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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

SYED MOHSIN,  
  
Plaintiff,  
  
v.  
  
CALIFORNIA DEPARTMENT OF  
WATER RESOURCES, and DAVID  
GUTIERREZ,  
  
Defendants.

No. 2:13-cv-01236-TLN-EFB

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
SECOND MOTION TO DISMISS**

This matter is before the Court pursuant to Defendants' California Department of Water Resources ("DWR") and David Gutierrez (collectively "Defendants") second motion to dismiss Plaintiff's amended complaint ("Amended Complaint"). (ECF No. 31.) Plaintiff Syed Mohsin ("Plaintiff") filed an opposition to Defendants' motion. (ECF No. 33.) Defendants also filed a reply. (ECF No. 34.) The Court has carefully considered the arguments raised in Defendants' motion and reply, as well as Plaintiff's opposition. For the reasons set forth below, Defendants' motion to dismiss is GRANTED IN PART and DENIED IN PART.

**I. Factual Background**

Plaintiff was employed as an Assistant Engineering Specialist by DWR from August 2000 to April 13, 2012. (Amended Complaint, ECF No. 30 at ¶ 8.) He was diagnosed with right temporal lobe epilepsy at the age of 10 and suffered from various types of seizures throughout his

1 life. (ECF No. 30 at ¶ 17.) Plaintiff alleges that at the time he was hired, his neurologist  
2 completed a medical form that served the basis for DWR to accommodate certain restrictions on  
3 Plaintiff's duty statement as required by his condition. (ECF No. 30 at ¶¶ 22–25.) Plaintiff  
4 states these accommodations remained in place until February 2002, when they were removed  
5 from his duty statement over his protest. (ECF No. 30 at ¶¶ 35–36.)

6 On August 5, 2002, Plaintiff had brain surgery that lessened the degree of his seizures, but  
7 negatively impacted his mental processing speed and the use of his executive functions. (ECF  
8 No. 30 at ¶¶ 38–39.) Plaintiff alleges that he attempted to receive accommodations for his  
9 condition following the surgery, but that Mr. Gutierrez “effectively refused” to provide those  
10 accommodations. (ECF No. 30 at ¶¶ 45–46.) The Amended Complaint states that DWR sought  
11 evaluations proposing accommodations for Plaintiff's condition from multiple doctors, including  
12 Plaintiff's own doctor. (ECF No. 30 at ¶¶ 47–50.) Ultimately, DWR issued a “Notice of Medical  
13 Action” pursuant to CAL. GOV'T CODE § 19991.10 on March 12, 2012. (ECF No. 30 at ¶ 61.)

14 Plaintiff states that his medical termination was preceded by ten years of harassment in an  
15 effort to force Plaintiff to resign. (ECF No. 30 at ¶ 56.) Plaintiff also alleges that he was rejected  
16 from approximately 20 other positions within DWR for which he applied and that those positions  
17 were filled by individuals with lesser qualifications. (ECF No. 30 at ¶¶ 65–67.)

## 18 **II. Procedural Background**

19 On June 6, 2013, Plaintiff filed a Complaint against Defendants DWR, David Gutierrez,  
20 and Michael Waggoner, for violations of the Fourteenth Amendment of the U.S. Constitution,  
21 Section 1983 (42 U.S.C. § 1983); Americans with Disabilities Act (“ADA”) (42 U.S.C. § 12101,  
22 et seq.); Section 504 of the Rehabilitation Act (“Section 504”) (29 U.S.C. § 794); the California  
23 Fair Employment and Housing Act (“FEHA”) (CAL. GOV'T CODE § 12900, et seq.); and for  
24 Intentional Infliction of Emotional Distress, Negligence, and Wrongful Termination. (ECF No.  
25 1.) On August 20, 2013, Defendants filed a Motion to Dismiss. (ECF No. 9.)

26 On October 1, 2014, this Court issued an order granting and denying in parts Defendants'  
27 Motion to Dismiss. (ECF No. 26.) Plaintiff was granted leave to amend and filed an Amended  
28 Complaint on December 16, 2014. (ECF No. 30.)

1 In the Amended Complaint, Plaintiff brings five causes of action against Defendants  
2 DWR and Gutierrez, alleging the following violations: violation of the ADA (42 U.S.C. § 12101,  
3 et seq.); violation of Section 504 (29 U.S.C. § 794); violation of Section 1983 under the Fourteen  
4 Amendment; violation of the FEHA (CAL. GOV'T CODE § 12940, et seq.); and Wrongful  
5 Termination. (ECF No. 30.) Also, in his Amended Complaint, Plaintiff removes Defendant  
6 Waggoner entirely. (ECF No. 30.) On December 12, 2014, Defendants filed a Motion to Dismiss  
7 the Amended Complaint. (ECF No. 31.)

