the two governmental agencies.” (Dkt. No. 8 at 8.) The  
16 factual allegations contained in this May 2008 complaint are limited to a failure to accommodate  
17 plaintiff’s disability and do not reference any termination or failure to reassign. (Dkt. No. 9, Ex.  
18 2.)

19           On June 18, 2008, DFEH sent plaintiff a right-to-sue notice. (*Id.*, Ex. 5.) That  
20 notice stated that plaintiff had the right to sue under the California Government Code and that he  
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22           <sup>2</sup> In this March 29, 2007 letter, plaintiff states that in January 2007 he faxed DFEH with a  
23 request to add these new allegations to his complaint. (*Id.*) The January 2007 letter plaintiff  
24 references is contained as an exhibit to the complaint. (Dkt. No. 1 at 18.) That letter states that  
25 plaintiff’s “claim or issue is not just alleging the department failed to reassign a probationary  
26 employee. I am alleging the department failed to continue to accommodate me as my previous  
supervisor (Veronda Moore). I am also alleging the department (Mary Ingram) failed to interact  
with me in good faith, while seeking a reasonable accommodation . . .” Despite the claims in  
plaintiff’s January 2007 letter, the failure to accommodate, however, was clearly addressed in  
both the plaintiff’s first and amended (or second) discrimination complaint.

1 had one year from the date of that letter to bring a civil action. (Id.) It is unclear from the record  
2 whether this notice related to the first, second or third discrimination complaint filed with  
3 DFEH.<sup>3</sup> Plaintiff also filed a complaint with the County of Sacramento Civil Service  
4 Commission which was set for argument on December 19, 2008. (Dkt. No. 14 at 49.)

5 Plaintiff filed a civil complaint requesting monetary damages in this federal court  
6 on June 17, 2009. (Dkt. No. 1.) The court held oral argument on the instant motion to dismiss  
7 on December 17, 2009. Following oral argument, the court issued an order which provided  
8 plaintiff with additional time in which to file any additional correspondence between himself and  
9 either DFEH or the EEOC. (Dkt. No. 13.) In response, plaintiff filed a declaration, points and  
10 authorities and supporting exhibits. (Dkt. No. 14.) This action was reassigned to the  
11 undersigned by Order of Reassignment dated February 9, 2010. (Dkt. No. 16.) In response,  
12 plaintiff filed a document expressing concern that he would need to reargue his opposition and  
13 resubmit supporting documents.<sup>4</sup> (Dkt. No. 17.)

## 14 II. Legal Standards for Motion to Dismiss

### 15 a. Motion to Dismiss Pursuant to Rule 12(b)(6)

16 A complaint should not be dismissed under Rule 12(b)(6) unless it appears  
17 beyond doubt that plaintiff can prove no set of facts in support of his claims which would entitle  
18 plaintiff to relief. NOW, Inc. v. Schiedler, 510 U.S. 249, 256 (1994); Cervantes v. City of San  
19 Diego, 5 F.3d 1273, 1274-75 (9th Cir. 1993). Dismissal may be based either on the lack of  
20 cognizable legal theories or the lack of pleading sufficient facts to support cognizable legal  
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22 <sup>3</sup> The court notes that the reference numbers contained in the DFEH's March 2, 2007  
23 denial and the June 28, 2008 notice of case closure are different. (Compare Dkt. No. 14, Ex. 1  
24 (referencing number E-200506-E-1495-00-pe) with Dkt. No. 1, Ex. A (listing number  
E200708E1699-00-p).

25 <sup>4</sup> The court understands plaintiff's concerns. However, the undersigned judge has access  
26 to and has fully examined all of the documents filed in this action as well as a recording of the  
December 17, 2009 oral argument. The court is fully apprised of the issues before it and no  
resubmission or reargument is necessary.

1 theories. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

2           The complaint's factual allegations are accepted as true. Church of Scientology of  
3 California v. Flynn, 744 F.2d 694, 696 (9th Cir. 1984). The court construes the pleading in the  
4 light most favorable to plaintiff and resolves all doubts in plaintiff's favor. Parks School of  
5 Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). General allegations are  
6 presumed to include specific facts necessary to support the claim. NOW, 510 U.S. at 256  
7 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)).

