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

MARGARET ANN DIRKS,  
Plaintiff,

2:09-CV-03399-JAM-EFB

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

v.

THE PERMANENTE MEDICAL GROUP,  
INC.; and DOES 1 through 5,  
inclusive,  
Defendant.

\_\_\_\_\_ /

This matter comes before the Court on Defendant The  
Permanente Medical Group, Inc.'s ("Defendant's") Motion to  
Dismiss Plaintiff Margaret Dirks' ("Plaintiff's") Complaint  
("Complaint") pursuant to Federal Rule of Civil Procedure  
12(b)(6). Plaintiff opposes the motion.<sup>1</sup> For the reasons stated  
below, Defendant's Motion is GRANTED in part and DENIED in part.

\_\_\_\_\_

<sup>1</sup> Because oral argument will not be of material assistance,  
the Court orders this matter submitted on the briefs. E.D. Cal.  
L.R. 230(g).

1 I. FACTUAL AND PROCEDURAL BACKGROUND

2 On or about October 2002, Plaintiff began working at  
3 Defendant's appointment and advice call center ("call center").  
4 Pl's Compl. 2:5. During her tenure at the call center, Plaintiff  
5 alleges that she gradually began to experience health problems,  
6 including headaches, dizziness, mental confusion/inability to  
7 concentrate, tight/burning throat, cough, burning eyes and nose,  
8 tight chest, nausea, loss of balance, loss of hair, and  
9 difficulty breathing. Pl's Compl. 2-3:6. Plaintiff's symptoms  
10 allegedly began daily upon entering the call center, increased  
11 during work hours, then immediately subsided upon leaving the  
12 building. Pl's Compl. 3:7. However, Plaintiff alleges that some  
13 residual symptoms remained throughout the evening and into the  
14 next day, but gradually cleared over time. Id. On several  
15 occasions, Plaintiff informed her employer regarding her  
16 difficulty breathing, which forced her to leave work. Pl's  
17 Compl. 3:8.

21 Plaintiff made numerous complaints to various managers  
22 about how the building's condition affected her health. Pl's  
23 Compl. 3:8. Plaintiff asserts that Defendant's management  
24 scowled and rolled their eyes at Plaintiff and told Plaintiff  
25 that the problem only existed with her. Pl's Compl. 4:9.  
26 However, Plaintiff alleges that other employees were  
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1 experiencing similar symptoms from the call center. Pl's Compl.  
2 3:7.

3 In response to these complaints, Defendant moved  
4 Plaintiff's desk location several times in the call center. Pl's  
5 Compl. 4:10. Defendant did not allow Plaintiff to telecommute or  
6 relocate to another building. Pl's Compl. 4:11.

7  
8 Plaintiff's symptoms allegedly became more severe in 2008.  
9 Pl's Compl. 3:7. Thus, on October 2, 2008, Plaintiff saw Judy  
10 Dyke, Nurse Practitioner, who determined that Plaintiff's health  
11 condition was caused by environmental factors at work. Pl's  
12 Compl. 5:13. To treat the symptoms, Ms. Dyke suggested in a note  
13 to Defendant that Plaintiff be provided a Hepa filter at work.  
14 Id. Defendant ignored the note. Id.

15  
16 On October 20, 2008, Plaintiff resigned from her  
17 employment. Pl's Compl. 5:14. Plaintiff's written resignation  
18 stated that her back problem was a basis for resignation, and  
19 added that although she intended to work through October 2008,  
20 the toxic fumes in the workplace and the lack of response by  
21 management made work unbearable and a health risk. Id.

22  
23 After Plaintiff resigned, a third party called Plaintiff  
24 on behalf of Defendant for an exit interview. Pl's Compl. 5:15.  
25 When Plaintiff was asked whether she would sue Defendant due to  
26 the working conditions, Plaintiff responded "yes." Id.  
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1 Subsequently, Plaintiff applied for positions in Oregon and San  
2 Diego. Id. Plaintiff was not hired at either facility. Id.