### 8 **III. Standard of Law**

#### 9 A. Motion to Dismiss

10 Federal Rule of Civil Procedure 8(a) requires that a pleading contain “a short and plain  
11 statement of the claim showing that the pleader is entitled to relief.” See *Ashcroft v. Iqbal*, 556  
12 U.S. 662, 678–79 (2009). Under notice pleading in federal court, the complaint must “give the  
13 defendant fair notice of what the claim . . . is and the grounds upon which it rests.” *Bell Atlantic*  
14 *v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations omitted). “This simplified notice  
15 pleading standard relies on liberal discovery rules and summary judgment motions to define  
16 disputed facts and issues and to dispose of unmeritorious claims.” *Swierkiewicz v. Sorema N.A.*,  
17 534 U.S. 506, 512 (2002).

18 On a motion to dismiss, the factual allegations of the complaint must be accepted as true.  
19 *Cruz v. Beto*, 405 U.S. 319, 322 (1972). A court is bound to give plaintiff the benefit of every  
20 reasonable inference to be drawn from the “well-pleaded” allegations of the complaint. *Retail*  
21 *Clerks Int’l Ass’n v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1963). A plaintiff need not allege  
22 “‘specific facts’ beyond those necessary to state his claim and the grounds showing entitlement to  
23 relief.” *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads  
24 factual content that allows the court to draw the reasonable inference that the defendant is liable  
25 for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. 544, 556 (2007)).

26 Nevertheless, a court “need not assume the truth of legal conclusions cast in the form of  
27 factual allegations.” *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir.  
28 1986). While Rule 8(a) does not require detailed factual allegations, “it demands more than an

1 unadorned, the defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678. A  
2 pleading is insufficient if it offers mere “labels and conclusions” or “a formulaic recitation of the  
3 elements of a cause of action.” *Twombly*, 550 U.S. at 555; see also *Iqbal*, 556 U.S. at 678  
4 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory  
5 statements, do not suffice.”). Moreover, it is inappropriate to assume that the plaintiff “can prove  
6 facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not  
7 been alleged[.]” *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*,  
8 459 U.S. 519, 526 (1983).

9       Ultimately, a court may not dismiss a complaint in which the plaintiff has alleged “enough  
10 facts to state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 697 (quoting  
11 *Twombly*, 550 U.S. at 570). Only where a plaintiff fails to “nudge[] [his or her] claims . . . across  
12 the line from conceivable to plausible[,]” is the complaint properly dismissed. *Id.* at 680. While  
13 the plausibility requirement is not akin to a probability requirement, it demands more than “a  
14 sheer possibility that a defendant has acted unlawfully.” *Id.* at 678. This plausibility inquiry is “a  
15 context-specific task that requires the reviewing court to draw on its judicial experience and  
16 common sense.” *Id.* at 679.

17       In ruling upon a motion to dismiss, the court may consider only the complaint, any  
18 exhibits thereto, and matters which may be judicially noticed pursuant to Federal Rule of  
19 Evidence 201. See *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988); *Isuzu*  
20 *Motors Ltd. v. Consumers Union of United States, Inc.*, 12 F. Supp. 2d 1035, 1042 (C.D. Cal.  
21 1998).

22       If a complaint fails to state a plausible claim, “[a] district court should grant leave to  
23 amend even if no request to amend the pleading was made, unless it determines that the pleading  
24 could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122,  
25 1130 (9th Cir. 2000) (en banc) (quoting *Doe v. United States*, 58 F.3d 484, 497 (9th Cir. 1995));  
26 see also *Gardner v. Marino*, 563 F.3d 981, 990 (9th Cir. 2009) (finding no abuse of discretion in  
27 denying leave to amend when amendment would be futile). Although a district court should  
28 freely give leave to amend when justice so requires under Federal Rule of Civil Procedure

1 15(a)(2), “the court’s discretion to deny such leave is ‘particularly broad’ where the plaintiff has  
2 previously amended its complaint[.]” *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713  
3 F.3d 502, 520 (9th Cir. 2013) (quoting *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 622 (9th  
4 Cir. 2004)).

5 B. Granting Leave to Amend

6 Federal Rule of Civil Procedure 15(a) “declares that leave to amend shall be freely given  
7 when justice so requires.” *Foman v. Davis*, 371 U.S. 178, 182 (internal citation omitted). In the  
8 absence of (1) undue delay, (2) bad faith or dilatory motive, (3) futility of amendment, and (4)  
9 prejudice to the opposing party, leave to amend should be granted freely. *Id.* However, each  
10 factor is not given equal weight. *United States v. Webb*, 655 F.2d 977, 980 (9th Cir. 1981)  
11 (finding that where prejudice or bad faith is present, denial of leave to amend a pleading protects  
12 the judicial system and other litigants). Furthermore, repeated failure to cure deficiencies by  
13 amendments previously allowed is a reason to deny leave to amend. *Foman*, 371 U.S. at 182.  
14 The policy of granting leave to amend should be applied with “extreme liberality.” *DCD*  
15 *Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987). Granting or denying leave to  
16 amend is within the sound discretion of the trial court, and will be reversed only for abuse of  
17 discretion. *Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 343 (9th Cir. 1996). In using its  
18 discretion, the district court “must be guided by the underlying purpose of Rule 15 to facilitate  
19 decision on the merits, rather than on the pleadings or technicalities.” *Webb*, 655 F.2d at 979.

