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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

CHRYSTI CORKILL, an individual,  
  
Plaintiff,  
  
vs.  
  
PREFERRED EMPLOYERS GROUP, LLC,  
a limited liability company; PREFERRED  
EMPLOYERS INSURANCE COMPANY, a  
corporation; and DOES 1 through 25,  
inclusive,  
  
Defendants.

CASE NO. 11cv505 - IEG (WMC)  
  
**ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANT’S MOTION FOR  
SUMMARY JUDGMENT**  
  
[Doc. No. 17]

Presently before the Court is Defendant Preferred Employers Group, LLC (“PEG”)’s motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. [Doc. No. 17.] For the reasons stated below, the Court **GRANTS IN PART** and **DENIES IN PART** PEG’s motion for summary judgment.

**BACKGROUND**

**I. Facts**

This action arises out the termination of Plaintiff Chrysti Corkill (“Plaintiff”)’s employment by Defendant PEG. The following facts are taken from the allegations in the complaint. During Plaintiff’s employment with PEG, Plaintiff suffered from a mental disability requiring her to take medical leave. [Doc. No. 1-1, Compl. ¶ 17.] Specifically, on February 17, 2010, Plaintiff’s physician

1 placed her on medical leave for anxiety and depression. [Id.] Plaintiff provided Kim Urban, PEG's  
2 Benefits Analyst, with a note from her physician, and Plaintiff completed an application for  
3 family/medical leave. [Id.] Shortly thereafter, Plaintiff received a notice from PEG approving her  
4 leave. [Id.] On April 7, 2010, Plaintiff had a follow-up appointment with her physician, and her  
5 physician informed her that she was unable to return to work full-time and extended Plaintiff's  
6 medical leave. [Id. ¶ 18.]

7         Around the beginning of April 2010, various PEG employees began questioning Plaintiff about  
8 her remaining medical leave availability. [Id. ¶ 19.] On April 9, 2010, Plaintiff received a message  
9 from Daryl Tilghman, PEG's Assistant Vice President, Human Resources. [Id. ¶ 20.] This message  
10 stated that PEG was unable to extend Plaintiff's medical leave and that she needed to return to work  
11 by April 12, 2010. [Id. ¶ 21.] Plaintiff spoke with Mr. Tilghman and informed him that she would  
12 only be able to return to work if she was allowed to work part-time to accommodate her mental  
13 disability. [Id.] Mr. Tilghman summarily stated that part-time work was not available. [Id.] On April  
14 12, 2010, Plaintiff did not return to work, and PEG terminated her employment. [Id. ¶ 22.]

15         Plaintiff alleges that she was terminated even though she had not used her entire 12 weeks of  
16 family/medical leave provided to her under California law. [Id. ¶ 21.] Plaintiff also alleges that PEG  
17 has allowed other employees to work on a part-time basis. [Id.]

## 18 **II. Administrative History**

19         On June 30, 2010, Plaintiff filed an administrative charge<sup>1</sup> with the California Department of  
20 Fair Employment and Housing ("DFEH") alleging that she was subjected to employment  
21 discrimination. [Doc. No. 18-1, Ex. C.] The charge named Defendant Preferred Employers Insurance  
22 Company ("PEIC") in the caption of the charge and named Daryl Tilghman in the body of the charge.  
23 [Id.]

24         On July 2, 2010, the DFEH sent Mr. Tilghman a notice informing him of Plaintiff's June 30,  
25 2010 charge. [Doc. No. 22-15, Ex. 15.] On August 6, 2010, the DFEH received a completed  
26 "Notification of Respondent's Address" form that was signed by Mr. Tilghman and named "Preferred

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28         <sup>1</sup> The parties and the case law also refer to "administrative charges" as "administrative complaints." The Court will refer to Plaintiff's administrative pleadings as "charges" to distinguish them from Plaintiff's civil complaint.

