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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JAMILAH TALIBAH ABDUL-HAQQ,
Plaintiff,
v.
KAISER EMERGENCY IN SAN
LEANDRO,
Defendant.

Case No. 16-cv-05454-PJH

**ORDER DISMISSING COMPLAINT
WITH LEAVE TO AMEND**

Re: Dkt. Nos. 16, 17,18

Before the court is defendants' motion to dismiss pro se plaintiff Abdul-Haqq's complaint. Dkt. 16. The court finds that the matter is suitable for decision without oral argument. Accordingly, the hearing set for February 15, 2016 is VACATED. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby DISMISSES the complaint, but grants Abdul-Haqq leave to file an amended complaint.

BACKGROUND

A. The Prior Related Case

This is an employment discrimination dispute. In a prior related case, Abdul-Haqq v. Kaiser Found. Hosps. et al., No. 4:14-cv-04140-PJH, Abdul-Haqq sued Kaiser Foundation Hospitals and The Permanente Medical Group for, inter alia, racial discrimination under Title VII of the Civil Rights Act ("Title VII"), harassment, disability discrimination under the Americans with Disabilities Act ("the ADA"), failure to engage in the interactive process under the California Fair Employment and Housing Act ("FEHA"), and intentional infliction of emotional distress. On January 23, 2015, after a hearing, the court granted a motion to dismiss Abdul-Haqq's first amended complaint, with leave to amend. No. 14-4140 Dkt. 50. The court found that plaintiff had not properly pleaded

1 exhaustion of her administrative remedies as to the Title VII, FEHA, and ADA claims, and
2 that plaintiff failed to state a claim as to her other causes of action. Id. On April 10, 2015,
3 the court granted a motion to dismiss the second amended complaint, based on a lack of
4 exhaustion and failure to state a cognizable claim. No. 14-4140 Dkt. 68. Abdul-Haqq
5 appealed the decision, and the Ninth Circuit affirmed on October 4, 2016. No. 14-4140
6 Dkt. 80.

7 **B. The Complaint’s Allegations**

8 The complaint in this matter was filed on September 23, 2016. Dkt. 1. Plaintiff
9 has captioned the defendants as “Kaiser Emergency in San Leandro, a part of The
10 Permanente Medical Group,” but the real parties in interest are Kaiser Foundation
11 Hospitals and The Permanente Medical Group (collectively, “defendants”). Plaintiff’s
12 allegations are similar to her earlier complaint, but the new complaint focuses on more
13 recent events in her workplace. The alleged incidents largely occurred in Kaiser
14 Permanente’s San Leandro emergency department.

15 Abdul-Haqq asserts eight causes of action: (1) disability discrimination; (2)
16 harassment for having a disability; (3) intentional infliction of emotional distress; (4) failure
17 to prevent harassment; (5) failure to prevent discrimination; (6) unauthorized video and
18 audio recording; (7) retaliation for whistleblowing; and (8) racial discrimination. Two of
19 these claims—failure to prevent discrimination and racial discrimination—are referenced
20 only in the case caption, but not actually alleged in the body of the complaint. The
21 complaint is generally vague, conclusory, unclear and devoid of specific names,
22 incidents, dates, and events. The bulk of the factual allegations seem to be directed to
23 the disability discrimination and harassment claims.

24 Abdul-Haqq’s complaint describes herself as a victim of “deceptive management
25 practices [occurring] consistently through her employment.” Compl. ¶ 11. Abdul-Haqq
26 has an anxiety disorder, and in January 2015 she informed her employers of unspecified
27 “triggers” that exacerbate her anxiety. Compl. ¶¶ 13, 20. This information also included
28 her “functional limitations,” and that Abdul-Haqq is “uncomfortable with her ex-Assistant

1 Nurse Manager Treye Gaustand.” Compl. ¶ 21.

2 Plaintiff alleges that defendants have failed to take her triggers into consideration
3 and to accommodate her disability. Compl. ¶ 14. On the contrary, defendants have
4 “made sure” that plaintiff experiences “all triggers that cause her anxiety.” Compl. ¶ 32.
5 In particular, Abdul-Haqq has requested “effective communication with her managers.”
6 Compl. ¶ 16. However, this request was not resolved, forcing plaintiff to file a workers’
7 compensation claim. Compl. ¶ 17. Ignoring plaintiff’s “functional limitations” decreases
8 her ability to “communicate effectively.” Compl. ¶ 22. Plaintiff further alleges that
9 “doctors and other staff” were “verbally aggressive” to her in 2015. Compl. ¶ 23.
10 Defendants continue to “ignore” her “complaints of mistreatment by doctors and
11 deceptive managerial practices.” Id.