20 **IV. Analysis**

21 A. Count I: Violation of the ADA by Defendant Gutierrez

22 Plaintiff initially brought his ADA claim against Defendant DWR. (ECF No. 1 at ¶¶ 76–  
23 91.) This Court dismissed Plaintiff’s claim based on the state’s immunity from suit. (ECF No. 26  
24 at 7.) In so ruling, this Court noted that a claim against the state under Title I of the ADA is  
25 permissible only when the plaintiff brings suit against state officials for prospective injunctive  
26 and declaratory relief. (ECF No. 26 at 6.)

27 Plaintiff alleges in his Amended Complaint that Defendant Gutierrez, in his official  
28 capacity within the meaning of the ADA, has treated Plaintiff less favorably than other DWR

1 employees because of Plaintiff's disability. (ECF No. 30 at ¶ 71.) Plaintiff claims he was not  
2 provided with the accommodations necessary for his disability. (ECF No. 30 at ¶ 75.) Plaintiff  
3 also alleges that Gutierrez retaliated against him when Plaintiff was not hired for a position he  
4 was otherwise qualified for because of his request for accommodations. (ECF No. 30 at ¶ 85.)  
5 Plaintiff, at the conclusion of his Amended Complaint, makes a variety of prayers for relief, but  
6 does not specify what damages are attributable to which claim. (Prayer for Relief, ECF No. 30 at  
7 ¶¶ 1–11.)

8 Defendant moves to dismiss Plaintiff's claim on three grounds: (1) the injunctive relief  
9 requested is improper; (2) Plaintiff does not have standing to sue; and (3) Plaintiff has other  
10 adequate monetary remedies by suing under the Civil Service Act. (Mem. in Supp. of Def.'s Mot.  
11 to Dismiss, ECF No. 31-1 at 10–13.)

12 i. Prospective Injunctive Relief

13 A claim against the state under Title I of the ADA is permissible only when the plaintiff  
14 brings suit against state officials for prospective injunctive and declaratory relief—the Ex parte  
15 Young doctrine. *Walsh v. Nevada Dep't of Human Res.*, 471 F.3d 1033, 1036 (9th Cir. 2006).  
16 “[U]nder the Ex parte Young doctrine, the Eleventh Amendment does not bar a suit against a state  
17 official when that suit seeks prospective injunctive relief.” *Douglas*, 271 F.3d at 817–18 (internal  
18 citations omitted). Title I of the ADA itself authorizes private injunctive suits against state  
19 officials. 42 U.S.C. §§ 2000e(n), 2000e–5(f)–(g). An Ex parte Young suit is available where a  
20 plaintiff alleges ongoing violation of federal law, and where the relief sought is prospective rather  
21 than retrospective. *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1047 (9th  
22 Cir. 2000).

23 Defendant Gutierrez argues that Plaintiff's claim is impermissible under the Ex parte  
24 Young doctrine because Plaintiff seeks retrospective relief. (ECF No. 31-1 at 10.) The Court  
25 agrees that, to the extent Plaintiff requests retrospective relief under his ADA claim, his request  
26 for relief is improper. However, Plaintiff clearly states in his Prayer for Relief that he requests  
27 prospective injunctive relief. (Prayer for Relief, ECF No. 30 at ¶¶ 2–4.) If successful in this case,  
28 Plaintiff requests that he be offered the position of Engineer Water Resource with an opportunity

1 for promotion and no pay cut, that all DWR staff be trained for reasonable accommodations and  
2 requirements of the interactive process and first aid for individuals with epilepsy, and that  
3 Defendant Gutierrez engage in a meaningful interactive process to develop reasonable  
4 accommodations that Plaintiff needs to perform his job. (Prayer for Relief, ECF No. 30 at ¶¶ 2–  
5 4.) Plaintiff also alleges other damages for retrospective relief in his Prayer for Relief (Prayer for  
6 Relief, ECF No. 30 at ¶¶ 5–11); however the Court assumes these damages to be attributed to  
7 Plaintiff’s other causes of action. Defendant Gutierrez’s retrospective relief argument improperly  
8 rests on the belief that if the discrimination occurred in the past, then the relief also relates to the  
9 past. Defendant Gutierrez’s argument is misplaced. Plaintiff requests reinstatement and  
10 accommodations for his disability when he continues to work at DWR. Only to the extent that  
11 Plaintiff requests prospective injunctive relief under the ADA does Plaintiff properly bring his  
12 claims under the Ex parte Young Doctrine. Therefore, Defendants’ motion to dismiss on these  
13 grounds is denied.