8           The court may disregard allegations contradicted by the complaint's attached  
9 exhibits. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987); Steckman v. Hart  
10 Brewing, Inc., 143 F.3d 1293, 1295 (9th Cir.1998). Furthermore, the court is not required to  
11 accept as true allegations contradicted by judicially noticeable facts. Mullis v. United States  
12 Bankruptcy Ct., 828 F.2d 1385, 1388 (9th Cir. 1987). The court may consider matters of public  
13 record, including pleadings, orders, and other papers filed with the court. Mack v. South Bay  
14 Beer Distrib., 798 F.2d 1279, 1282 (9th Cir. 1986), abrogated on other grounds by Astoria Fed.  
15 Sav. and Loan Ass'n v. Solimino, 501 U.S. 104 (1991). The court need not accept unreasonable  
16 inferences, or unwarranted deductions of fact. See Western Mining Council v. Watt, 643 F.2d  
17 618, 624 (9th Cir. 1981).

18           Pro se pleadings are held to a less stringent standard than those drafted by lawyers.  
19 Haines v. Kerner, 404 U.S. 519, 520-21 (1972). Unless it is clear that no amendment can cure its  
20 defects, a pro se litigant is entitled to notice and an opportunity to amend the complaint before  
21 dismissal. See Lopez v. Smith, 203 F.3d 1122, 1127-28 (9th Cir. 2000) (en banc); Noll v.  
22 Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987).

23           **b. Motion to Dismiss Pursuant to Rule 12(b)(1)**

24           Federal district courts are courts of limited jurisdiction. The United States  
25 Constitution Article III section 1 provides that the judicial power of the United States is vested in  
26 the Supreme Court, "and in such inferior Courts as the Congress may from time to time ordain

1 and establish.” Congress therefore confers jurisdiction upon federal district courts, as limited by  
2 the U.S. Const. Art. III, § 2. See Ankenbrandt v. Richards, 504 U.S. 689, 697-99 (1992).  
3 Because federal courts are courts of limited jurisdiction, a case presumably lies outside the  
4 jurisdiction of the federal courts unless proven otherwise. Kokkonen v. Guardian Life Ins. Co. of  
5 Am., 511 U.S. 375, 376-78 (1994). Lack of subject matter jurisdiction may be raised at any time  
6 by either party or by the court. See Attorneys Trust v. Videotape Computer Prods., Inc., 93 F.3d  
7 593, 594-95 (9th Cir. 1996).

8           On a Rule12(b)(1) motion to dismiss for lack of subject matter jurisdiction,  
9 plaintiff bears the burden of proof that jurisdiction exists. See, e.g., Sopcak v. Northern  
10 Mountain Helicopter Serv., 52 F.3d 817, 818 (9th Cir. 1995); Thornhill Pub. Co. v. General Tel.  
11 & Electronics Corp., 594 F.2d 730, 733 (9th Cir. 1979). Different standards apply to a 12(b)(1)  
12 motion, depending on the manner in which it is made. See, e.g., Crisp v. U.S., 966 F. Supp. 970,  
13 971-72 (E.D. Cal. 1997).

14           First, if the motion attacks the complaint on its face, the court considers the  
15 complaint’s allegations to be true, and plaintiff enjoys “safeguards akin to those applied when a  
16 Rule 12(b)(6) motion is made.” Doe v. Schachter, 804 F. Supp. 53, 56 (N.D. Cal. 1992).  
17 Presuming its factual allegations to be true, the complaint must demonstrate that the court has  
18 either diversity jurisdiction or federal question jurisdiction. For diversity jurisdiction pursuant to  
19 28 U.S.C. § 1332, plaintiff and defendants must be residents of different states. District courts  
20 have federal question jurisdiction over “all civil actions that arise under the Constitution, laws, or  
21 treaties of the United States.” 28 U.S.C. § 1331. “A case ‘arises under’ federal law either where  
22 federal law creates the cause of action or ‘where the vindication of a right under state law  
23 necessarily turn[s] on some construction of federal law.’” Republican Party of Guam v.  
24 Gutierrez, 277 F.3d 1086, 1088-89 (9th Cir. 2002) (citing Franchise Tax Bd. v. Constr. Laborers  
25 Vacation Trust, 463 U.S. 1, 8-9 (1983)).

26           Second, if the motion makes a “factual attack” on subject matter jurisdiction,

1 often referred to as a “speaking motion,” the court does not presume the factual allegations of the  
2 complaint to be true. Thornhill, 594 F.2d at 733. In a factual attack, defendant challenges the  
3 truth of the jurisdictional facts underlying the complaint. “Faced with a factual attack on subject  
4 matter jurisdiction, the trial court may proceed as it never could under Rule 12(b)(6). . . . No  
5 presumptive truthfulness attaches to plaintiff’s allegations, and the existence of disputed material  
6 facts will not preclude the trial court from evaluating for itself the merits of jurisdictional  
7 claims.” Id. The court may consider evidence such as declarations or testimony to resolve  
8 factual disputes. Id.; McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988).

