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8 UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
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11 ARTURO VERDUZCO,

12 Plaintiff,

13 v.

14 CONAGRA FOODS PACKAGED  
15 FOODS, LLC,

16 Defendant.  
17

No. 1:18-cv-01681-DAD-SKO

ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
MOTION TO DISMISS

(Doc. No. 33)

18 Plaintiff Arturo Verduzco filed this lawsuit against defendant Conagra Foods Packaged  
19 Foods, LLC after plaintiff was allegedly subject to workplace discrimination by defendant's  
20 employees. (Doc. No. 1.) The court previously granted defendant's motion to dismiss plaintiff's  
21 complaint for failure to state a claim with leave to amend and in the dismissal order instructed  
22 plaintiff "to pay close attention to the legal standards . . . before filing any amended complaint" in  
23 this action. (Doc. No. 27 at 15.) Thereafter, plaintiff filed a first amended complaint ("FAC").  
24 (Doc. No. 29.) Currently pending before the court is defendant's motion to dismiss the FAC for  
25 failure to state a claim. (Doc. No. 33.) For the reasons explained below, defendant's motion to  
26 dismiss is granted in part and denied in part.

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## BACKGROUND

Plaintiff originally filed this action asserting various employment-discrimination claims under Title VII of the Civil Rights Act of 1964 (“Title VII”), the Equal Pay Act (“EPA”), and California common law for intentional infliction of emotional distress (“IIED”). (Doc. No. 1.) The court granted defendant’s motion to dismiss the complaint in its entirety but granted plaintiff leave to amend. (Doc. No. 27.) The FAC reasserts some of the same claims the court previously dismissed, but includes new claims and additional factual allegations.

The FAC asserts seven claims against defendant: (1) gender discrimination under Title VII and California’s Fair Employment and Housing Act (“FEHA”)<sup>1</sup>; (2) disability discrimination under the American with Disabilities Act (“ADA”) and under FEHA; (3) failure to accommodate under the ADA and FEHA; (4) failure to engage in the interactive process under the ADA and FEHA; (5) retaliation under Title VII for filing charges with the Equal Employment Opportunity Commission (“EEOC”) and the Department of Fair Employment and Housing (“DFEH”); (6) pay discrimination under the EPA; and (7) IIED. (FAC at ¶¶ 50–137.)

The FAC’s sixth and seventh claims are nearly identical to certain claims appearing in plaintiff’s original complaint, with little to no different allegations in support thereof. For these two claims, the court incorporates by reference the supporting allegations as set forth in its previous dismissal order and will not summarize them again here. (See Doc. No. 27 at 2–3.)

The FAC’s first claim for gender discrimination differs from the original claim in one material way but otherwise rests on the theory that plaintiff was discriminated against on the basis of his gender when he was denied training as a quality assurance supervisor. (Compare Doc. No. 1 at ¶ 52, with FAC at ¶ 59.) However, the alleged time frame in which plaintiff plausibly worked in that position has now been changed. The court found that the original complaint did not plausibly allege that plaintiff served as a quality assurance supervisor past October 2015.

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<sup>1</sup> Although the FAC labels the claim as, “Gender Discrimination,” the supporting allegations reference both Title VII and FEHA. (FAC at 11, ¶¶ 50–67.) The original complaint explicitly labeled the claim as a violation of Title VII and the supporting allegations did not mention FEHA. (Doc. No. 1 at 8, ¶¶ 52–59.) The court construes the FAC to allege gender discrimination under both Title VII and FEHA.

1 (See Doc. No. 27 at 7–8.) Given that date, the court found that plaintiff’s claim in this regard was  
2 time-barred. (*Id.* at 8.) Plaintiff now alleges with documentary support that he served in that  
3 position, at least in some capacity, through November 2018. (FAC at ¶ 58.) As discussed below,  
4 this new factual allegation is material in assessing whether plaintiff’s claim for gender  
5 discrimination is time-barred.

6 The FAC’s fifth claim, alleging retaliation after filing charges with the EEOC and DFEH,  
7 also differs from plaintiff’s original theory of retaliation. (*Compare* Doc. No. 1 at ¶¶ 82–90, with  
8 FAC at ¶¶ 110–127.) In his original complaint, plaintiff alleged that defendant retaliated against  
9 him for filing two EEOC/DFEH charges: EEOC Charge # 556-2014-00770 and EEOC Charge #  
10 556-2014-00854 (the “2014 Charges”). (Doc. No. 1 at ¶ 83.) The 2014 Charges purportedly  
11 focused on race/national origin discrimination, although no details were provided regarding the  
12 alleged discrimination. (See Doc. No. 8-3.) The theory of plaintiff’s original retaliation claim  
13 was that his request for time off from work was denied because he filed the 2014 Charges. (*Id.*)  
14 Plaintiff then filed a charge with the EEOC/DFEH for retaliation based on the filing of the 2014  
15 Charges: EEOC Charge # 556-2016-00365 (the “April 2016 Charge”). (*Id.*) On January 9,  
16 2018, the EEOC issued a notice of right to sue on the April 2016 Charge. (Doc. No. 8-4 at 1.)  
17 Thus, the original complaint was filed based on the April 2016 Charge.

18 The FAC abandons the theory alleged in the April 2016 Charge, namely that defendant  
19 was retaliated against because he filed the 2014 Charges. Instead, the FAC’s retaliation claim is  
20 based on two new theories. First, in or around January and February 2018, plaintiff claims that  
21 defendant failed to train him as a mechanic in retaliation for his complaints in 2015 when plaintiff  
22 was denied training as a quality assurance supervisor. (FAC at ¶ 113–14.) Second, in or around  
23 July and August 2019, plaintiff alleges that he was on a “medical restriction” and requested a  
24 reassignment in positions, from juice topping helper, which required plaintiff “to stand for several  
25 hours” and “caused him significant pain,” to a position as a cook. (*Id.* at ¶ 115–16.) Defendant  
26 purportedly denied that request. (*Id.* at ¶ 116–19.) Plaintiff alleges that defendant’s denial was in  
27 retaliation for plaintiff’s complaining about gender and racial harassment in the past, including  
28 potentially the 2014 Charges. (*Id.* at ¶¶ 120–21 (citing the 2014 Charges).) On March 19, 2020,

1 plaintiff filed a charge with the DFEH claiming he had been retaliated against in 2018 and 2019  
2 as discussed above (the “2020 Charge”). (*See id.* at 46–48.) The same day, the DFEH issued  
3 plaintiff a right to sue. (*Id.* at 45.) Thus, plaintiff’s retaliation claim is now based on the 2020  
4 Charge (not the April 2016 Charge, as it was in the original complaint).