14 ii. Plaintiff’s Standing to Seek Prospective Injunctive Relief

15 Defendant argues that because Plaintiff is not currently employed with DWR, he has no  
16 standing to seek prospective injunctive relief. (ECF No. 31-1 at 11.) “To have standing to bring  
17 a claim for relief, a plaintiff must show that he has: (1) suffered an injury that (2) was caused by  
18 the defendant and (3) is likely to be redressed by the relief he seeks.” *Walsh v. Nevada Dept. of*  
19 *Human Resources*, 471 F. 3d 1033, 1036–37 (9th Cir. 2006), (following *Thinket Ink Info. Res.,*  
20 *Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1057 (9th Cir. 2004)). Plaintiff meets these  
21 requirements. He alleges the injury he suffered was being unemployed after losing his job and he  
22 continues to suffer by not having a job. (ECF No. 30 at ¶ 61). Plaintiff further alleges his injury  
23 was caused by Defendant Gutierrez. (ECF No. 30 at ¶ 61). Plaintiff now requests the position of  
24 Engineer Water Resource as part of his prospective injunctive relief. (Prayer for Relief, ECF No.  
25 30 at ¶¶ 2–4.) Based on the foregoing, the Court finds Plaintiff does have standing to seek  
26 prospective injunctive relief and Defendants’ motion to dismiss this claim is denied.

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1                   iii. Adequate Alternative Remedies

2                   Defendant asserts that because Plaintiff alleged that he was terminated in violation of the  
3 law, monetary damages under the Civil Service Act are an adequate remedy, and Plaintiff's claim  
4 for equitable relief under Title I of the ADA should be dismissed. (ECF No. 31-1 at 12.) Plaintiff  
5 argues in his opposition that Title I of the ADA allows him to bring an action alleging prospective  
6 injunctive relief under the Ex parte Young doctrine. (ECF No. 33 at 7–8.) Plaintiff is correct that  
7 he has brought a proper claim.<sup>1</sup> Therefore, the Court need not assess whether Plaintiff should  
8 have brought a claim under the Civil Service Act. The Court finds no legal basis, and Defendants  
9 offer none, to find that Plaintiff must bring a claim under the Civil Service Act rather than under  
10 Title I of the ADA. Therefore, Defendants' motion to dismiss as to Count I is denied.

11                   B. Count II: Violations of Section 504 by Defendant DWR

12                   Plaintiff originally brought a claim under Section 504 against Defendant DWR. The  
13 Court dismissed Plaintiff's claim for failing to state a claim under Federal Rule of Civil Procedure  
14 12(b)(6) with leave to amend. (ECF No. 26 at 8.) Plaintiff failed to plead facts that would allow  
15 the Court to draw the reasonable inference that the Defendant DWR is liable for the misconduct  
16 alleged. (ECF No. 26 at 8.) Plaintiff resubmitted this claim in his Amended Complaint as Count  
17 II. (ECF No. 30 at ¶¶ 87–90.) Defendant DWR renews its objection alleging that Plaintiff's  
18 Amended Complaint fails to state a claim under Section 504. (ECF No. 31-1 at 14.)

19                   Defendants' motion to dismiss is with respect to three separate claims Plaintiff alleges  
20 under Section 504. Plaintiff alleges that by medically terminating him, DWR: (1) failed to  
21 provide Plaintiff with reasonable accommodation of a job coach; (2) refused to engage in the  
22 interactive process; and (3) retaliated against him and subsequently did not hire him for other  
23 positions. (ECF No. 30 at ¶¶ 87–90.)

24                   Plaintiff's Amended Complaint includes more factual support for his allegations. (ECF  
25 No. 30 at ¶¶ 87–90.) Specifically, Plaintiff attaches two additional documents, Exhibit A (ECF  
26 No. 30-1) and Exhibit B (ECF No. 30-2), to his Amended Complaint. Exhibit A is a declaration

27 \_\_\_\_\_  
28 <sup>1</sup> Plaintiff has filed with the Equal Opportunity Commission (EEOC) and received a right-to-sue letter, and has  
therefore, exhausted his administrative remedies. (ECF No. 33 at 8.)



1 in support of the Amended Complaint made by Plaintiff and the attachment to Exhibit A is a  
2 spreadsheet of jobs he applied to after his termination. (ECF No. 30-1.) Exhibit B is a  
3 declaration in support of the Amended Complaint made by Plaintiff's professor, Hubert Morel-  
4 Sextoux, PH.D. (ECF No. 30-2.) The Court typically does not take into consideration documents  
5 that are not part of the complaint.<sup>2</sup> Exhibits A and B are not the type of documents that may be  
6 considered in a motion to dismiss. However, the Court notes that Plaintiff's aforementioned  
7 Exhibit A is a declaration which contains factual allegations that Plaintiff included in his  
8 Amended Complaint. Because Plaintiff's declaration in Exhibit A is similar to a pleading of facts  
9 in support of his claims, the Court will consider Plaintiff's declaration in Exhibit A in its  
10 determination. However, Exhibit B, the witness declaration, and the attachment to Exhibit A, the  
11 spreadsheet, are facts that are not alleged by Plaintiff, rather, they are evidentiary exhibits in  
12 support of Plaintiff's allegations. (ECF No. 30-1 attachment at 5; ECF No. 30-2.) Because these  
13 are both evidentiary attachments, they may not be considered. Therefore, the Court will not  
14 consider the attachment to Exhibit A or Exhibit B.