### 9 III. Discussion

#### 10 a. Subject Matter Jurisdiction

11 Defendant first argues that the complaint should be dismissed because it pleads  
12 only state law claims. This contention is without merit.

13 Pro se pleadings are liberally construed. Haines, 404 U.S. at 520-21 (1972). It is  
14 undisputed that the second cause of action in the complaint pleads only state law violations:  
15 “tortious discharge in violation of public policy.” (Dkt. No. 1 at 10.) The first cause of action is  
16 for disability discrimination and alleges violations of state laws. (Id. at 9.) However, the first  
17 cause of action also states that it is for “disability discrimination in violation of federal statutes  
18 for Title I, VII of the Americans with Disabilities Act (ADA),” and the “Equal Employment  
19 Opportunity Commission (EEOC) regulations for Title 1.” (Dkt. No. 1 at 6.) The complaint also  
20 alleges that “plaintiff was terminated because of his disability, and because he filed an ADA  
21 accommodation request and consulted with his union representative, regarding possible  
22 accommodation rights.” (Id. at 9.) Furthermore, plaintiff references the ADA frequently  
23 throughout his complaint. (See, e.g., Complaint at 1 (alleging federal question jurisdiction and  
24 stating that plaintiff’s complaint “embraces EEOC and ADA Compliance guidelines”).) Clearly,  
25 plaintiff intends to allege an ADA claim. Defendants point out that plaintiff also appears to  
26 allege under the same cause of action a state law violation and has attached a right to sue notice



1 from the DFEH. It would appear, then, that plaintiff seeks to include two separate causes of  
2 action within his first cause of action. Even if lacking in precision, it is clear that the complaint  
3 seeks to plead a federal claim. Therefore, defendant's motion is denied on this ground.

4 b. Statute of Limitations: Federal Claims

5 Defendant asserts that should the court interpret the complaint to include causes of  
6 action under the ADA and Title VII of the Civil Rights Act, plaintiff has not administratively  
7 exhausted those claims. With his opposition, plaintiff for the first time attached a right to sue  
8 letter from the EEOC, dated May 25, 2007. (Dkt. 9, Ex. 3.) In its reply, defendant contends that  
9 any federal claims are time barred.

10 To establish federal subject matter jurisdiction, plaintiff is required to exhaust his  
11 EEOC administrative remedies before seeking federal adjudication of any Title VII claims and  
12 claims brought pursuant to Title I of the ADA. Sosa v. Hiraoka, 920 F.2d 1451, 1456 (9th Cir.  
13 1990) (Title VII); Dao v. Auchan Hypermarket, 96 F.3d 787, 788 (5th Cir. 1996) (Title I of  
14 ADA); Stewart v. Brown, 86 F.3d 107, 110 (7th Cir. 1996) (Title I of ADA); Alberti v. City &  
15 County of San Francisco Sheriff's Dept., 32 F.Supp.2d 1164, 1174 (N.D. Cal. 1998), overruled  
16 on other grounds by Zimmerman v. Oregon Dept. of Justice, 170 F.3d 1169 (9th Cir. 1999).

17 A plaintiff filing a complaint under Title VII or Title I of the ADA has ninety days  
18 to file the complaint in federal court after receipt of the EEOC's right to sue letter. See 42  
19 U.S.C. § 2000e-16(c) ("Within 90 days of receipt of notice of final action taken by . . . the  
20 [EEOC] . . . if aggrieved by the final disposition of his complaint, or by the failure to take final  
21 action on his complaint, [an employee] may file a civil action . . ."); 42 U.S.C. § 2000e-5(f)(1)  
22 (requiring the filing of a civil action within 90 days of receiving a right to sue notice); 42 U.S.C.  
23 § 12117(a) (incorporating Title VII's enforcement procedures into the ADA). In addition, a  
24 plaintiff must file an EEOC complaint within 300 days of the alleged violation. See 42 U.S.C. §  
25 2000e-5(e); 29 C.F.R. § 1601.13; Draper v. Coeur Rochester, Inc., 147 F.3d 1104, 1107 (9th Cir.  
26 1998). This requirement effectively serves as a statute of limitations for the filing of Title VII

1 claims. See Draper, 147 F.3d at 1107.