5 The FAC’s second, third, and fourth claims brought under the ADA are entirely new. On  
6 July 22, 2019, plaintiff informed defendant “that he was placed on limited duties by his doctor  
7 due to several herniated discs in his spine.” (*Id.* at ¶ 72.) As a result of that condition, plaintiff  
8 was purportedly unable to lift more than 50 pounds and asked to be reassigned job positions  
9 because he could not perform his duties as a mechanic helper. (*Id.* at ¶ 73.) Plaintiff asked to be  
10 reassigned to a position as a cook but was told that other employees had priority. (*Id.* at ¶ 74.)  
11 Defendant denied that request for reassignment, even though plaintiff alleges he was more senior  
12 than other cooks and defendant employed fewer cooks than was necessary. (*Id.* at ¶¶ 74–75.)  
13 Due to the accommodation denial, plaintiff was diagnosed with two hernias on August 3, 2019.  
14 (*Id.* at ¶ 76.) Plaintiff was sent home on August 6, 2019 and has not returned to work since. (*Id.*)  
15 Although plaintiff continued to submit updates from his doctor every two months after being sent  
16 home, defendant refused to even meet with plaintiff and has not allowed him to return to work.  
17 (*Id.* at ¶ 77.) Plaintiff asserts three claims related to his disability. With respect to his disability  
18 discrimination claim, plaintiff alleges that he was denied workplace accommodation “due to his  
19 continual complaints regarding the gender and racial harassments claims he filed both within the  
20 company and with the EEOC and DFEH.” (*Id.* at ¶ 78.) The FAC also asserts claims for failure  
21 to accommodate, (*id.* at ¶¶ 82–94), and failure to engage in the interactive process, (*id.* at ¶¶ 95–  
22 109.)

### 23 LEGAL STANDARD

24 The purpose of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6)  
25 is to test the legal sufficiency of the complaint. *N. Star Int’l v. Ariz. Corp. Comm’n*, 720 F.2d  
26 578, 581 (9th Cir. 1983). A dismissal may be warranted where there is “the lack of a cognizable  
27 legal theory or the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri*  
28 *v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). A plaintiff must allege “enough facts

1 to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,  
2 570 (2007). A claim is plausible on its face “when the plaintiff pleads factual content that allows  
3 the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”  
4 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court accepts as true the allegations in the  
5 complaint and construes the allegations in the light most favorable to the plaintiff. *Hishon v.*  
6 *King & Spalding*, 467 U.S. 69, 73 (1984); *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir.  
7 1989). However, the court will not assume the truth of legal conclusions cast in the form of  
8 factual allegations. *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir.  
9 1986). While Federal Rule of Civil Procedure 8(a) does not require detailed factual allegations,  
10 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory  
11 statements, do not suffice” to survive dismissal under Rule 12(b)(6). *Iqbal*, 556 U.S. at 676. A  
12 complaint must do more than allege mere “labels and conclusions” or “a formulaic recitation of  
13 the elements of a cause of action.” *Twombly*, 550 U.S. at 555.

14 In ruling on a motion to dismiss brought under Rule 12(b)(6), the court is permitted to  
15 consider material which is properly submitted as part of the complaint, documents that are not  
16 physically attached to the complaint if their authenticity is not contested and the plaintiff’s  
17 complaint necessarily relies on them, and matters of public record. *Lee v. City of Los Angeles*,  
18 250 F.3d 668, 688–89 (9th Cir. 2001). The FAC attaches supporting documents, including  
19 portions of an administrative charge, right-to-sue notices issued by the EEOC and DFEH, and  
20 other material supporting plaintiff’s claims. (See FAC 32–76.) In connection with the pending  
21 motion, defendant has submitted copies of plaintiff’s administrative charges and the  
22 corresponding right-to-sue notices. (See Doc. No. 33-2, Exs. A–R.) Because the FAC attaches  
23 these documents or necessarily relies upon them and plaintiff does not dispute their authenticity,  
24 the court will consider these materials in resolving the pending motion to dismiss.

## 25 ANALYSIS

26 Defendant moves to partially dismiss the FAC with prejudice for failure to state a claim.  
27 (See Doc. No. 33 at 2–4.) Specifically, defendant does not seek dismissal of plaintiff’s claims for  
28 gender discrimination under FEHA (Claim One, Subpart Two), failure to accommodate under the

1 ADA and FEHA (Claim Three), and failure to engage in the interactive process under the ADA  
2 and FEHA (Claim Four). (*Id.* at 8–17.) However, defendant moves to dismiss all other claims in  
3 the FAC. (*Id.*) Plaintiff opposes dismissal of his claim for gender discrimination under Title VII  
4 (Claim One, Subpart One) and claim for retaliation in response to filing charges with the EEOC  
5 and DFEH (Claim Five). (Doc. No. 36.) Plaintiff does not oppose the motion to dismiss with  
6 respect to the following claims: disability discrimination under the ADA and FEHA (Claim  
7 Two), violation of the EPA (Claim Six), and IIED (Claim Seven). (*See id.* at 1–2, 6–11.) The  
8 court will address defendant’s arguments below in the order they appear in the pending motion to  
9 dismiss.