12 Plaintiff alleges that defendants have also made “false allegations” against her,
13 placed her on a work schedule without confirming it with her, refused to pay her for FMLA
14 leave, and sought to “sabotage” her nursing career and employment. Compl. ¶ 24.
15 These actions exacerbated her disability. Compl. ¶ 25.

16 In December 2015 and March 2016, plaintiff again “gave details” to defendants of
17 what she needed to prevent triggers of her anxiety. Compl. ¶ 32. Defendants denied her
18 requests and refused to put the denial of her requests in writing. Compl. ¶ 33. Plaintiff
19 describes the emergency room as “chaotic,” but states that the environment itself does
20 not cause her symptoms; rather, it is the “deceptive managerial practices” that are the
21 problem. Compl. ¶ 30.

22 To support her emotional distress claim, Abdul-Haqq argues that defendants were
23 “on notice” that she “was experiencing exacerbating of symptoms.” Compl. ¶ 35. Abdul-
24 Haqq made a request to them “five times” to have “all topics” for any meeting “in writing
25 and emailed” in advance, to no avail. Id. The result was that Abdul-Haqq could not focus
26 or effectively communicate. Id.

27 To support her failure to prevent harassment claim, plaintiff describes several
28 doctors who have engaged in “aggressive behavior towards staff.” Compl. ¶¶ 36–37.

1 Despite the complaints of nurses, defendants have “allowed” these doctors to transfer
2 from Haywood to Fremont, and now San Leandro. Id. Abdul-Haqq complained about
3 these doctors to the EEOC and was “warned” that one of the doctors, Dr. Baker, would
4 “make it difficult for her in San Leandro.” Compl. ¶¶ 38–40. Because Abdul-Haqq
5 reported Dr. Baker and the other doctors, she “was suspended, called in for fact-finding
6 meeting,” had concerns raised about her “patient care delivery,” and was treated in “an
7 aggressive unprofessional manner.” Compl. ¶ 41.

8 To support her unauthorized recording claim, Abdul-Haqq alleges that “cameras
9 with audio and motion sensing capability are in the facility in areas of expected privacy,”
10 allegedly to “intimidat[e]” the staff. Compl. ¶ 42. The cameras are located in “the break
11 room and the patient care areas inside the emergency room.” Id.

12 To support her retaliation for whistleblowing claim, Abdul-Haqq alleges that “in
13 early May” (presumably 2016), she filed a complaint about “continued deceptive
14 managerial practices.” Compl. ¶ 43. “Now,” the same doctors she accused are “writing
15 patient care concerns” about her. Id.

16 **C. The Instant Motion to Dismiss and Plaintiff’s Responses**

17 Defendants’ motion to dismiss urges that all claims in the complaint must be
18 dismissed for failure to state a claim and/or failure to exhaust administrative remedies. In
19 the alternative, defendants request that Abdul-Haqq be ordered to provide a more definite
20 statement of her claims pursuant to Federal Rule of Civil Procedure 12(e). Dkt. 16.

21 Instead of responding to defendant’s motion, plaintiff has filed a “Notice of Request
22 for Production of Documents.” Dkt. 17. This filing appears to be a request for discovery
23 from defendants. A few days later, plaintiff filed a document captioned “Attention Clerks
24 – Documents in Related Case.” Dkt. 18. This document “request[s]” that the briefing on
25 the motion to relate the current case to Abdul-Haqq’s prior related case be “moved over”
26 or copied to the current case’s docket.