2 Unless equitable tolling applies, plaintiff's EEOC right-to-sue letter establishes  
3 that the plaintiff's federal claims are time barred. The EEOC's right-to-sue letter is dated May  
4 25, 2007. Therefore, plaintiff had until August 24, 2007,<sup>5</sup> to file his complaint. However,  
5 plaintiff did not file this action until June 17, 2009.

6 At the December 17, 2009 hearing, plaintiff conceded that his action was time  
7 barred based solely on the May 25, 2007 right-to-sue letter. He contended, however, that certain  
8 acts of DFEH and/or the EEOC provide him with grounds to equitably toll the statute of  
9 limitations. Plaintiff also requested an evidentiary hearing on this issue.<sup>6</sup> Judge Hollows noted  
10 that agency misadvice is generally insufficient to support equitable tolling but stated that he  
11 would consider additional written documentation from plaintiff before issuing a ruling on the  
12 motion to dismiss.

13 Following the December 17, 2009 hearing, the plaintiff filed additional documents  
14 in support of his contention that he is entitled to equitable tolling. (Dkt. No. 14.) He contended  
15 that he was told that "he had to file a new complaint with the charges the DFEH/EEOC omitted  
16 out of its July 2006 complaint and investigation." (Dkt. No. 3.) He specifically states that he  
17 was told by the "EEOC representative that he had to lodge a new complaint with Wrongful  
18 termination, Retaliation and Disparity of Treatment, etc. . . . considering his case was no longer  
19 open in May 2008." (Dkt. No. 14 at 2.) Most significantly, plaintiff has not provided any  
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21 <sup>5</sup> Defendant calculates the 90 days as running one day later until August 25, 2007. (Dkt.  
22 No. 10 at 4.) However, since plaintiff's filing of this lawsuit did not occur until nearly two years  
later, the court need not reach this issue.

23 <sup>6</sup> At the hearing on this motion, the court discussed the possibility of granting plaintiff an  
24 evidentiary hearing. However, because plaintiff's factual allegations, even if taken as true, would  
25 not entitle him to relief from the statute of limitations, no evidentiary hearing is necessary. Cf.  
26 Irwin v. Veterans Admin., 489 U.S. 89, 458 (1990) (refusing to remand where there was no basis  
in the record for application of the doctrine of equitable tolling); Elvig v. Calvin Presbyterian  
Church, 375 F.3d 951, 955 n.1 (9th Cir. 2004) (noting that the court's review for failure to state a  
claim is generally limited to the contents of the complaint).

1 correspondence or even set forth any alleged conversations in his declaration establishing that  
2 there were any representations made to him by DFEH or EEOC within the 90 days after issuance  
3 of the May 25, 2007 right-to-sue letter. In fact, the first correspondence that plaintiff has  
4 provided from after that date is a September 27, 2007 letter relating to union grievances (see Dkt.  
5 No. 14, pp.39-52), and a letter plaintiff wrote to DFEH on May 28, 2008 (see Dkt. No. 9, exs. 2  
6 & 5.)

7           The doctrine of equitable tolling is available only in extreme cases. Scholar v.  
8 Pacific Bell, 963 F.2d 264, 267 (9th Cir. 1992); Miranda v. Castro, 292 F.3d 1063 (9th Cir. 2002)  
9 (“Equitable tolling is unavailable in most cases.”). In Scholar, Ninth Circuit discussed the  
10 application of the equitable tolling doctrine by the Supreme Court, and cited several examples of  
11 the Supreme Court’s allowance of equitable tolling of the statute of limitations. Id. The Ninth  
12 Circuit noted that when the statute of limitations was not complied with because of, for example,  
13 defective pleadings, when a claimant was tricked by an adversary into letting a deadline lapse or  
14 when the EEOC’s notice of the statutory period was clearly inadequate, the Supreme Court has  
15 made use of the equitable tolling doctrine. However, when a party fails to act diligently, it  
16 “cannot invoke equitable principles to excuse that lack of diligence.” Baldwin County Welcome  
17 Ctr. v. Brown, 466 U.S. 147, 151 (1984); Scholar v. Pac. Bell, 963 F.2d 264, 267-68 (9th Cir.  
18 1992) (claimant who fails to exercise due diligence in preserving legal rights is not entitled to  
19 equitable tolling); see also Irwin v. Dept. of Veterans Admin., 498 U.S. 89, 96 (1990) (equitable  
20 tolling does not extend to what is at best a garden variety claim of excusable neglect).