3 Plaintiff timely filed two complaints with the Department  
4 of Fair Employment and Housing ("DFEH"). Her first complaint  
5 filed on September 15, 2009 alleged that Defendant failed to  
6 reasonably accommodate her disability. Pl's Opp. Exh. 1. On  
7 October 29, 2009, Plaintiff filed a second complaint alleging  
8 that she was retaliated against for her disability. Pl's Opp.  
9 Exh. 2. Plaintiff immediately received a right to sue letter for  
10 each complaint. Id.

11 The action was filed in Sacramento County Superior Court  
12 on October 30, 2009 (Case No. 32-2009-00062358). On December 7,  
13 2009, the action was removed to this Court based on diversity of  
14 citizenship pursuant to 28 U.S.C. § 1332.

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18 II. OPINION

19 A. Legal Standard

20 A party may move to dismiss an action for failure to state  
21 a claim upon which relief can be granted pursuant to Federal  
22 Rule of Civil Procedure 12(b)(6). In considering a motion to  
23 dismiss, the court must accept the allegations in the complaint  
24 as true and draw all reasonable inferences in favor of the  
25 plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1975),  
26 overruled on other grounds by Davis v. Scherer, 468 U.S. 183  
27 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). Assertions that  
28

1 are mere "legal conclusions," however, are not entitled to the  
2 assumption of truth. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950  
3 (2009), citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555  
4 (2007). To survive a motion to dismiss, a plaintiff needs to  
5 plead "enough facts to state a claim to relief that is plausible  
6 on its face." Twombly, 550 U.S. at 570. Dismissal is  
7 appropriate where the plaintiff fails to state a claim  
8 supportable by a cognizable legal theory. Balistreri v.  
9 Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

12 In general, the court may not consider materials other  
13 than the facts alleged in the complaint when ruling on a motion  
14 to dismiss. Anderson v. Angelone, 86 F.3d 932, 934 (9th Cir.  
15 1996). The court may, however, consider additional materials if  
16 the plaintiff has alleged their existence in the complaint and  
17 if their authenticity is not disputed. See Branch v. Tunnell,  
18 14 F.3d 449, 454 (9th Cir. 1994), overruled on other grounds by  
19 Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir.  
20 2002). Here, Plaintiff attached two documents to her Opposition  
21 to the Motion to Dismiss: Plaintiff's Complaint and Right to Sue  
22 Letter issued by the DFEH on September 15, 2009, and Plaintiff's  
23 Complaint and Right to Sue Letter issued by the DFEH on October  
24 29, 2009. Defendants do not question the validity of these  
25 documents and in fact recognize the documents in their Motion.

1 Def's Motion 3:22-4:12. Accordingly, the Court will consider  
2 these documents in deciding Defendant's Motion.

3  
4 Upon granting a motion to dismiss for failure to state a  
5 claim, the court has discretion to allow leave to amend the  
6 complaint pursuant to Federal Rule of Civil Procedure 15(a).  
7 "Absent prejudice, or a strong showing of any [other relevant]  
8 factor[], there exists a presumption under Rule 15(a) in favor  
9 of granting leave to amend." Eminence Capital, L.L.C. v.  
10 Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003). "Dismissal  
11 with prejudice and without leave to amend is not appropriate  
12 unless it is clear . . . that the complaint could not be saved  
13 by amendment." Id.

14  
15 B. Disability Discrimination

16  
17 Plaintiff's first cause of action alleges that Defendant  
18 discriminated against her because of her disability when  
19 Defendant constructively terminated and failed to rehire  
20 Plaintiff. Defendant argues that this claim should be dismissed  
21 for multiple reasons: (1) Plaintiff failed to timely exhaust her  
22 administrative remedies; (2) Plaintiff's condition is not a  
23 disability; (3) Defendant did not know about Plaintiff's  
24 disability; and (4) Plaintiff did not suffer adverse employment  
25 action because of her disability.  
26

27 To establish a disability discrimination claim under  
28 California's Fair Employment and Housing Act ("FEHA"), plaintiff

1 must show that she: (1) suffers from a disability; (2) is  
2 otherwise qualified to do the job; and (3) was subjected to an  
3 adverse employment action because of the disability.  
4