27 Plaintiff’s “Notice of Request for Production of Documents” (Dkt. 17) is DENIED.
28 Plaintiff cannot seek discovery unless and until she has stated a cognizable claim for

1 relief. As discussed below, she has not yet done so. Plaintiff’s “request” to the Clerk that
 2 the briefing on the motion to relate this case to her prior case be “moved over” (Dkt. 18) is
 3 also DENIED. Motions to relate cases are filed and briefed in the lower-numbered case
 4 under the Local Rules, see Civ. L.R. 3-12(b), so these papers were properly filed.

5 **DISCUSSION**

6 **A. Legal Standard**

7 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests for the
 8 legal sufficiency of the claims alleged in the complaint. Ileto v. Glock, Inc., 349 F.3d
 9 1191, 1199–1200 (9th Cir. 2003). To survive a motion to dismiss for failure to state a
 10 claim, a complaint generally must satisfy the requirements of Federal Rule of Civil
 11 Procedure 8, which requires that a complaint include a “short and plain statement of the
 12 claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).

13 A complaint may be dismissed under Rule 12(b)(6) for failure to state a claim if the
 14 plaintiff fails to state a cognizable legal theory, or has not alleged sufficient facts to
 15 support a cognizable legal theory. Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699
 16 (9th Cir. 1990). The court is to “accept all factual allegations in the complaint as true and
 17 construe the pleadings in the light most favorable to the nonmoving party.” Outdoor
 18 Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 899–900 (9th Cir. 2007).

19 Legally conclusory statements, not supported by actual factual allegations, need
 20 not be accepted by the court. Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009). The
 21 allegations in the complaint “must be enough to raise a right to relief above the
 22 speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citations
 23 and quotations omitted). “A claim has facial plausibility when the plaintiff pleads factual
 24 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 (citation omitted). “[W]here the well-
 26 pleaded facts do not permit the court to infer more than the mere possibility of
 27 misconduct, the complaint has alleged – but it has not ‘show[n]’ – that the pleader is
 28 entitled to relief.” Id. at 679. In the event dismissal is warranted, it is generally without

1 prejudice, unless it is clear the complaint cannot be saved by any amendment. See
2 Sparling v. Daou, 411 F.3d 1006, 1013 (9th Cir. 2005).

3 Federal Rule of Civil Procedure 12(e) permits a party to move for a more definite
4 statement when a pleading “is so vague or ambiguous that the party cannot reasonably
5 prepare a response.” Fed. R. Civ. P. 12(e). “A Rule 12(e) motion is proper only where
6 the complaint is so indefinite that the defendant cannot ascertain the nature of the claim
7 being asserted and therefore cannot reasonably be expected to frame a proper
8 response.” Cal. Police Activities League v. Cal. Police Youth Charities, Inc., No. C 08-
9 1991 PJH, 2009 WL 537091, at *3 (N.D. Cal. Mar. 3, 2009) (quotations omitted). In such
10 a case, the court may in its discretion “require such detail as may be appropriate in the
11 particular case, and may dismiss the complaint if [the court’s] order is violated.” McHenry
12 v. Renne, 84 F.3d 1172, 1179 (9th Cir. 1996).

13 **B. Analysis**

14 As an initial matter, the complaint is defective because it fails to make clear the
15 statutory basis for each of the claims. Instead, Abdul-Haqq only asserts generally that
16 the complaint is brought pursuant to Title VII, the ADA, and FEHA. Compl. ¶ 1. As a
17 result, the court is unable to determine whether Abdul-Haqq’s claim for “failure to prevent
18 harassment,” for example, is premised on Title VII, the ADA, or FEHA, or whether this
19 claim attempts to allege harassment on the basis of disability or on the basis of race. In
20 any amended complaint, Abdul-Haqq must specifically state the statutory basis or other
21 legal basis for each individual claim.