15 i. Retaliation Against Plaintiff and Failure to Hire Him for Other Positions

16 For the sake of clarity, the Court first addresses Plaintiff's claim that he was retaliated  
17 against and subsequently not hired for other positions. In order to bring a prima facie claim for  
18 termination or failure to hire under Section 504, Plaintiff must show he is: (1) a handicapped  
19 person under the Act; (2) otherwise qualified for the position sought; (3) being excluded from the  
20 position solely by reason of that handicap; and (4) seeking a position that exists as part of a  
21 program or activity receiving federal financial assistance. *Smith v. Barton*, 914 F.2d 1330, 1338  
22 (9th Cir. 1990).

23 Defendants argue that Plaintiff has failed to plead sufficient facts to meet the second,  
24 third, and fourth elements of this claim. (ECF No. 31-1 at 14.) A plaintiff need not allege

25 \_\_\_\_\_  
26 <sup>2</sup> A court may consider documents external to the pleadings in a motion to dismiss under the incorporation by  
27 reference doctrine where the contents of the documents are alleged in the complaint and neither party questions the  
28 authenticity of the documents. *Knieval v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). The types of instruments that  
qualify for incorporation under Federal Rule of Civil Procedure 10(c) are written instruments that are documentary  
evidence. *Montgomery v. Buege*, No. CIV. 08-385 WBS KJM, 2009 WL 1034518, at \*3 (E.D. Cal. April 16, 2009).  
Witness affidavits and other exhibits containing evidentiary material do not fall within Rule 10(c). *Id.*

1 “‘specific facts’ beyond those necessary to state his claim and the grounds showing entitlement to  
2 relief.” Twombly, 550 U.S. at 570. Federal Rule of Civil Procedure 8(a) does not require detailed  
3 factual allegations, but demands more than an accusation that the defendant unlawfully harmed  
4 plaintiff. Iqbal, 556 U.S. at 678.

5 The parties appear to agree that Plaintiff qualifies as a handicapped person under the Act.  
6 The Court finds that Plaintiff alleges sufficient facts to support the second element—that he was  
7 otherwise qualified for the position he sought. In Plaintiff’s Amended Complaint, he references  
8 Exhibit A, which alleges his qualifications for the positions to which he applied. (ECF No 30-1 at  
9 ¶¶ 2–7, ¶¶ 9–11.) Plaintiff had over eleven years’ experience working for DWR, received review  
10 scores of 95%, and ranked second for the positions he sought. (ECF No. 30-1 at ¶¶ 3–7.)  
11 Plaintiff also compares himself to other applicants, alleging that he had more experience than the  
12 less qualified individuals who were hired. (ECF No. 30-1 at ¶¶ 10–11.) Because these factual  
13 allegations are accepted as true, Cruz, 405 U.S. at 322, it can be assumed that Plaintiff was  
14 qualified for the positions he sought. Iqbal, 556 U.S. at 678. Therefore, Plaintiff alleged  
15 sufficient facts to meet the second element for proving a prima facie case of failure to hire under  
16 Section 504.

17 The Court further finds that Plaintiff meets the pleading requirements for the third  
18 element—that Plaintiff was excluded from those positions because of his handicap. Plaintiff’s  
19 Amended Complaint argues he was not given the position to which he applied because of his  
20 disability. (ECF No. 30-1 at ¶¶ 2-7; ¶¶ 12-14.) After Plaintiff’s medical termination he applied  
21 to eight positions for Engineer Water Resources with DWR. (ECF No. 30-1 at ¶ 12.) Plaintiff  
22 was never called for an interview and discovered that his previous supervisor was the hiring  
23 supervisor for the position. (ECF No. 30-1 at ¶ 13.) Furthermore, the individual selected for the  
24 position was less qualified for the position because she was previously a student intern when  
25 Plaintiff worked at DWR. (ECF No. 30-1 at ¶ 13.) Therefore, Plaintiff had more experience and  
26 had a longer work history than the candidate chosen for the position. (ECF No. 30-1 at ¶¶ 12–  
27 14.) Based on these facts, the Court can reasonably infer that there were no other reasons to not  
28 hire Plaintiff other than his disability. Therefore, Plaintiff has alleged sufficient facts to meet the

1 third element.

