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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Michael A. Leon,	)	CV 10-587-TUC-DCB
	)	
Plaintiff,	)	<b>ORDER</b>
	)	
vs.	)	
	)	
Danaher Corporation, et. al.,	)	
	)	
Defendants.	)	
	)	
_____	)	

This matter was referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and the local rules of practice of this Court, LRCiv 72.1, for a Report and Recommendation on the Defendants' Motion to Dismiss. Before the Court is the Magistrate Judge's Report and Recommendation (R&R) on the Defendants' Motion to Dismiss. The Magistrate Judge recommends to the Court that the Motion to Dismiss should be granted and the action terminated. The Plaintiff filed Objections to the R&R and the Defendants filed a Response to the Objections.

**STANDARD OF REVIEW**

When objection is made to the findings and recommendation of a magistrate judge, the district court must conduct a de novo review. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003).

**PLAINTIFF'S OBJECTIONS**

Plaintiff generally objects to all of the legal and evidentiary

1 conclusions contained in the Report and Recommendation. Plaintiff  
2 clarifies to the Court that he is a "severely disabled pro se litigant  
3 receiving social security benefits." (Objection at 1.) Plaintiff  
4 further asserts that he should be allowed to file an amended complaint  
5 to attempt to cure the defects.

#### 6 DISCUSSION

7 Before the Court is Plaintiff's First Amended Complaint. In  
8 addition, the EEOC dismissed Plaintiff's claim and notified him of his  
9 right to file a lawsuit. Defendants contended that the named individual  
10 employees were not subject to liability in their individual capacities  
11 under Title VII and the ADA. Defendants further contended that  
12 Plaintiff's claims were untimely, unexhausted and legally insufficient.

13 The R&R recommends, as follows:

14 For the foregoing reasons, Plaintiff's First Amended  
15 Complaint should be dismissed as time-barred with regard to  
16 claims arising up to and including his May 11, 2007  
17 termination. Additionally, Plaintiff's First Amended  
18 Complaint should be dismissed for failure to state a claim  
19 with regard to Plaintiff's allegations of post-employment  
20 retaliation consisting of the posting of his image and  
21 security measures, including warnings to employees, allegedly  
22 taken by Defendants concerning Plaintiff and his son.  
23 Further, Plaintiff's First Amended Complaint should be  
24 dismissed for failure to exhaust administrative remedies with  
25 regard to Plaintiff's post-employment claim of discrimination  
26 and retaliation concerning allegations that Securaplane  
27 refused to contact him after receipt of his resume for job  
28 openings in 2010. Alternatively, with regard to allegations  
that Defendants retaliated against Plaintiff by refusing to  
contact him after receipt of his resume for job openings in  
2010, the First Amended Complaint should be dismissed for  
failure to state a claim.

1           In the Ninth Circuit a plaintiff must be given leave to  
2 amend his complaint unless it is absolutely clear that the  
3 deficiencies of the complaint could not be cured by amendment.  
4 *Noll v. Carlson*, 809 F.2d 1446, 1447 (9<sup>th</sup> Cir. 1987),  
5 *superseded in part by* 28 U.S.C. § 1915(e)(2)(B)(ii); *see also*  
6 *Cook, Perkiss and Liehe, Inc. v. Northern Calif. Collection*  
7 *Serv.*, 911 F.2d 242, 247 (9<sup>th</sup> Cir. 1991) ("We have held that  
8 in dismissals for failure to state a claim, a district court  
9 should grant leave to amend even if no request to amend the  
10 pleading was made, unless it determines that the pleading  
11 could not possibly be cured by the allegation of other  
12 facts.").

13           Plaintiff filed his First Amended Complaint after  
14 receipt of Defendants' Motion to Dismiss. The record is clear  
15 that Plaintiff's claims arising during his employment up to  
16 and including his May 11, 2007 termination are time-barred  
17 and, thus, cannot be cured by further amendment of the  
18 complaint. Additionally, amendment of the First Amended  
19 Complaint could not cure Plaintiff's claims of post-employment  
20 discrimination given that: (1) his claims concerning the  
21 posting of his image at Securaplane and other security  
22 measures do not fall within the purview of the anti-  
23 discrimination and/or anti-retaliation provisions of Title  
24 VII and the ADA; and (2) he has not exhausted administrative  
25 remedies concerning his claim that Securaplane's failure to  
26 contact him upon receipt of his resume in 2010 was  
27 discriminatory or retaliatory, thus rendering the Court  
28 without jurisdiction over such a claim. Alternatively, even  
if the EEOC Charge somehow encompassed Plaintiff's claim of  
post-employment retaliation, further amendment of the  
complaint cannot cure the deficiencies regarding such claim  
given Plaintiff's contention that the alleged retaliation was  
based upon his involvement in whistleblower activity and  
complaints all regarding safety issues and not activity  
protected under Title VII or the ADA. Under the instant  
circumstances, further amendment of Plaintiff's complaint  
would be futile. *See Lopez*, 203 F.3d at 1127; *Noll*, 809 F.2d