5 1. Exhaustion of Administrative Remedies

6 Prior to filing a civil action under FEHA, a plaintiff  
7 must exhaust all administrative remedies. Rodriguez v. Airborne  
8 Express, 265 F.3d 890, 895 (9th Cir. 2001). Because exhaustion  
9 is a jurisdictional prerequisite to a lawsuit, failure to  
10 exhaust the administrative remedy bars a later lawsuit on the  
11 claim. Id. at 900.  
12

13 Exhaustion requires filing a complaint timely with the  
14 DFEH and obtaining a right to sue letter. Rodriguez, 265 F.3d at  
15 896 (citations omitted). The causes of action in the later civil  
16 complaint must be "like or reasonably related" to those in the  
17 DFEH complaint. Id. This standard is met when the allegations in  
18 the civil complaint are within the scope of the administrative  
19 investigation of the DFEH complaint. Id.  
20

21 Here, Plaintiff filed two complaints with DFEH, alleging  
22 failure to accommodate and retaliation based on her disability.  
23 Plaintiff's second DFEH complaint alleging retaliation based on  
24 disability would reasonably trigger an investigation into  
25 constructive termination and failure to hire. Plaintiff  
26 specifically stated in her resignation letter that the building  
27 was a reason for her resignation and "no one would address [her  
28

1 health] issue[s]" caused by the building. Plaintiff also stated  
2 that she "was refused employment" after she "complained bitterly  
3 about her symptoms." Even though she did not check the boxes  
4 "constructive discharge" and "denial of employment" in the  
5 complaint, the DFEH would likely have included disability  
6 discrimination in its investigation. See Winter v. Corr. Corp.  
7 of Am., 2009 U.S. Dist. LEXIS 53668 (June 24, 2009). Thus,  
8 Plaintiff's claim for disability discrimination is not barred  
9 for failure to exhaust administrative remedies.  
10  
11

## 12 2. Disability

13 To qualify as disabled under FEHA, Gov. Code § 12900 et  
14 seq., plaintiff must have, or be perceived to have, (1) a  
15 physiological disorder that affects one or more of the basic  
16 bodily systems that (2) limits a major life activity. Cal. Gov.  
17 Code § 12926(k). Here, Plaintiff alleges that the building's  
18 conditions caused her difficulty breathing, which affected her  
19 respiratory system. Further, Plaintiff alleges that her  
20 breathing, which is a major life activity, was limited.  
21 Defendant has not cited any case law to support the argument  
22 that these facts are insufficient to show Plaintiff has a  
23 disability. As such, the Court will accept Plaintiff's  
24 allegations in the Complaint as true and draw all reasonable  
25 inferences in favor of the Plaintiff. In doing so, the Court  
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1 finds that Plaintiff has sufficiently stated facts to establish  
2 her condition is a disability.

3 3. Knowledge of the Disability

4 "An adverse employment decision cannot be made 'because  
5 of' a disability, when the disability is not known to the  
6 employer." Avila v. Continental Airlines, Inc., 165 Cal. App.  
7 4th 1237, 1246 (2008)(citations omitted). Knowledge of a  
8 disability will be imputed to the employer when a disability is  
9 the only reasonable interpretation of the known facts. Id.  
10 "'Vague or conclusory statements revealing an unspecified  
11 incapacity are not sufficient to put an employer on notice'"  
12 under FEHA. Id. (quoting Brundage v. Hahn, 57 Cal. App. 4th 228,  
13 237 (1997)).

14 Here, Plaintiff alleges that she made numerous complaints  
15 to various managers about her health problems resulting from the  
16 condition of the building. Plaintiff further alleges that she  
17 filed multiple incident reports to leave work early because of  
18 difficulty breathing due to continuous coughing. Similar to  
19 Avila, where providing medical forms that stated plaintiff was  
20 hospitalized and sick was insufficient to put defendant on  
21 notice of the disability, complaints about the building's  
22 condition and difficulty breathing are generalized complaints  
23 that do not show Defendant knew about Plaintiff's disability.  
24 There are other reasonable interpretations of Plaintiff's  
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1 complaints: the symptoms could be a recurring sickness, a  
2 chronic allergic reaction, or a side effect of medications.  
3 Further, the nurse practitioner's note only suggested that  
4 Defendant provide a Hepa filter to Plaintiff at work, but did  
5 not describe any condition that would raise the inference of a  
6 disability protected by FEHA.  
7