22 **1. Claims 1 and 2: Discrimination and Harassment on the Basis of Disability**

23 Plaintiff’s first and second claims allege discrimination and harassment based on
24 her disability. No specific statutory authority is given for each claim. Because disability is
25 not a protected class under Title VII, see 42 U.S.C. § 2000e-2(a)(1); Garity v. APWU Nat’l
26 Labor Org., 828 F.3d 848, 853 n.3 (9th Cir. 2016), the court will presume that Abdul-Haqq
27 intended to make a claim either under the ADA and/or FEHA. The court finds dismissal
28 of both these claims is required because (1) plaintiff has not plausibly pleaded that the

1 claims are exhausted; and (2) plaintiff fails to allege that she was discriminated against
2 and/or harassed because of her disability.

3 As to the exhaustion issue, Title I of the ADA incorporates the enforcement
4 procedures of Title VII. 29 U.S.C. § 12117(a). To establish federal subject matter
5 jurisdiction for an ADA employment discrimination claim, a plaintiff must file an
6 administrative charge with the EEOC or other appropriate state agency—such as the
7 California Department of Fair Employment and Housing (“DFEH”)—before commencing
8 an action. 42 U.S.C. § 2000e-5(f)(1); Josephs v. Pac. Bell, 443 F.3d 1050, 1061 (9th Cir.
9 2006); B.K.B. v. Maui Police Dep’t, 276 F.3d 1091, 1099 (9th Cir. 2002). If the agency
10 dismisses the charge and issues a right-to-sue letter, a claimant typically has ninety days
11 “after the giving of such notice” to file a civil action against her employer. 42 U.S.C.
12 § 2000e-5(f)(1); Nelmida v. Shelly Eurocars, Inc., 112 F.3d 380, 383 (9th Cir. 1997).
13 “Allegations of discrimination not included in the plaintiff’s administrative charge may not
14 be considered by a federal court unless the new claims are like or reasonably related to
15 the allegations contained in the EEOC charge.” B.K.B., 276 F.3d at 1100 (quotation
16 omitted).

17 Similarly, under FEHA, employees must exhaust their administrative remedies by
18 filing an administrative complaint with DFEH within one year of the alleged unlawful
19 employment action, and obtain a notice of right to sue. Cal. Gov’t Code § 12960;
20 Romano v. Rockwell Int’l, Inc., 14 Cal. 4th 479, 492 (1996). The scope of the written
21 administrative charge “defines the permissible scope of the subsequent civil action.”
22 Rodriguez v. Airborne Express, 265 F.3d 890, 897 (9th Cir. 2001).

23 No right-to-sue letter from either the EEOC or DFEH is attached to the complaint.
24 Instead, the complaint alleges in a conclusory fashion that plaintiff has “exhausted” her
25 Title VII and FEHA remedies, and that the EEOC and DFEH “have issued the pertinent
26 Letters of Right to Sue.” Compl. ¶ 2. There is no allegation, even a conclusory one, that
27 Abdul-Haqq exhausted her ADA claims.

28 ///

1 Defendants have submitted a May 4, 2016 administrative charge that, to their
2 knowledge, is the only charge filed by Abdul-Haqq since January 2015. This
3 administrative charge is almost completely devoid of factual detail. Plaintiff alleges in a
4 conclusory fashion that she was discriminated, retaliated against, and harassed based on
5 “disability, engagement in protected activity, family care of medical leave [and] race.”
6 Defs.’ Mot. Ex. A. The only specific fact alleged in the charge is that Abdul-Haqq
7 received a written warning on or about May 3, 2016 for an incident that happened five
8 months ago.

9 Administrative charges must be construed “with utmost liberality since they are
10 made by those unschooled in the technicalities of formal pleading.” Kaplan v. Int’l
11 Alliance of Theatrical & Stage Emps., 525 F.2d 1354, 1359 (9th Cir. 1975). However,
12 “[t]he crucial element of a charge of discrimination is the factual statement contained
13 therein.” B.K.B., 276 F.3d at 1100. “In determining whether a plaintiff has exhausted
14 allegations that she did not specify in her administrative charge, it is appropriate to
15 consider such factors as the alleged basis of the discrimination, dates of discriminatory
16 acts specified within the charge, perpetrators of discrimination named in the charge, and
17 any locations at which discrimination is alleged to have occurred.” Id.