10 **A. Claim One: Gender Discrimination**

11 1. Title VII

12 Title VII makes it unlawful for an employer “to discriminate against any individual with  
13 respect to his compensation, terms, conditions, or privileges of employment, because of such  
14 individual's race, color, religion, sex, or national origin[.]” 42 U.S.C. § 2000e-2(a). Before filing  
15 a lawsuit under Title VII, an employee must first file a timely charge with an administrative  
16 agency. 42 U.S.C. § 2000e-5. “A discriminatory act which is not made the basis for a timely  
17 charge . . . is merely an unfortunate event in history which has no present legal consequences.”  
18 *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977). Generally, charges alleging  
19 discrimination under Title VII must be filed with the EEOC within 180 days from the date that  
20 the alleged discriminatory act occurred. 42 U.S.C. § 2000e-5(e)(1); *Laquaglia v. Rio Hotel &*  
21 *Casino, Inc.*, 186 F.3d 1172, 1174 (9th Cir. 1999). If an employee initiates a charge with a state  
22 that enforces its own anti-discrimination laws, known as a “deferral” state, the employee has 300  
23 days to file such a charge. *Id.* Because California is a deferral state, the 300-day period applies  
24 to plaintiff’s claim. *See Bouman v. Block*, 940 F.2d 1211, 1220 (9th Cir. 1991). After receiving a  
25 notice of right to sue, an employee must file suit in federal court within 90 days. 42 U.S.C.  
26 § 2000e-5(f)(1). “The requirement for filing a Title VII civil action within 90 days from the date  
27 EEOC dismisses a claim constitutes a statute of limitations.” *Scholar v. Pac. Bell*, 963 F.2d 264,  
28 266–67 (9th Cir. 1992). If an employee does not file suit within the 90-day period, “the action is

1 barred[.]” *Id.* at 267.

2 In his gender-discrimination claim brought under Title VII plaintiff alleges that he was  
3 discriminated against when he was denied training as a quality assurance supervisor but is vague  
4 regarding some key details with regard to that claim. (FAC at ¶¶ 50–67.) The court is mindful  
5 that the *pro se* FAC must be construed liberally. *See Erickson v. Pardus*, 55 U.S. 89, 94 (2007);  
6 *see also Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (explaining that, “particularly in civil  
7 rights cases,” *pro se* pleadings must be given “the benefit of any doubt” (quoting *Bretz v. Kelman*,  
8 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (*en banc*))). Therefore, the court will break down  
9 plaintiff’s claim.

10 On the one hand, plaintiff alleges that he was denied training “[i]n or around August  
11 2015” and that he complained about that denial of training “[i]n or around September 2015[.]”  
12 (FAC at ¶¶ 30, 35.) Plaintiff’s clock to file an administrative charge should have started to run on  
13 the date that he was denied training in August 2015. This is because a failure to train is a discrete  
14 discriminatory act occurring on a “particular day”; it is not an act that “occurs over a series of  
15 days or perhaps years” as is the case with claims alleging a hostile working environment. *Nat’l*  
16 *R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002). On the other hand, plaintiff’s  
17 allegations arguably give rise to a reasonable inference that he was denied training again on a  
18 separate occasion at a later date. *See Dixon v. Haw., Dep’t of Educ.*, No. 16-00110 DKW, 2017  
19 WL 6029589, at \*6 (D. Haw. Dec. 5, 2017) (“Dixon’s claims that she was denied training  
20 opportunities afforded to Barry in 2009 and 2012 are discrete acts, each separately actionable . .  
21 .”). While plaintiff alleges that he was disqualified or removed from his position around October  
22 or November 2015, (see FAC at ¶¶ 38, 57), he now alleges for the first time that he was  
23 “nominally kept in the position” through November 2018, (see *id.* at ¶ 58.) In support of the  
24 allegation that he was “nominally” a quality assurance supervisor through November 2018,  
25 plaintiff has attached to his FAC as an exhibit a copy of his “Probationary Job Training  
26 Evaluation” listing him as a quality assurance supervisor, which is dated November 9, 2018. (*Id.*  
27 at 50.) This allegation and the corroborating exhibit were absent from the original complaint.  
28 Moreover, the FAC alleges that plaintiff was denied training for that position in November 2018.

1 (See *id.* at ¶¶ 28, 54 (“Training was delayed and spread over three years . . .”).) Plaintiff confirms  
2 this allegation in the opposition to the pending motion to dismiss. (See Doc. No. 36 at 3 (“. . .  
3 Plaintiff was requesting to be trained, and being denied, well into 2018.”).) Construing the  
4 allegations of the FAC in a light most favorable to him, plaintiff has plausibly alleged that he was  
5 denied training as a quality assurance supervisor during November 2018.

6 For the court to properly consider various denials of training, plaintiff must have filed a  
7 timely charge with the appropriate administrative agency for each alleged denial. See *Dixon*,  
8 2017 WL 6029589, at \*6 (“Dixon was required to file an EEOC Charge within 300 days of each  
9 denial of training.”). Plaintiff cites and attaches just two such charges, and the related notices of  
10 his right to sue issued with respect to those charges, in support of his claim that he exhausted his  
11 administrative remedies. (See FAC at ¶¶ 14, 18–19.) Only one of the charges cited by plaintiff  
12 alleges gender discrimination based on the denial of training as a quality assurance supervisor  
13 (the “2018 Charge”). (See *id.* at ¶ 14 (referencing EEOC # 37A-2018-02860); see Doc. No. 33-2,  
14 Ex. A, at 5–6 (providing the allegations).) The 2018 Charge states that, on January 8, 2018,  
15 plaintiff was discriminated against because of his gender when he was denied training as a quality  
16 assurance supervisor. (Doc. No. 33-2, Ex. A, at 5.) Although it is unclear from the 2018 Charge  
17 itself, plaintiff alleges that he initiated this charge on March 29, 2018, which the court will accept  
18 as true for purposes of the pending motion. (See FAC at ¶ 14.)