2 Finally, Defendants argue that Plaintiff did not establish that the specific position he  
3 applied to was part of a program that received federal financial assistance, as required by the  
4 fourth element of his claim. (ECF No. 31-1 at 15.) However, Plaintiff alleges that DWR receives  
5 federal financial assistance. (ECF No. 30 at ¶ 9.) From this fact, it can be reasonably inferred  
6 that, if the company receives federal aid, its programs would obtain some benefit from that aid.  
7 Schermerhorn, 373 U.S. at 753 n.6. Plaintiff need not allege “‘specific facts’ beyond those  
8 necessary to state his claim and the grounds showing entitlement to relief.” Twombly, 550 U.S. at  
9 570. Consequently, Plaintiff pleaded sufficient facts to show DWR received federal financial  
10 assistance.

11 ii. Remaining Claims under Section 504

12 Because Defendants’ motion to dismiss conflates the arguments with respect to the first  
13 and second claims under Count II, the Court will address both together. Defendants allege that  
14 Plaintiff provides no specific factual support that DWR refused to engage in the interactive  
15 process or refused to provide reasonable accommodation, such as by providing a job coach. (ECF  
16 No. 31-1 at 15.) However, the Court finds that Plaintiff has met the applicable pleading standard  
17 under Rule 12(b)(6).

18 Plaintiff does not need to allege “‘specific facts’ beyond those necessary to state his claim  
19 and the grounds showing entitlement to relief.” Twombly, 550 U.S. at 570. Plaintiff alleges that  
20 DWR refused to provide Plaintiff with reasonable accommodations and terminated him when he  
21 requested accommodations. (ECF No. 30 at ¶ 89.) Specifically, Plaintiff alleges that he was  
22 diagnosed with epilepsy and provided a list of employment restrictions by his doctor. (ECF No.  
23 30 at ¶¶ 22–23.) Plaintiff states that DWR was made aware of Plaintiff’s medical condition and  
24 employment restrictions and initially agreed upon accommodations, but that Plaintiff was  
25 subsequently forced to sign a revised duty statement that required him to perform work that was  
26 not permitted by his employment restrictions. (ECF No. 30 at ¶¶ 23, 32–35, 42.) Furthermore,  
27 Plaintiff alleges that Defendant DWR rejected, without discussion, the Department of  
28 Rehabilitation’s offer of a job coach for Plaintiff as reasonable accommodations to assist him.

1 (ECF No. 30 at ¶ 89.) From these facts, the Court can draw a reasonable inference that DWR  
2 refused to engage in the interactive process and failed to provide reasonable accommodation to  
3 which they originally agreed. Therefore, Defendants’ motion to dismiss is denied with respect to  
4 Count II.

5 C. Count III: Section 1983 Claims Against Defendant Gutierrez

6 In Plaintiff’s initial complaint, he brought a § 1983 claim against Defendant Gutierrez  
7 based on the Fourteenth Amendment. (ECF No. 1 at ¶¶ 98–106.) The Court held that, to the  
8 extent this claim was brought against Defendant Gutierrez in his individual capacity, it was  
9 dismissed without leave to amend, but further stated that Plaintiff was permitted to bring a § 1983  
10 claim against Defendant Gutierrez in his official capacity on Fourteenth Amendment grounds.  
11 (ECF No. 26 at 8.) Plaintiff, in his Amended Complaint, brings his § 1983 claim against  
12 Defendant Gutierrez, acting in his official capacity, for the denial of equal protection and due  
13 process rights under the Fourteenth Amendment. (ECF No. 30 at ¶¶ 92–93.)

14 Defendants in their second Motion to Dismiss argue that Defendant Gutierrez is immune  
15 from Plaintiff’s § 1983 claim, while using the same arguments from Count I. Defendants allege  
16 as follows: (1) Plaintiff does not request prospective relief; and (2) Plaintiff has adequate  
17 remedies at law. (ECF No. 31-1 at 16.)

18 The United States Supreme Court has carved out “an important exception to this general  
19 rule [of Eleventh Amendment immunity]: a suit challenging the constitutionality of a state  
20 official’s action is not one against the State.” *Pennhurst State School & Hospital v. Halderman*,  
21 465 U.S. 89, 102. Under the *Ex parte Young* exception, the Supreme Court has determined that  
22 actions seeking injunctive relief may stand against state officials. *Id.* See also *Doe v. Lawrence*  
23 *Livermore Nat. Lab.*, 131 F.3d 836, 839 (9th Cir. 1997) (“However, there is one exception to this  
24 general rule: When sued for prospective injunctive relief, a state official in his official capacity is  
25 considered a “person” for § 1983 purposes. In what has become known as part of the *Ex parte*  
26 *Young* doctrine, a suit for prospective injunctive relief provides a narrow, but well-established,  
27 exception to Eleventh Amendment immunity”) (internal citations omitted). Similar to the Court’s  
28 rationale as to Count I, Plaintiff properly requested prospective injunctive relief for this claim and

1 does not need to exhaust other remedies before bringing this claim. Therefore, Defendants'  
2 Motion to Dismiss Count III is denied.