8 Although Plaintiff's allegations demonstrate that  
9 Defendant knew about Plaintiff's health problems, these  
10 allegations are not sufficient to state a claim that Defendant  
11 knew about Plaintiff's disability. Thus, these allegations are  
12 insufficient to establish Defendant had knowledge that Plaintiff  
13 had a FEHA protected disability.  
14

#### 15 4. Adverse Employment Action Because of Disability

16 To establish a constructive discharge, the plaintiff must  
17 show that "the employer's conduct effectively force[d] an  
18 employee to resign." Turner v. Anheuser-Busch, 7 Cal. 4th 1238,  
19 1244 (1994). The working conditions, as a result of the  
20 discrimination, must be so intolerable that a reasonable person  
21 would resign. Poland v. Chertoff, 494 F.3d 1174, 1184 (9th Cir.  
22 2007). This is an objective inquiry. Id.  
23  
24

25 Here, Plaintiff's allegations do not sufficiently state an  
26 adverse employment action. Although Plaintiff alleges that she  
27 ultimately quit because Defendant failed to change the working  
28 conditions, which allegedly caused her disability, Plaintiff's

1 decision must be reasonable in the circumstances. Other  
2 employees worked in the call center under the same conditions as  
3 Plaintiff. Plaintiff does not allege that other employees quit  
4 because of the working conditions. Therefore, Plaintiff has  
5 failed to allege sufficient objective facts to support this  
6 cause of action.  
7

8           Moreover, Plaintiff does not allege that Defendant's  
9 treatment of her caused her to quit. Plaintiff alleges that  
10 Defendant's management would scowl and roll their eyes at her  
11 complaints about the working conditions and tell her that the  
12 problem only existed with her. However, Plaintiff does not claim  
13 that this caused her to quit. The resignation only states that  
14 the working conditions became too unbearable. Therefore,  
15 Plaintiff has not pled sufficient facts to allege that the  
16 working conditions were so unbearable that a reasonable person  
17 would resign.  
18

19           Accordingly, although Plaintiff has sufficiently pled  
20 enough facts to demonstrate that she timely exhausted her  
21 administrative remedies and that she qualifies as disabled under  
22 FEHA, Plaintiff has failed to allege sufficient facts to show  
23 Defendant knew of her disability and that she suffered an  
24 adverse employment action because of her disability. As such,  
25 Defendant's motion to dismiss Plaintiff's first cause of action  
26 for disability discrimination is GRANTED with leave to amend.  
27  
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1 C. Failure to Accommodate

2 Defendant argues that Plaintiff's second cause of action  
3 for failure to accommodate should be dismissed because  
4 Plaintiff did not have a disability under FEHA, and an  
5 accommodation of telecommuting or working from home is  
6 unreasonable because it would violate the collective bargaining  
7 agreement.  
8

9 Under FEHA, an employer is liable for failing to  
10 reasonably accommodate the known or perceived disability of an  
11 employee. Gov. Code § 12940. To establish a claim for failure to  
12 accommodate, the plaintiff must show that (1) she suffers from a  
13 disability under FEHA; (2) she can perform the essential  
14 functions of the job with or without accommodation; and (3)  
15 defendant failed to reasonably accommodate plaintiff's  
16 disability. Jensen v. Wells Fargo Bank, 85 Cal. App. 4th 245,  
17 254 (2000) (citations omitted).  
18

19 Here, as explained above, Plaintiff has stated sufficient  
20 facts that show she suffered from a qualified disability under  
21 FEHA. Further, the Complaint alleges that Defendant moved  
22 Plaintiff's desk location several times in the same building  
23 that allegedly was causing her health problems. Because  
24 Plaintiff's disability was caused by the building, Defendant's  
25 accommodation of moving her desk in the same building may be  
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1 unreasonable. As such, the Complaint sufficiently states a claim  
2 for failure to reasonably accommodate.