19 Plaintiff’s claim is not time-barred because he timely filed an administrative charge and  
20 this lawsuit in federal court. The discrimination allegedly took place on January 8, 2018, when  
21 plaintiff claims he was denied training as a quality assurance supervisor because of his gender.  
22 Plaintiff had until November 4, 2018 to timely file an administrative charge. See § 2000e-5(e)(1).  
23 He did so by filing the 2018 Charge on March 29, 2018, (FAC at ¶ 14), and thus his claim is  
24 properly exhausted. Further, plaintiff received a notice of right to sue from the EEOC on  
25 November 9, 2018. (FAC at 32; see also *id.* at 33 (attaching notice of right to sue issued by  
26 DFEH on October 2, 2018).) Plaintiff had until February 7, 2019 to timely file suit before this  
27 claim would be time-barred. See § 2000e-5(f)(1). He filed the original complaint on December

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11, 2018, well within the 90-day window.<sup>2</sup> Therefore, plaintiff has plausibly stated a claim for gender discrimination under Title VII.

Defendant argues for dismissal based on a different failure-to-train incident and a different administrative charge (the “July 2016 Charge”). (See Doc. Nos. 33 at 10; 33-2, Ex. E, at 22–29.) The court agrees that the July 2016 Charge, and the allegations contained within, cannot serve as the basis for plaintiff’s gender-discrimination claim under Title VII because it is time-barred. The July 2016 Charge alleges that plaintiff was discriminated against on the basis of his gender when he was denied training on or around October 16, 2015. (Doc. No. 33-2, Ex. E, at 24.) The July 2016 Charge was timely filed on July 10, 2016.<sup>3</sup> See § 2000e-5(e)(1) (requiring plaintiff to file a charge by August 11, 2016 at the latest). Plaintiff received a notice of right to sue on the July 2016 Charge from the DFEH on March 9, 2017 and from the EEOC on May 17, 2017. (Doc. No. 33-2, Exs. F–G, at 30–32, 33–35.) However, because the original complaint was filed on December 11, 2018, plaintiff did not file suit based on the July 2016 Charge before the statute of

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<sup>2</sup> Although defendant does not make the argument, the court notes that the date the original complaint was filed controls for purposes of analyzing the statute of limitations here. Under Federal Rule of Civil Procedure 15(c)(1), “amendments made after the statute of limitations has run may ‘relate back’ to the date of the original pleading when the amended pleading arises ‘out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading.’” *Hebner v. McGrath*, 543 F.3d 1133, 1137–38 (9th Cir. 2008) (quoting Fed. R. Civ. P. 15(c)(1)). “The relation back doctrine of Rule 15(c) is ‘liberally applied.’” *ASARCO, LLC v. Union Pac. R.R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014) (citation omitted). Here, the allegations supporting plaintiff’s claim for gender discrimination in the FAC relate back to his original complaint because the two pleadings “share a common core of operative facts so that the adverse party has fair notice of the transaction, occurrence, or conduct called into question.” See *id.* (citation omitted). Both pleadings concerned discrimination on the basis of gender when plaintiff was denied training as a quality assurance supervisor. The only difference is that the FAC now plausibly alleges that plaintiff worked in that position during 2018 (contradicted by his own allegations in the original complaint) based on a corroborating document prepared by defendant. Defendant had “fair notice” that plaintiff might be able to plausibly allege that he worked as a quality assurance supervisor during 2018. Accordingly, plaintiff’s claim is not barred by the statute of limitations. See, e.g., *Dornell v. City of San Mateo*, 19 F. Supp. 3d 900, 907–08 (N.D. Cal. 2013) (finding the original complaint as the operative pleading for purposes of the 90-day window under § 2000e-5(f)(1) because the amendment related back).

<sup>3</sup> Defendant claims that the July 2016 Charge was filed on September 30, 2016, (Doc. No. 33-1 at ¶ 7), however, the charge itself lists the “File Date” as “July 10, 2016,” (Doc. No. 33-2, Ex. E, at 24.) For purposes of the pending motion to dismiss, the court will accept as true the July date.

1 limitations expired. See § 2000e-5(f)(1) (requiring plaintiff to file suit by August 15, 2017 at the  
2 latest). Thus, plaintiff's claim based on the July 2016 Charge is time-barred.

3 However, plaintiff's Title VII gender-discrimination claim based on the 2018 Charge  
4 survives. Defendant's motion to dismiss this claim is denied.

5 2. FEHA

6 As noted above, the FAC adds a gender-discrimination claim under FEHA. (FAC at 11,  
7 ¶¶ 50–67.) Defendant's motion generally seeks dismissal of plaintiff's gender-discrimination  
8 claim “[u]nder Title VII” based upon the applicable statute of limitations. (Doc. No. 33 at 8–10.)  
9 That basis for dismissal is addressed above. The motion to dismiss makes no reference to  
10 plaintiff's gender-discrimination claim brought under FEHA. (See *passim id.* (citing law  
11 pertaining to Title VII only).) In its reply brief, defendant discusses California Government Code  
12 § 12960(e) for the first time, (see Doc. No. 37 at 2–3), even though the FAC referenced and cited  
13 the statute in the allegations supporting plaintiff's gender-discrimination claim, (FAC at ¶¶ 51,  
14 53.) Because defendant did not raise any arguments with respect to plaintiff's FEHA-gender-  
15 discrimination claim in its motion to dismiss, defendant waived its argument presented for the  
16 first time in the reply brief. *United States v. Gianelli*, 543 F.3d 1178, 1184 n.6 (9th Cir. 2008)  
17 (“[A]rguments raised for the first time in a reply brief are generally considered waived.”); *United*  
18 *States v. Rozet*, 183 F.R.D. 662, 667 (N.D. Cal. 1998) (“Legal issues raised for the first time in  
19 reply briefs are waived.”). Therefore, to the extent defendant now seeks dismissal of plaintiff's  
20 claim for gender discrimination under FEHA—based on the denial of training as a quality  
21 assurance supervisor—the motion will be denied.