3 D. Count IV: Violations of FEHA by all Defendants

4 Plaintiff originally alleged a number of causes of action under FEHA against all  
5 Defendants. (ECF No. 1 at ¶¶ 107–19.) The Court did not dismiss those claims, but advised  
6 Plaintiff to amend the issues under this claim and indicated that the Court would look favorably  
7 on a future motion to dismiss the claims under Federal Rule of Civil Procedure 12(b)(6) as they  
8 were written. (ECF No. 26 at 12.) In Plaintiff's Amended Complaint, he again brings his FEHA  
9 claims, this time including slightly more facts. (ECF No. 30 at ¶¶ 100–11.) Defendants again  
10 move to dismiss Plaintiff's FEHA claims alleging that: (1) Plaintiff has not alleged sufficient  
11 facts for its claims; and (2) Defendant Gutierrez cannot be sued individually for discrimination  
12 under FEHA. (ECF No. 31-1 at 16–17.)

13 Plaintiff has already been told by the Court to address his factual insufficiencies in his  
14 Amended Complaint as to the instant claim, and has failed to adequately do so. Plaintiff appears  
15 to include a myriad of claims under FEHA, but does not bother to specifically enumerate them,  
16 leaving the Court and Defendants to infer the specific statutes under FEHA on which Plaintiff  
17 relies for each argument. Moreover, Plaintiff fails to indicate not only which claims he is  
18 bringing, but also which Defendant he brings the claim against and why.

19 First, Plaintiff must clearly set forth the causes of actions he wishes to include and under  
20 what sub-section of FEHA he brings those claims. Second, Plaintiff must also clearly indicate  
21 against which Defendants he wishes to bring each claim. Finally, Plaintiff must allege sufficient  
22 facts to withstand a motion to dismiss. Plaintiff was strongly advised by this Court that failing to  
23 adequately enumerate the specific causes of action he brings under FEHA and the factual  
24 allegations that support them would result in the Court granting a motion to dismiss. The Court  
25 will grant Plaintiff one final opportunity to amend his claims under FEHA. For these reasons,  
26 Defendants' Motion to Dismiss Plaintiff's FEHA claims is granted with leave to amend.

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1                   E. Count V: Wrongful Termination

2                   Plaintiff originally alleged a common law tort claim of wrongful termination against all  
3 Defendants. (ECF No. 1 at ¶¶ 120-24.) The Court dismissed his claim because Plaintiff failed to  
4 comply with the California Government Claims Act (“CGCA”) by not asserting he met the  
5 requirements of the Act. (ECF No. 26 at 13.) Furthermore, Plaintiff did not indicate he complied  
6 with California Government Code § 945.6. (ECF No. 26 at 13.) Plaintiff was granted leave to  
7 amend, in order to indicate he complied with the CGCA and Government Code § 945.6.

8                   i. Compliance with the CGCA

9                   The CGCA instructs that no suit for money or damages may be brought against a public  
10 entity until the claims have been presented for review and the state issues notice rejecting those  
11 claims. CAL. GOV’T CODE § 900 et seq. (2003), see also, *Klein v. City of Laguna Beach*, 533 F.  
12 App’x 772, 774 (9th Cir. 2013) (dismissing plaintiff’s claims for failure to comply with the  
13 California Government Claims Act). “Compliance with the claims statute is mandatory, and  
14 failure to file a claim is fatal to the cause of action.” *Pac. Tel. & Tel. Co. v. Cnty. of Riverside*,  
15 106 Cal. App. 3d 183, 188 (Ct. App. 1980). After a claim is rejected, an individual has six  
16 months from the date the notice is deposited in the mail to file a court action. CAL. GOV’T CODE  
17 § 945.6.

18                   Numerous federal and state courts within California have found that this “claim  
19 presentation requirement” constitutes an element of any cause of action arising under the CGCA.  
20 See, e.g., *Perez v. Golden Empire Transit Dist.*, 209 Cal. App. 4th 1228, 1236 (2012) (“The court  
21 stated that the requirement is not merely procedural, but is a condition precedent to maintaining a  
22 cause of action and, thus, is an element of the plaintiff’s cause of action.”); *Ramos v. Marcisz*, No.  
23 06-CV-2282-W(CAB), 2008 WL 257292, at \*6 (S.D. Cal. Jan. 28, 2008). Failure to meet this  
24 requirement subjects a claim to dismissal for failure to state a cause of action. *Yearby v.*  
25 *California Dep’t of Corr.*, No. 2:07-CV-02800–JAM KJN P, 2010 WL 2880180, at \*4 (E.D. Cal.  
26 July 21, 2010). Because the parties are at the pleading stage, Plaintiff is only required to  
27 affirmatively allege compliance with CGCA. *Mock v. California Dept. of Corrections and*  
28 *Rehabilitation*, No. 15-CV-1104-MJS, 2015 WL 5604394, at \*6 (E.D. Cal. Sept. 23, 2015).