1 at 1448 (*citing Broughton v. Cutter Labs.*, 622 F.2d 458, 460  
2 (9<sup>th</sup> Cir. 1980)). Therefore, Plaintiff's First Amended  
3 Complaint should be dismissed without leave to amend.

4 (R&R at 20 - 22.)

5 Pursuant to Fed. R. Civ. P. 12(b), the district court may dismiss  
6 a complaint for failure to state a claim upon which relief can be  
7 granted, failure to effect proper service, lack of venue or personal  
8 jurisdiction, or lack of federal subject matter jurisdiction. See  
9 *Whittington v. Whittington*, 733 F.2d 620, 621 (9th Cir. 1984).

10 A pro se litigant's pleadings should be liberally construed, and the  
11 litigant should be given leave to amend with instructions as to curing  
12 the deficiency unless the defects cannot be cured by amendment. See *Lopez*  
13 *v. Smith*, 203 F.3d 1122, 1124, 1127-29 (9th Cir. 2000) (en banc). The  
14 district court, in exercising its inherent power to control its docket,  
15 may impose sanctions, including the dismissal of a case. See *Bautista v.*  
16 *Los Angeles County*, 216 F.3d 837, 841 (9th Cir. 2000). However, where  
17 deficiencies in a second amended complaint are readily curable with some  
18 guidance from the court, dismissal without leave to amend is an abuse of  
19 discretion. See *id.*

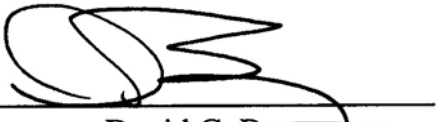
20 Here, the Court agrees with the R&R that any attempt to cure would  
21 be futile. The infirmity in Plaintiff's action is not inartful pleading,  
22 but incurable procedural errors. The R&R is factually thorough and  
23 legally accurate.

#### 24 CONCLUSION

25 Accordingly, after conducting a de novo review of the record,  
26 **IT IS ORDERED** that the Court **ADOPTS** the Report and Recommendation  
27 (Doc. 30) in its entirety. The Objections (Doc. 37) raised by the  
28 Plaintiff are **OVERRULED**.

1 IT IS FURTHER ORDERED that Defendants' Motion to Dismiss pursuant  
2 to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) (Doc. 13) is GRANTED and this  
3 action is terminated. A Final Judgment shall enter separately.<sup>1</sup>

4 DATED this 30<sup>th</sup> day of August, 2011.

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7 David C. Bury  
8 United States District Judge  
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20 <sup>1</sup>Although the filing of a notice of appeal generally divests the district  
21 court of jurisdiction over those aspects of the case involved in the appeal, the  
22 district court's jurisdiction is not affected when a litigant files a notice of  
23 appeal from an unappealable order. Estate of Connors v. O'Connor, 6 F.3d 656,  
24 658 (9th Cir. 1993). "When a Notice of Appeal is defective in that it refers to  
25 a non-appealable interlocutory order, it does not transfer jurisdiction to the  
26 appellate court, and so the ordinary rule that the district court cannot act  
27 until the mandate has issued on the appeal does not apply." Nascimento v.  
28 Dummer, 508 F.3d 905, 908 (9th Cir. 2007). In such a case, the district court  
"may disregard the purported notice of appeal and proceed with the case, knowing  
that it has not been deprived of jurisdiction." Ruby v. Secretary of the United  
States Navy, 365 F.2d 385, 389 (9th Cir. 1966). The R&R was not an appealable  
final order. See 28 U.S.C. § 1291. In addition, the R&R was not an  
interlocutory order generally appealable under 28 U.S.C. § 1292(a), and the Court  
did not provide the statement necessary to make the Order an interlocutory order  
appealable under 28 U.S.C. § 1292(b) nor was the motion to file the appeal in  
forma pauperis granted. The Notice of Appeal refers to a non-appealable  
interlocutory order and, therefore, it did not divest the Court of jurisdiction  
or preclude resolution of the pending R&R.