18 On the current record, the court cannot find that Abdul-Haqq has sufficiently
19 pleaded exhaustion of her disability discrimination and harassment claims. These claims
20 must therefore be dismissed for lack of subject matter jurisdiction because they are not
21 “like or reasonably related” to the only administrative charge in the record. See Freeman
22 v. Oakland Unified Sch. Dist., 291 F.3d 632, 638 (9th Cir. 2002). However, because
23 plaintiff did not attach her right-to-sue letter(s) to the complaint or substantively respond
24 to the motion to dismiss, the court will grant her leave to file an amended complaint. The
25 amended complaint must plead exhaustion of all ADA, Title VII and FEHA claims and
26 attach all of the relevant right to sue letter(s).

27 Moreover, even assuming that these claims were exhausted, the complaint does
28 not state a claim for disability discrimination or harassment. Under both FEHA and the

1 ADA, to prove discrimination based upon a disability, plaintiff must allege that (1) she
2 suffers from a qualifying disability; (2) was qualified for the job, i.e., able to perform its
3 essential functions with reasonable accommodation; and (3) was subjected to an adverse
4 employment action because of her disability. Brundage v. Hahn, 57 Cal. App. 4th 228,
5 236 (1997); Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1246 (9th Cir. 1999).

6 Abdul-Haqq's allegations do not plausibly allege these elements. First, although
7 Abdul-Haqq alleges that she suffers from an anxiety disorder, Compl. ¶ 13, it is not clear
8 from the facts alleged whether this is an "impairment that substantially limits one or more
9 [her] major life activities." 42 U.S.C. § 12102(1)(A). Second, the complaint does not
10 make clear what particular adverse employment action(s) Abdul-Haqq was subjected to.
11 An "adverse employment action is one that materially affect[s] the compensation, terms,
12 conditions, or privileges . . . of employment." Davis v. Team Elec. Co., 520 F.3d 1080,
13 1089 (9th Cir. 2008). Finally, even assuming that some of defendants' alleged actions
14 qualify as adverse employment actions, nowhere is it plausibly alleged that defendants
15 acted because of Abdul-Haqq's disability.

16 **2. Claim 3: Intentional Infliction of Emotional Distress**

17 Abdul Haqq's third claim is for intentional infliction of emotional distress ("IIED").
18 The elements of IIED in California are (1) extreme and outrageous conduct by the
19 defendant, with (2) the intention of causing, or reckless disregard of the probability of
20 causing, emotional distress, which (3) actually and proximately causes (4) plaintiff's
21 severe or extreme emotional distress. Christensen v. Superior Court, 54 Cal. 3d 868,
22 903 (1991).

23 Abdul-Haqq's IIED claim is based on a single paragraph in the complaint. Plaintiff
24 alleges that she requested "five times" that defendants have "all topics" for meetings "in
25 writing and emailed" to her in advance. Compl. ¶ 35. Because defendants did not
26 accommodate her request, Abdul-Haqq could not focus or effectively communicate. Id.

27 Dismissal of this claim is appropriate for two independent reasons. First, it does
28 not plausibly state a claim for IIED because defendants' alleged behavior was not

1 “extreme and outrageous.” Second, the claim is preempted by California’s exclusive
2 workers’ compensation remedy because the alleged infliction of emotional distress
3 “occurred at the worksite, in the normal course of the employer-employee relationship.”
4 Miklosy v. Regents of Univ. of Cal., 44 Cal. 4th 876, 902 (2008); accord Shoemaker v.
5 Myers, 52 Cal. 3d 1, 15 (1990). Defendants’ denial of pre-meeting emails is conduct
6 occurring at the worksite within the scope of the employment relationship

7 Because amendment would be futile based on the facts alleged in the complaint,
8 this claim is dismissed WITH PREJUDICE. If plaintiff wishes to include an IIED claim in
9 her amended complaint, it must be based on facts other than defendants’ denial of pre-
10 meeting emails, and based on events occurring outside of the normal course of the
11 employer-employee relationship.