1 Plaintiff's Amended Complaint makes no reference to this requirement and presents no  
2 facts to indicate that the requirement was met. Within the entire Amended Complaint there is no  
3 affirmative allegation that Plaintiff complied with the CGCA. Plaintiff has not shown that filing a  
4 claim with the EEOC supplants the need to file with the CGCA, and the Court is not aware that  
5 such a rule exists. The Court previously dismissed Plaintiff's wrongful termination claim for  
6 failure to state a claim and granted Plaintiff leave to amend. However, Plaintiff, again, did not  
7 allege any additional facts relating to his compliance with CGCA. This repeat failure requires  
8 dismissal of the claim.

9 ii. Compliance with Government Code § 945.6

10 In addition to Plaintiff's failure to plead the CGCA requirement, Plaintiff also does not  
11 demonstrate in his pleadings that he is exempt from the statute of limitations imposed by  
12 California Government Code § 945.6.

13 Under California Government Code § 945.6, an individual has six months from the date  
14 the state mails written notice of the rejection of his claims to file suit. Defendants' in their initial  
15 Motion to Dismiss asked the Court to take judicial notice of documents obtained from the  
16 Victim's Compensation and Government Claims Board ("VCGCB") related to Plaintiff's claim.  
17 (ECF No. 9-2.) The Court declined to take judicial notice of these documents and denied  
18 Defendants' request to dismiss these claims as time-barred. (ECF No. 26 at 15.)

19 Defendants are correct that failure to file a claim within the statute of limitations provided  
20 by the CGCA is grounds for dismissal with prejudice. Gov't. Code § 945.6. The statutory time  
21 period begins to run when the written notice of rejection is deposited in the mail. CAL. GOV'T  
22 CODE §§ 913, 945.6. Courts have consistently found claims filed beyond the six-month period to  
23 be time-barred, even when the plaintiff never received the written notice. *Dowell v. Cnty. of*  
24 *Contra Costa*, 173 Cal. App. 3d 896, 901 (1985) (A claimant who fails to receive a written notice  
25 of the public entity's action on the claim within a reasonable time after the end of the 45-day  
26 period for its consideration, should make inquiry to determine whether, and if so, when, the notice  
27 was in fact served. [T]he six-month rule applies if notice was served, even though not actually  
28 received by the claimant.) (emphasis in original) (internal citations omitted); *Perryman v. Los*

1 Angeles Cnty. Metro. Transp. Auth., No. B168177, 2004 WL 1638105 (Cal. Ct. App. July 23,  
2 2004) (“[CAL. GOV’T CODE § 945.6] makes clear that ... any notice, is deemed to have been  
3 presented and received at the time of deposit in the mail... Thus, the Legislature made a choice  
4 that any risk of a postal delivery problem falls on the recipient of the notice.”) (internal citations  
5 omitted).

6 In their Motion to Dismiss, Defendants offered multiple documents for judicial notice to  
7 demonstrate that the claims are time-barred, but none clearly state the date the notice of rejection  
8 was deposited in the mail. (Req. for Judicial Notice in Supp. of Mot. to Dismiss, ECF No. 9-2.)  
9 The Court declined to take judicial notice of these documents, but instructed Plaintiff to provide  
10 facts to correct this deficiency. (ECF No. 26 at 15.) Because Plaintiff failed to correct this issue,  
11 the Court now assumes there are no facts supporting Plaintiff’s ability to bring this claim. The  
12 burden remains with the Plaintiff to demonstrate in his Amended Complaint that his claim meets  
13 the requirements of the CGCA, including the statute of limitations. Because Plaintiff failed to  
14 prove he complied with the CGCA, the Court dismisses Plaintiff’s Count V wrongful termination  
15 claim with leave to amend.

16 **V. Conclusion**

17 For the reasons set forth above, the Court hereby GRANTS IN PART and DENIES IN  
18 PART Defendants’ Motion to Dismiss. (ECF No. 31.) The Court orders as follow:

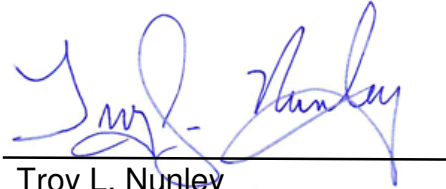
- 19 1. Defendants’ Motion to Dismiss Count I is DENIED.
- 20 2. Defendants’ Motion to Dismiss Count II is DENIED.
- 21 3. Defendants’ Motion to Dismiss Count III is DENIED.
- 22 4. Defendants’ Motion to Dismiss Count IV is GRANTED WITH LEAVE TO  
23 AMEND.
- 24 5. Defendants’ Motion to Dismiss Count V GRANTED WITH LEAVE TO  
25 AMEND.

26 The Court shall allow Plaintiff to file a second Amended Complaint with respect to Counts  
27 IV and V only. Should Plaintiff elect to do so, the amended complaint must be filed with this Court  
28 within twenty-one (21) days from the entry of this Order.



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Dated: November 17, 2015



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Troy L. Nunley  
United States District Judge