22 **B. Claim Two: Disability Discrimination Under the ADA and FEHA**

23 “[T]o state a prima facie case of discrimination under the ADA” for disparate treatment, a  
24 plaintiff must allege that he: “(1) is disabled; (2) is qualified [for his job]; and (3) suffered an  
25 adverse employment action because of [his] disability.” *Snead v. Metro. Prop. & Cas. Ins. Co.*,

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1 237 F.3d 1080, 1087 (9th Cir. 2001).<sup>4</sup> A claim under FEHA for disability discrimination based  
2 on disparate treatment has the same elements. *See Avila v. Continental Airlines, Inc.*, 165 Cal.  
3 App. 4th 1237, 1246 (2008). Defendant moves to dismiss plaintiff’s disability discrimination  
4 claim brought under the ADA and FEHA. (See Doc. No. 33 at 10–11 n.2.) Defendant’s  
5 argument for dismissal is straight forward.

6 The FAC alleges that plaintiff was discriminated against when defendant refused to grant  
7 plaintiff’s request to be reassigned as a juice topping helper to a position as a cook. (FAC at  
8 ¶¶ 72–77.) Yet plaintiff “alleges that these actions were taken against him due to his continual  
9 complaints regarding the *gender and racial harassment claims he filed* both within the company  
10 and with the EEOC and DFEH.” (*Id.* at ¶ 78.) In other words, the FAC does not allege that  
11 defendant “suffered an adverse employment action *because of [his] disability.*” *Snead*, 237 F.3d  
12 at 1087 (emphasis added); *see also Avila*, 165 Cal. App. 4th at 1246 (explaining FEHA proscribes  
13 “an employer’s intentionally discriminatory act against an employee *because of his or her*  
14 *disability* (referred to as disparate treatment discrimination)” (emphasis added)). Instead, plaintiff  
15 claims that defendant continued to make him work in a particular position that posed difficulties  
16 for him, not because of his alleged disability itself, but rather, because defendant was ostensibly  
17 retaliating against plaintiff for his earlier complaints regarding gender and racial harassment.  
18 Plaintiff does not address this persuasive argument in his opposition to the pending motion to  
19 dismiss. (See *passim* Doc. No. 36.) Therefore, plaintiff’s claim for disability discrimination  
20 under the ADA and FEHA will be dismissed.

21 **C. Claim Five: Retaliation Under Title VII After Filing EEOC/DFEH Charges**

22 Title VII prohibits retaliation by an employer “against an employee for making a charge  
23 or otherwise participating in a Title VII proceeding.” *Nilsson v. City of Mesa*, 503 F.3d 947, 953  
24 (9th Cir. 2007); *see also* 42 U.S.C. § 2000e-3(a). As discussed above, an employee must timely  
25 file an administrative charge and a lawsuit in federal court. § 2000e-5(e)(1); § 2000e-5(f)(1).

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27 <sup>4</sup> A disparate treatment claim for discrimination under the ADA is distinct from claims regarding  
28 reasonable accommodations and/or the interactive process brought under the ADA. *See Snead*,  
237 F.3d at 1087 n.6.

1 Here, plaintiff's theory of retaliation is based on two alleged incidents summarized in his 2020  
2 Charge, one occurring in 2018 and the other occurring in 2019. The court will address both of  
3 plaintiff's theories of liability below.

4 Plaintiff's claim fails to the extent it is based on alleged retaliation occurring in 2018. He  
5 alleges that he was retaliated against in February 2018 by being denied training as a mechanic due  
6 to his complaints three years earlier in 2015 in which he claimed he was denied training as a  
7 quality assurance supervisor. (FAC at ¶¶ 43, 113–14.) Drawing all reasonable inferences in  
8 plaintiff's favor, the court will assume that the alleged retaliation occurred on the last possible  
9 day, February 28, 2018. Plaintiff was thus required to submit an administrative charge with the  
10 DFEH by December 25, 2018—or 300 days after the alleged retaliation occurred. See § 2000e-  
11 5(e)(1). But plaintiff did not initiate the 2020 Charge until March 19, 2020—more than a year  
12 after the deadline to do so had passed. (See FAC at 46–48.) Nor has plaintiff identified any other  
13 administrative charge alleging this theory of retaliation. Accordingly, plaintiff's retaliation  
14 claim—based on the claim of being denied training as a mechanic in February 2018—will be  
15 dismissed.

16 However, to the extent plaintiff's claim is based on alleged retaliation occurring in 2019,  
17 it survives the pending motion to dismiss. The FAC alleges that plaintiff's request for  
18 reassignment to the cook position was denied in 2019 because of prior gender and racial  
19 harassment claims he filed internally with defendant and externally with the EEOC and DFEH.  
20 (FAC at ¶¶ 115–20.) The FAC alleges that plaintiff was denied reassignment in or around July  
21 2019. (See *id.* at ¶ 115, 119.) The 2020 Charge makes the same allegations. (*Id.* at 46–48.)  
22 Defendant does not seek dismissal of this theory of retaliation on administrative-exhaustion or  
23 statute-of-limitation grounds.

24 Instead, defendant points out that the FAC and 2020 Charge reference previously filed  
25 race and gender *harassment* charges, whereas those prior charges themselves actually referred to  
26 race and gender *discrimination*. (Doc. No. 37 at 5.) Defendant makes two arguments in support  
27 of dismissal of this claim, neither of which are persuasive. First, defendant argues that for  
28 purposes of the pending Rule 12(b)(6) motion, the court should not accept as true the allegations

1 of prior “harassment” charges because they are contradicted by the fact that plaintiff’s actual prior  
2 charges concerned “discrimination.” (Doc. No. 33 at 14.) The court disagrees that there is any  
3 contradiction whatsoever. As defendant’s own cited authority shows, courts use these terms  
4 interchangeably in the context of Title VII. *See Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634,  
5 644–46 (9th Cir. 2003) (using “harassment” and “discrimination” interchangeably and making no  
6 distinction between the two).<sup>5</sup> But even if there was some contradiction between the words  
7 “discrimination” and “harassment,” it is not so contradictory as to disregard the FAC’s allegations  
8 on a motion to dismiss. *See, e.g., Hearn v. R.J. Reynolds Tobacco Co.*, 279 F. Supp. 2d 1096,  
9 1102 (D. Ariz. 2003) (“At this stage of the litigation, however, the district court must resolve any  
10 ambiguities in the considered documents in the plaintiff’s favor.”); *Ruhnke v. SkinMedica, Inc.*,  
11 No. SACV 14-0420-DOC, 2014 WL 12577172, at \*7 (C.D. Cal. Sept. 5, 2014) (finding that  
12 judicially-noticed material did not “unambiguously contradict[]” the plaintiff’s allegations).