21           Plaintiff is not entitled to equitable tolling for numerous reasons. First, plaintiff  
22 received clear and explicit instruction that his time for filing a federal lawsuit was running  
23 commencing May 25, 2007. It is undisputed that the EEOC informed plaintiff that his lawsuit  
24 “**must be filed WITHIN 90 DAYS of your receipt of this Notice** or your right to sue will be  
25 lost” (Dkt. No. 9, Ex. 3, emphasis in original) The EEOC clearly notified plaintiff that this  
26 notice would be the only notice of dismissal and of plaintiff’s right-to-sue that it would send.

1 (Id.)

2           Second, plaintiff has not alleged or shown that he was tricked or misled into  
3 missing the filing deadline or that he exercised diligence in preserving his legal rights, even if, as  
4 he alleges, the right to sue letter only covered a partial investigation of his claims. Any reliance  
5 on a statement made by DFEH that it would file plaintiff's third complaint with the EEOC is  
6 irrelevant in light of the EEOC's right-to-sue letter's express 90-day filing deadline for his first  
7 and second complaint. Plaintiff contends that he received what amounts to incomplete advice  
8 about how to proceed with claims that he belatedly sought to add to his initial EEOC filing. This  
9 contention does not warrant equitable tolling. See Lawrence v. Florida, 549 U.S. 327, 336-37  
10 (2007) (to be entitled to equitable tolling the party must establish (1) that he has been pursuing  
11 his rights diligently; and (2) that some extraordinary circumstance stood in his way and prevented  
12 timely filing); Miranda v. Castro, 292 F. 3d 1063, 1066-67 (9th Cir. 2002) (mere negligent  
13 advice about the statute of limitations will not support a claim of equitable tolling); see also  
14 Mahroom v. Defense Language Institute, 732 F.2d 1439, 1440-41 (9th Cir. 1984) (finding a  
15 second right-to-sue letter without effect, and that it "should not require a different result in  
16 absence of any indication that the Commission intended to withdraw its earlier decision and  
17 revoke its first right-to-sue letter).

18           Third, the May 2008 filing that plaintiff avers should have been filed with the  
19 EEOC per DFEH, does not add any additional allegations. Whether or not it was sent to the  
20 EEOC is irrelevant. It is a virtual substantive duplicate of the first complaint, for which the  
21 statute of limitations ran on August 24, 2007. It alleges only failure to make accommodations for  
22 plaintiff's disability. Plaintiff cannot simply refile a nearly identical employment discrimination  
23 complaint to attempt to revive his stale right-to-sue.

24           More specifically, plaintiff contends that the Ninth Circuit's reasoning in Salgado  
25 v. Atlantic Richfield Co., 823 F.2d 1322 (9th Cir. 1987), requires equitable tolling in this case.  
26 In Salgado, the Court found equitable tolling appropriate because the state agency stated that it

1 was deferring the investigation of the complaint to the EEOC and it forwarded the complaint to  
2 the EEOC. There, the employee was notified that he had to await the outcome of the EEOC's  
3 processing to benefit from the results of any investigation. Id. at 1326. There is no evidence of  
4 any such co-extensive relationship here that would lead plaintiff to conclude that the 90-day  
5 statute of limitations would not bar his federal claim. Moreover, in Salgado, the court found that  
6 a FEHA claim may, under certain circumstances, be tolled during the pendency of an EEOC  
7 investigation. The EEOC deadline and not the FEHA deadline is at issue here because plaintiff  
8 is seeking to toll his federal claims.

9           Finally, plaintiff asserts that his second claim with the EEOC,<sup>7</sup> brought on the  
10 same grounds as his first claim, entitles him to equitable tolling because he did not receive a  
11 second right-to-sue letter. This contention fails on numerous grounds.

12           First, an EEOC charge must be filed within 180 days of the last discriminatory act  
13 (or within 300 days in a state, such as California, which has its own anti-discrimination laws and  
14 agency). See 42 U.S.C. S 2000e-1. The second filing of an EEOC charge does not change the  
15 acts which are the subject of this litigation, which took place in January 2006, the pertinent date  
16 at issue. Plaintiff waited 878 days to file the second (or third) charge of discrimination with the  
17 DFEH, which he says in turn told him they would also file it with the EEOC. Assuming,  
18 *arguendo*, the DFEH erred and that this 2008 charge of discrimination should have been  
19 simultaneously filed with the EEOC on May 27, 2008, this claim is still time barred. This claim  
20 was allegedly to be filed with the EEOC approximately 578 days past the 300 day deadline. A  
21 plaintiff cannot skirt the statute of limitations by filing and refiling his complaint of employment  
22 discrimination, seeking to renew the time for its expiration with each attempt.