3         At this stage of the litigation, the Court may not  
4 consider Defendant's argument that the only acceptable  
5 accommodations violate the collective bargaining agreement  
6 because it is based on evidence outside the allegations in the  
7 Complaint.  
8

9         Accordingly, Defendant's motion to dismiss Plaintiff's  
10 second cause of action for failure to accommodate is DENIED.  
11

12 D. Failure to Engage in the Interactive Process

13         Plaintiff's second cause of action also alleges that  
14 Defendant failed to enter into a good faith interactive process  
15 with her. Defendant argues that Plaintiff's failure to engage in  
16 the interactive process claim should be dismissed because  
17 Defendant did not know about Plaintiff's disability and thus,  
18 Defendant could not have known to engage in the interactive  
19 process.  
20

21         An employer must engage in an interactive process when the  
22 employee gives the employer notice of the employee's disability.  
23 Jensen, 85 Cal. App. 4th at 261. For the interactive process to  
24 work, "both sides must communicate directly, exchange essential  
25 information, and neither side can delay or obstruct the  
26 process." Id.  
27  
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1 As explained previously, Plaintiff failed to state  
2 sufficient facts to demonstrate that Defendant had notice of  
3 her alleged disability. As such, Defendant's motion to dismiss  
4 Plaintiff's second cause of action for failure to engage in the  
5 interactive process is GRANTED with leave to amend.  
6

7 E. Retaliation

8 Plaintiff's third and fourth causes of action allege  
9 retaliation for making a complaint of discrimination and  
10 retaliation for whistleblowing.  
11

12 To establish retaliation, the plaintiff must show that (1)  
13 she engaged in a protected activity; (2) the employer subjected  
14 the employee to an adverse employment action; and (3) there is a  
15 causal link between the protected activity and the employer's  
16 action. Akers v. County of San Diego, 95 Cal. App. 4th 1441,  
17 1445 (2002).  
18

19 Plaintiff's Complaint alleges that Defendant retaliated  
20 against Plaintiff after she asserted that she would sue  
21 Defendant because of the working conditions. Plaintiff alleges  
22 that after this comment, she applied for open positions in  
23 Oregon and San Diego and was not hired at either facility. In  
24 making these allegations, Plaintiff assumes that Defendant is  
25 the employer of the Oregon and San Diego offices. Defendant  
26 argues that both retaliation claims fail because the locations  
27 that refused to hire Plaintiff are not Defendant's facilities,  
28

1 so there is no causal link between the disability and the  
2 failure to hire. Thus, Defendant did not retaliate against  
3 Plaintiff.  
4

5 Plaintiff fails to state any facts alleging how Defendant  
6 is associated with these two facilities or how Defendant  
7 exchanges information with other facilities regarding complaints  
8 that could give rise to retaliation by Defendant. Accordingly,  
9 Defendant's motion to dismiss Plaintiff's third and fourth  
10 causes of action for retaliation is GRANTED with leave to amend.  
11

### 12 III. ORDER

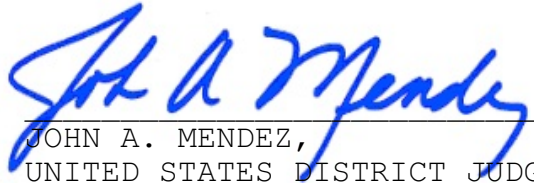
13 For the reasons set forth above, Defendant's motion to  
14 dismiss is GRANTED in part and DENIED in part.

- 15 • Defendant's Motion to Dismiss Plaintiff's first cause of  
16 action for Disability Discrimination is GRANTED with leave  
17 to amend;
- 18 • Defendant's Motion to Dismiss Plaintiff's second cause of  
19 action for Failure to Accommodate is DENIED.  
20
- 21 • Defendant's Motion to Dismiss Plaintiff's second cause of  
22 action for Failure to Engage in the Interactive Process is  
23 GRANTED with leave to amend.
- 24 • Defendant's Motion to Dismiss Plaintiff's third cause of  
25 action for Retaliation for Making a Complaint of  
26 Discrimination is GRANTED with leave to amend; and  
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- 1 • Defendant's Motion to Dismiss Plaintiff's fourth cause of  
2 action for Retaliation for Whistleblowing is GRANTED with  
3 leave to amend.  
4

5 Plaintiff has twenty (20) days from the date of this Order  
6 to file an Amended Complaint consistent with this Order.  
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8 DATED: April 29, 2010

  
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10 JOHN A. MENDEZ,  
11 UNITED STATES DISTRICT JUDGE  
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