13 Defendants also make a second, related, argument. In his opposition, plaintiff clarifies  
14 that he intended to allege in his FAC retaliation based on prior *discrimination*. (Doc. No. 36 at  
15 10.) Defendant correctly observes that the court may not consider new claims asserted in a  
16 lawsuit for the first time “unless the new claims are like or reasonably related to the allegations  
17 contained in the EEOC charge.” (Doc. No. 37 at 5) (quoting *B.K.B. v. Maui Police Dep’t*, 276  
18 F.3d 1091, 1100 (9th Cir. 2002)). Accepting plaintiff’s concession that he intended to allege  
19 discrimination in his FAC, defendant argues that discrimination (as was intended to be alleged in  
20 the FAC) and harassment (as was alleged in the 2020 Charge) are not “like or reasonably related”  
21 to one another. (*Id.*) This argument is without merit. As an initial matter, the court must  
22 construe the 2020 Charge “with the utmost liberality.” *See Kaplan v. Int’l All. of Theatrical &*  
23 *Stage Emps.*, 525 F.2d 1354, 1359 (9th Cir. 1975), *abrogated on other grounds by Laughon v.*  
24 *Int’l All. of Theatrical Stage Emps.*, 248 F.3d 931 (9th Cir. 2001). The 2020 Charge summarizes  
25 plaintiff’s medical issue, his request to be reassigned from a juice topping helper to a cook

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26 <sup>5</sup> The court observes that one of the exhibits attached to the FAC—a DFEH intake form for  
27 employment discrimination complaints—makes no distinction between “discrimination” and  
28 “harassment” in at least one location. (*See, e.g.,* FAC at 37 (listing over 20 selections for  
retaliatory conduct, including, “Reported or resisted any form of discrimination or harassment”).)

1 position, defendant's denial, and alleges that plaintiff "believe[s] these actions were taken against  
2 [him] due to [his] continual complaints regarding the gender and racial *harassment* claims [he]  
3 filed both within the company and with the EEOC and DFEH." (FAC at 47 (emphasis added).)  
4 Construing the 2020 Charge in plaintiff's favor, as the court must, it is clear that he was  
5 referencing prior adverse treatment on the basis of his gender and race. Drawing a distinction  
6 between adverse treatment taking the form of harassment as opposed to discrimination, or vice  
7 versa, is inconsistent with liberally interpreting administrative grievances. More to the point,  
8 defendant fails to cite any case taking such a narrow interpretation of the "like or reasonably  
9 related" standard. (Doc. No. 37 at 5) (citing *Vasquez*, 349 F.3d at 644–46 (holding that retaliation  
10 for filing an internal grievance was not similar to retaliation for filing a discrimination charge  
11 with the EEOC because the allegations rested on different retaliatory conduct occurring during  
12 different time periods and involving different individuals)). This is not a case where the  
13 administrative charge alleged a certain retaliatory act (*e.g.*, denied time off) and the complaint  
14 filed in federal court alleges a completely different retaliatory act (*e.g.*, denied training). It is also  
15 not a case where the administrative charge alleged retaliation based on certain protected activity  
16 (*e.g.*, complaining of race discrimination) and the complaint filed in federal court alleges  
17 retaliation based on completely different protected activity (*e.g.*, complaining of gender  
18 discrimination). *See, e.g., Lowe v. City of Monrovia*, 775 F.2d 998, 1004 (9th Cir. 1985),  
19 *amended by* 784 F.2d 1407 (9th Cir. 1986) (finding that an employee failed to exhaust a sex-  
20 discrimination claim where her EEOC charge only mentioned racial discrimination); *Stallcop v.*  
21 *Kaiser Found. Hosp.*, 820 F.2d 1044, 1051 (9th Cir. 1987) (affirming district court's  
22 determination that employee failed to exhaust her administrative remedies as to sex and age  
23 discrimination because her administrative charge only alleged discrimination on the basis of  
24 national origin). Instead, this is a case where the 2020 Charge alleged a retaliatory act based on  
25 protected activity and the FAC alleges the same retaliatory act based on, essentially, the same  
26 protected activity but worded somewhat imprecisely. Nor does defendant discuss the relevant  
27 factors in determining whether allegations "like or reasonably related" to one another, such as  
28 "whether the original EEOC investigation would have encompassed the additional charges."

1 *Green v. Los Angeles Cnty. Superintendent of Schs.*, 883 F.2d 1472, 1476 (9th Cir. 1989); see  
2 also *B.K.B.*, 276 F.3d at 1100 (considering “the alleged basis of the discrimination, dates of the  
3 discriminatory acts specified within the charge, perpetrators of discrimination named in the  
4 charge, and any locations at which discrimination is alleged to have occurred” as well as the  
5 extent to which the new claims “are consistent with the plaintiff’s original theory of the case”).  
6 Had the EEOC investigated plaintiff’s retaliation claim due to his prior complaints for harassment  
7 on the basis of race and gender, the investigation “would have encompassed” that same retaliation  
8 due to plaintiff’s prior complaints for discrimination on the exact same basis. See *Green*, 883  
9 F.2d at 1476. The court concludes that requiring use of the word “discrimination” in the 2020  
10 Charge, as opposed to “harassment,” has no basis in law or common sense.