23           Second, as pointed out by defendant, "where, as here, a right to sue letter has  
24 issued, a suit has been instituted and the EEOC has closed its file, there is no longer a charge

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25           <sup>7</sup> From the record before the court, it appears that this was actually plaintiff's third filing  
26 with the DFEH.

1 pending before the EEOC which is capable of being amended.” Balazs v. Liebenthal, 32 F.3d  
2 151, 157 (4th Cir. 1994). Plaintiff’s cause of action is foreclosed because he did not file his  
3 federal civil action in a timely fashion in accordance with the statutory requirements.

4 In sum, all of plaintiff’s contentions are without merit. Plaintiff’s attempt to use  
5 the doctrine of equitable tolling to extend the numerous time frames for filing his federal claim  
6 are in essence nothing more than a request to extend the time frames because he believes he has a  
7 general right to prosecute a civil action. But that right is not without limitation. Were the court  
8 to extend the statute of limitations in cases such as this one under the guise of equitable tolling,  
9 the statutory time periods for exhausting administrative remedies and prosecuting subsequent  
10 civil actions would be rendered meaningless. Plaintiff (1) missed the 90 day timeframe for filing  
11 a civil action after receipt of his EEOC right-to-sue letter by over two years; (2) did not file this  
12 action within 300 days of the last discriminatory act; and (3) added no new facts or legal theories  
13 in his third administrative complaint which thereby did nothing to revive the expired limitations  
14 period. Any alleged statements by the DFEH about dual filing the third complaint with the  
15 EEOC are irrelevant. After multiple opportunities to do so, plaintiff has not proffered or even  
16 suggested facts which would merit further examination of the timeliness of his claims, whether  
17 via an evidentiary hearing or otherwise. Plaintiff’s federal claims are, quite simply, time barred.

### 18 c. State Law Claims

19 As there are no federal claims remaining, this court declines to exercise  
20 supplemental jurisdiction over plaintiff’s possible state law claims. See 28 U.S.C. § 1367(c)(3)  
21 (The district courts may decline to exercise supplemental jurisdiction over a claim . . . if the  
22 district court has dismissed all claims over which it has original jurisdiction”); see also, Acri v.  
23 Varian Associates, Inc., 114 F.3d 999, 1000-01 (9th Cir. 1997) (“in the usual case in which all  
24 federal-law claims are eliminated before trial, the balance of factors . . . will point toward  
25 declining to exercise jurisdiction over the remaining state-law claims”), quoting Carnegie-Mellon  
26


1 University. v. Cohill, 484 U.S. 343, 350 n.7 (1988).<sup>8</sup>

2 IV. Conclusion

3           Accordingly, IT IS HEREBY RECOMMENDED that defendant’s October 19,  
4 2009 motion to dismiss be granted on the grounds that plaintiff’s federal claims are time barred,  
5 that this action be dismissed with prejudice for lack of subject matter jurisdiction pursuant to  
6 Federal Rule of Civil Procedure 12(b)(1), and that the court decline to exercise jurisdiction over  
7 plaintiff’s state law claims.

8           These findings and recommendations are submitted to the United States District  
9 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen  
10 days after being served with these findings and recommendations, any party may file written  
11 objections with the court and serve a copy on all parties. Such a document should be captioned  
12 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections  
13 within the specified time may waive the right to appeal the District Court’s order. Turner v.  
14 Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir.  
15 1991).

16 DATED: June 1, 2010

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19   
20 KENDALL J. NEWMAN  
21 UNITED STATES MAGISTRATE JUDGE  
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23           <sup>8</sup> At the conclusion of plaintiff’s filing entitled “rebuttal points and authorities in  
24 opposition to defendant’s reply motion to dismiss,” he requests, without support, sanctions  
25 against defendant for refusing stipulations, insisting on going to court “to argue over issues,” and  
26 for filing a “frivolous” motion to dismiss. (Dkt. No. 11 at 4-6.) These contentions appear  
without merit and are not sought in a manner consistent with the procedural requirements of the  
Local Rules or Federal Rules of Civil Procedure. “Pro se litigants must follow the same rules of  
procedure that govern other litigants.” King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987).