12 **3. Claim 4: Failure to Prevent Harassment on the Basis of Disability**

13 In her fourth claim, plaintiff complains that she was subjected to a “difficult
14 environment” in her employment, including “unprofessional” and “abusive” behavior by
15 certain doctors. Compl. ¶¶ 36, 40–41. However, a difficult work environment, standing
16 alone, does not give rise to a cause of action under Title VII, FEHA, or the ADA. Rather,
17 the alleged harassment must be made based on some protected trait, such as race, sex,
18 or disability. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (“Title
19 VII does not prohibit all verbal or physical harassment in the workplace; it is directed only
20 at discrimination [because of a protected trait.]”) accord Cal. Gov’t Code § 12940(j)(1)
21 (FEHA); 42 U.S.C. § 12112(a) (ADA). It is not clear from the complaint what type of
22 harassment Abdul-Haqq complains of, but because most of plaintiff’s allegations concern
23 disability discrimination, the court will presume that Abdul-Haqq intends to make a claim
24 for failure to prevent harassment based on disability under FEHA.

25 Under FEHA, California Government Code § 12940(k) provides that it is an
26 unlawful employment practice for an employer “to fail to take all reasonable steps
27 necessary to prevent discrimination and harassment from occurring.” Cal. Gov’t Code
28 § 12940(k). The California Supreme Court has stated that FEHA “makes it a separate

1 unlawful employment practice” for an employer to violate § 12940(k). State Dept. of
2 Health Servs. v. Superior Court, 31 Cal. 4th 1026, 1040 (Cal. 2003). To state a claim for
3 failure to prevent harassment under FEHA, a plaintiff must allege that (1) she was
4 subjected to discrimination, harassment, or retaliation because of a protected trait; (2) her
5 employer failed to take all reasonable steps to prevent discrimination, harassment or
6 retaliation; and (3) this failure caused plaintiff to suffer injury, damage, loss, or harm.
7 Lelaind v. City & Cnty. of San Francisco, 576 F. Supp. 2d 1079, 1103 (N.D. Cal. 2008);
8 Cal. Gov’t Code § 12940(j)(1)–(k). Of course, there can be no violation of 12940(k)
9 absent a finding of actual discrimination or harassment. Trujillo v. North County Transit
10 Dist., 63 Cal. App. 4th 280, 283–84 (Cal. Ct. App. 1998) (“[T]here’s no logic that says an
11 employee who has not been discriminated against can sue an employer for not
12 preventing discrimination that didn’t happen.”); accord Tritchler v. Cnty. of Lake, 358 F.3d
13 1150, 1155 (9th Cir. 2003).

14 Plaintiff’s fourth claim must be dismissed for the same reasons as the first and
15 second claims. It is not clear that Abdul-Haqq has exhausted her administrative
16 remedies with respect to this claim, and the complaint does not plausibly allege that she
17 was subjected to harassment because of her disability.

18 **4. Claims 5 and 8: Failure to Prevent Harassment; Racial Discrimination**

19 Abdul-Haqq does not allege any specific facts in support of these two claims,
20 which are referenced only in the caption of the complaint. The claims must therefore be
21 dismissed for failure to state a claim. For the purposes of the potential amended
22 complaint, the court will make it clear to plaintiff the elements that are required to state a
23 claim for racial discrimination or failure to prevent harassment based on race under Title
24 VII and FEHA. (To the extent that Abdul-Haqq seeks to assert harassment based upon
25 disability, the court has already addressed that possible claim above.)

26 Title VII makes it unlawful for an employer to “discriminate against any individual
27 with respect to” the “terms, conditions, or privileges of employment, because of such
28 individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e–2(a). To

1 establish a prima facie case of discrimination based on race, plaintiff must allege that (1)
2 she is a member of a protected class; (2) she was qualified for her position and
3 performing her job satisfactorily; (3) she experienced an adverse employment action; and
4 (4) similarly situated individuals outside the protected class were treated more favorably,
5 or other circumstances surrounding the adverse employment action that give rise to an
6 inference of discrimination. Hawn v. Exec. Jet Mgmt., Inc., 615 F.3d 1151, 1156 (9th Cir.
7 2010). The elements of a prima facie case for racial discrimination under FEHA are the
8 same as those of Title VII. See Guz v. Bechtel Nat'l Inc., 24 Cal. 4th 317, 354 (2000);
9 Metoyer v. Chassman, 504 F.3d 919, 941 (9th Cir. 2007).