11 Plaintiff has plausibly alleged a retaliation claim under Title VII on the basis of allegedly  
12 being denied reassignment to a cook position because he previously filed EEOC/DFEH charges  
13 alleging gender and race discrimination in the workplace. Accordingly, defendant’s motion to  
14 dismiss the retaliation claim—based on being denied reassignment to the position of cook—will  
15 be denied. However, the motion to dismiss plaintiff’s retaliation claim—based on an alleged  
16 failure to train plaintiff as a quality assurance supervisor—will be granted.<sup>6</sup>

17 **D. Claim Six: Gender-Based Pay Discrimination Under the EPA**

18 To state a claim under the EPA, plaintiff must allege that: “(1) the work of the employees  
19 of one sex required the exercise of substantially equal skill, effort, and responsibility and was  
20 performed under similar working conditions as that of employees of the opposite sex, and (2) the  
21 pay to men and women was unequal.” See *Roberts v. W. Airlines*, 425 F. Supp. 416, 428 (N.D.  
22 Cal. 1976). “To be ‘substantially equal,’ the jobs need not be identical, but must require similar

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23 <sup>6</sup> In the event the court allows plaintiff’s retaliation claim to survive in part, defendant asks the  
24 court to dismiss the “time-barred allegations contained in paragraphs 112–144 of the FAC and  
25 limit [the] retaliation claim to the allegations regarding [plaintiff’s] medical conditions . . . as  
26 alleged in paragraphs 115–120 of the FAC.” (Doc. No. 37 at 5.) Given that the FAC does not  
27 contain 144 paragraphs, defendant’s request in this regard is confusing. However, it appears  
28 defendant requests that the court dismiss the retaliation allegations as it pertains to plaintiff’s first  
theory (*i.e.*, denied training as a mechanic), but allow the retaliation allegations concerning  
plaintiff’s second theory (*i.e.*, denied reassignment to cook). Construed as such, defendant’s  
request will be granted.

1 skills, effort, and responsibility performed under similar conditions; it is actual job performance  
2 requirements, rather than job classifications or titles, that is determinative.” *E.E.O.C. v.*  
3 *Maricopa Cnty. Cmty. Coll. Dist.*, 736 F.2d 510, 513 (9th Cir. 1984) (citation omitted).

4 Here, dismissal of plaintiff’s amended EPA claim is warranted. The FAC’s allegations  
5 supporting the EPA claim are more conclusory than those contained in plaintiff’s original  
6 complaint. (*Compare* Doc. No. 1 at ¶¶ 58–63, *with* FAC at ¶¶ 128–31.) In the FAC plaintiff fails  
7 to allege that he was paid less than his female counterparts for performing similar work as a  
8 quality assurance supervisor. Plaintiff alleges that he was disqualified from being a quality  
9 assurance supervisor about two or three months after being promoted to that role in 2015,  
10 although he alleged he was “nominally kept in the position” through November 2018. (FAC at  
11 ¶¶ 30, 36, 38, 58.) The FAC does not allege that plaintiff performed similar duties, used the same  
12 effort, or had similar skills (given that plaintiff is complaining of being denied training for that  
13 very position) as compared to the female quality assurance supervisors. In fact, the FAC does not  
14 allege that plaintiff ever worked as a quality assurance supervisor during that short two-to-three-  
15 month period of time where he was quickly promoted and disqualified. Plaintiff’s claim that he  
16 “nominally” worked as a quality assurance supervisor also does not plausibly suggest that he  
17 actually performed similar duties or used the same effort as compared to the female quality  
18 assurance supervisors. But most importantly, even assuming plaintiff plausibly alleged that he  
19 performed the duties of quality assurance supervisor, the FAC fails to allege that plaintiff was  
20 actually paid less. Plaintiff’s allegation that he “was pay-discriminated and retaliated against,”  
21 (*id.* at ¶ 129), is a legal conclusion cast in the form of a factual allegation and will not be credited  
22 for purposes of ruling on the pending motion to dismiss. *See Ringrose*, 788 F.2d at 643 n.2.  
23 Plaintiff’s main grievance appears to be that he was denied training as a quality assurance  
24 supervisor—not that he was paid less for actually performing a similar position as compared to  
25 his female coworkers. (*See id.* at ¶ 129 (“Defendant has allowed to award positions to females  
26 and provide due training to said females while refusing to do the same to Plaintiff who is  
27 male.”).) In sum, the allegations of the FAC do not “allow the court to draw the reasonable  
28 inference that the defendant is liable” under the EPA. *See Iqbal*, 556 U.S. at 678. In light of this

1 conclusion, the court need not address defendant’s secondary argument that the claim is time-  
2 barred. Plaintiff’s EPA claim will therefore be dismissed.

3 **E. Claim Seven: IIED Under California Law**

4 To state a claim for IIED, plaintiff must allege: “(1) extreme and outrageous conduct by  
5 the defendant with the intent to cause, or reckless disregard for the probability of causing,  
6 emotional distress; (2) suffering of severe or extreme emotional distress by plaintiff; and (3)  
7 plaintiff’s emotional distress is actually and proximately the result of defendant’s outrageous  
8 conduct.” *Ramachandran v. City of Los Altos*, 359 F. Supp. 3d 801, 818–19 (N.D. Cal. 2019)  
9 (citation omitted). “Conduct is ‘extreme and outrageous’ when it is ‘so extreme as to exceed all  
10 bounds of that usually tolerated in a civilized community.’” *Robles v. Agreserves, Inc.*, 158 F.  
11 Supp. 3d 952, 978 (E.D. Cal. 2016) (citations omitted).

12 In his FAC plaintiff has simply re-alleged his IIED claim with little to no different  
13 allegations than those advanced in support of his IIED claim as asserted in his original complaint.  
14 (*Compare* Doc. No. 1 at ¶¶ 91–98 (alleging that the extreme and outrageous conduct was the  
15 failure to train him as a quality assurance supervisor, pay discrimination, and retaliation for filing  
16 previous charges with the EEOC and DFEH), *with* FAC at ¶¶ 133–34 (same).) Dismissal of  
17 plaintiff’s amended IIED claim is therefore warranted for the same reasons the court dismissed  
18 his original IIED claim. (*See* Doc. No. 27 at 13–15.) Plaintiff cannot plausibly state an IIED  
19 claim based on defendant’s personnel management decisions. *See, e.g., Dupree v. Apple, Inc.*,  
20 No. 16-cv-00289-LHK, 2016 WL 4191653, at \*7–8 (N.D. Cal. Aug. 9, 2016) (dismissing  
21 plaintiff’s IIED claim because “complaints about his work schedule and ability to access Apple’s  
22 training system fall clearly within the purview of personnel management actions”); *Bradshaw v.*  
23 *Glatfelter Ins. Grp.*, No. 1:08-cv-01898-OWW, 2009 WL 1438265, at \*4 (E.D. Cal. May 20,  
24 2009) (“Plaintiff has not alleged any facts that give rise to a reasonable inference that Defendants’  
25 conduct was anything other than management-level decisions.”); *see also Janken v. GM Hughes*  
26 *Elecs.*, 46 Cal. App. 4th 55, 80 (1996) (dismissing an IIED claim based on personnel management  
27 decisions allegedly motivated by discrimination because “[m]anaging personnel is not outrageous  
28 conduct beyond the bounds of human decency, but rather conduct essential to the welfare and