10 It is not clear whether Abdul-Haqq's "harassment" claims are attempts to assert a
11 claim for a hostile work environment under Title VII, or made under FEHA. The required
12 elements for a failure to prevent harassment claim under FEHA are discussed above. If
13 Abdul-Haqq instead seeks to make a claim under Title VII for a hostile work environment,
14 plaintiff must allege that she (1) was subjected to verbal or physical conduct because of a
15 protected trait; (2) that the conduct was unwelcome; and (3) that the conduct was
16 sufficiently severe or pervasive to alter the conditions of her employment and create an
17 abusive work environment. Manatt v. Bank of Am., 339 F.3d 792, 798 (9th Cir. 2003).

18 If plaintiff wishes to pursue these two claims, her amended complaint must (i) set
19 out any claims for racial discrimination and failure to prevent harassment based on race
20 separately in the body of the complaint; (ii) make clear the specific statutory basis for
21 each of these claims (i.e., Title VII or FEHA); and (iii) allege supporting facts that, if
22 proven, would plausibly establish each of the required elements of the claim. Plaintiff
23 must additionally plead that these claims have been exhausted.

24 **5. Claim 6: Unauthorized Video and Audio Recording**

25 Plaintiff's sixth claim is for "unauthorized video and audio recording." Only a single
26 paragraph of facts is alleged in support of this claim. Abdul-Haqq alleges that defendants
27 have put cameras in "areas of expected privacy" as an intimidation tactic. Compl. ¶ 42.
28 Specifically, the alleged cameras are located in "the break room and the patient care

1 areas inside the emergency room.” Id.

2 This claim must be dismissed because plaintiff does not state the legal basis for
3 the claim. There is no prohibition on unauthorized recording in Title VII, FEHA, or the
4 ADA, so plaintiff has not pleaded any violation of the only statutes that she cites in the
5 complaint. To the extent that plaintiff wishes to make a claim for unauthorized recording
6 under the common law, the California constitution, or some other law, she must make
7 that clear in her amended complaint.

8 **6. Claim 7: Retaliation for Whistleblowing**

9 Plaintiff’s seventh claim asserts “retaliation for whistleblowing.” Again, it is not
10 clear whether this claim is made under Title VII, the ADA, or FEHA. To state a prima
11 facie claim for retaliation under Title VII, a plaintiff must allege that (1) she engaged in a
12 protected activity, (2) suffered an adverse employment action, and (3) there was a causal
13 link between the plaintiff’s protected activity and the adverse employment action. Poland
14 v. Chertoff, 494 F.3d 1174, 1179–80 (9th Cir. 2007). Protected activity includes
15 “oppos[ing] any practice made an unlawful employment practice” under Title VII,
16 including, for example, the filing of a charge of discrimination with the EEOC. 42 U.S.C.
17 § 2000e-3(a). The elements are the same for retaliation under FEHA. Yanowitz v.
18 L’Oreal USA, Inc., 36 Cal. 4th 1028, 1042 (2005); Cal. Gov’t Code § 12940(h).

19 Plaintiff’s failure to identify the specific statutory or other legal basis for this claim is
20 sufficient to require dismissal with leave to amend. Moreover, plaintiff’s complaint does
21 not sufficiently allege retaliation. As an initial matter, is it not obvious what specific
22 adverse employment action is the subject of the retaliation claim. Abdul-Haqq appears to
23 rely on the fact that doctors that she complained about “are now writing patient care
24 concerns” about her. Compl. ¶ 43. Without more supporting detail, the court is unable to
25 determine whether this action materially affects the conditions of employment. See
26 Davis, 520 F.3d at 1089. (Abdul-Haqq also references a “suspension” and “disciplinary
27 action,” but supplies no details about what these actions were or even when they
28 occurred.)