1 prosperity of society. A simple pleading of personnel management activity is insufficient to  
2 support a claim of intentional infliction of emotional distress, even if improper motivation is  
3 alleged.”). Therefore, defendant’s motion will be granted as to this claim and plaintiff’s IIED  
4 claim will be dismissed.

5 **F. Leave to Amend**

6 Federal Rule of Civil Procedure 15(a) instructs courts to “freely give leave when justice so  
7 requires.” “It is black-letter law that a district court must give plaintiffs at least one chance to  
8 amend a deficient complaint, absent a clear showing that amendment would be futile.” *Nat’l*  
9 *Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015). Nonetheless, a “district  
10 court’s discretion to deny leave to amend is particularly broad where plaintiff has previously  
11 amended the complaint.” *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990)  
12 (quoting *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir.1989)). A district  
13 court may deny leave to amend a second time based on the failure to cure previously noted  
14 deficiencies. See *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Abagninin v. AMVAC Chem. Corp.*,  
15 545 F.3d 733, 742 (9th Cir. 2008). To avoid dismissal with prejudice after leave to amend was  
16 previously granted, a plaintiff should disclose facts that he or she believes will help cure any  
17 deficiencies. See *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1133 (9th Cir. 2013). “A plaintiff  
18 may not in substance say ‘trust me,’ and thereby gain a license for further amendment when prior  
19 opportunity to amend had been given.” *Id.* Here, plaintiff was granted leave to amend once.  
20 (Doc. No. 27 at 15–16.) While plaintiff seeks further leave to amend in his opposition to the  
21 pending motion to dismiss, he does not proffer any additional facts that he could allege if granted  
22 that opportunity. (See Doc. No. 36 at 5.) The court therefore concludes that, as to some of  
23 plaintiff’s claims, the granting of further leave to amend would be futile since plaintiff has failed  
24 to cure the previously explained deficiencies in his complaint.

25 Plaintiff’s claim for disability discrimination under the ADA and FEHA (Claim Two) will  
26 be dismissed with leave to amend because it appears the claim could potentially “be cured by the  
27 allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citation omitted).  
28 Plaintiff’s Title VII claim for retaliation, in which plaintiff alleges that he was denied training in

1 2018 as a mechanic in retaliation for filing complaints claiming that he was denied training as a  
2 quality assurance supervisor in 2015 (Claim Five, Subpart One), will be dismissed without leave  
3 to amend. Although the original complaint did not present this theory of retaliation, “plaintiff  
4 [wa]s forewarned to pay close attention to the legal standards set forth” in the court’s original  
5 dismissal order. (Doc. No. 27 at 15.) Because the FAC’s retaliation claim on the basis of  
6 plaintiff allegedly being denied training as a mechanic in 2018 relies on the same flawed legal  
7 understanding the court previously rejected in detail, the claim based upon that same theory of  
8 retaliation will be dismissed without leave to amend. Plaintiff’s EPA claim (Claim Six) will be  
9 dismissed without leave to amend because plaintiff failed to cure previously explained  
10 deficiencies in his original complaint by essentially copying-and-pasting that same claim into his  
11 FAC. Plaintiff’s IIED claim (Claim Seven) will also be dismissed without leave to amend for the  
12 same reasons.

13 To summarize, plaintiff’s remaining claims asserted in the FAC are: gender  
14 discrimination under Title VII (Claim One, Subpart One) and FEHA (Claim One, Subpart Two);  
15 failure to accommodate under the ADA and FEHA (Claim Three); failure to engage in the  
16 interactive process under the ADA and FEHA (Claim Four); and retaliation under Title VII based  
17 on the denial of a job reassignment in 2019 (Claim Five, Subpart Two). Plaintiff will be granted  
18 further leave to amend his claims for disability discrimination under the ADA and FEHA (Claim  
19 Two)<sup>7</sup>, but he will not be granted further leave to amend any of his other claims dismissed by this  
20 order.

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23 <sup>7</sup> Should plaintiff elect to continue to pursue his disability discrimination claims under the ADA  
24 and FEHA by filing a second amended complaint, he shall comply with the requirements of the  
25 Federal Rules of Civil Procedure, and the Local Rules of this court. Any second amended  
26 complaint must bear the docket number assigned to this case and be labeled “Second Amended  
27 Complaint.” Local Rule 220 requires that an amended complaint be complete in itself without  
28 reference to any prior pleading. Any second amended complaint will supersede the original and  
first amended complaints. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Therefore, in a  
second amended complaint, each claim and the involvement of the defendant must be sufficiently  
alleged.

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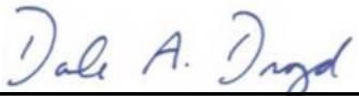
**CONCLUSION**

Accordingly:

1. Defendant's motion to dismiss the first amended complaint (Doc. No. 33) is granted in part and denied in part;
2. In the event plaintiff wishes to attempt to attempt to cure the noted deficiencies with respect to his claims that have been dismissed with leave to amend, he is granted twenty-one (21) days from the issuance of this order to file a second amended complaint.

IT IS SO ORDERED.

Dated: **June 7, 2021**

  
UNITED STATES DISTRICT JUDGE