1 Employers Group, LLC” as respondent’s legal name. [Doc. No. 22-16, Ex. 16.] On August 24, 2010,  
2 PEG through counsel sent a letter to the DFEH responding to the allegations in Plaintiff’s June 30,  
3 2010 charge. [Id.] The letter stated that PEG is the proper respondent and that Plaintiff improperly  
4 named PEIC as her employer. [Id.] On January 7, 2011, the DFEH sent Plaintiff a notice of case  
5 closure and notice of right-to-sue. [Doc. No. 18-1, Ex. D.]

6 On January 27, 2011, Plaintiff’s counsel mailed to the DFEH an amended charge that added  
7 additional allegations. [Doc. No. 22-26, Ex. 26; Doc. No. 22-27, Ex. 27, Declaration of Julie A.  
8 Cosner (“Cosner Decl.”) ¶ 2.]<sup>2</sup> The January 27, 2011 charge does not show that it was ever filed by  
9 the DFEH. [Doc. No. 22-26, Ex. 26.] On May 19, 2011, Plaintiff filed an amended charge with the  
10 DFEH. [Doc. No. 18-1, Ex. E.] This amended charge contained the same allegations as the original  
11 June 30, 2010 charge, but it named Defendant PEG in the caption of the charge. [Id.] An additional  
12 notice of case closure was sent to Plaintiff on June 22, 2011. [Id. Ex. F.]

### 13 **III. Procedural History**

14 On January 31, 2011, Plaintiff filed a civil complaint against Defendants PEG, PEIC, and W.R.  
15 Berkeley Corporation (“W.R. Berkley”) alleging causes of action for (1) wrongful termination in  
16 violation of California Government Code § 12945.2; (2) wrongful termination in violation of  
17 California Government Code § 12940(a); (3) discrimination on the basis of mental disability in  
18 violation of California Government Code § 12940(a); (4) failure to accommodate in violation of  
19 California Government Code § 12940(m); (5) failure to engage in the interactive process in violation  
20 of California Government Code § 12940(n); and (6) intentional infliction of emotional distress. [Doc.  
21 No. 1-1, Compl.]

22 On March 14, 2011, Plaintiff dismissed Defendant PEIC. [Doc. No. 37-3, Declaration of  
23 Elizabeth Koumas (“Koumas Decl.”) Ex. A.] Shortly thereafter, Defendants PEG and W.R. Berkeley  
24 removed the action to this Court pursuant to 28 U.S.C. § 1441 on the basis of diversity jurisdiction  
25 under 28 U.S.C. § 1332. [Doc. No. 1, Notice of Removal.] On June 8, 2011, the Court granted the  
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27 <sup>2</sup> PEG objects to and moves to strike exhibits 15, 16, 26, and 27 to Plaintiff’s notice of  
28 lodgment in support of her opposition to PEG’s motion for summary judgment, which are cited in the  
Court’s description of the administrative proceedings. [Doc. No. 30.] The Court addresses these  
objections below. See infra discussion section II.

1 parties' joint motion and dismissed Defendant W.R. Berkeley leaving PEG as the sole remaining  
2 Defendant. [Doc. No. 11.] By the present motion, PEG seeks summary adjudication of all six of  
3 Plaintiff's claims. [Doc. No. 17-1, Def.'s Mot.]

## 4 DISCUSSION

### 5 **I. Subject Matter Jurisdiction**

6 Upon reviewing the materials in this case, the Court became concerned about whether it  
7 had subject matter jurisdiction over this action. Therefore, on October 27, 2011, the Court issued  
8 an order to PEG to show cause why the action should not be remanded. [Doc. No. 33.] On  
9 November 3, 2011, PEG filed its response to the order to show cause showing that this Court has  
10 diversity jurisdiction over the action. [Doc. No. 37.]

11 Federal courts are courts of limited jurisdiction, having subject matter jurisdiction only  
12 over matters authorized by the Constitution and Congress. See Kokkonen v. Guardian Life Ins.  
13 Co., 511 U.S. 375, 377 (1994). A defendant may remove a civil action from state court to federal  
14 court if original jurisdiction would have existed at the time the complaint was filed. 28 U.S.C. §  
15 1441(a). "Removal statutes are strictly construed against removal." Luther v. Countrywide Home  
16 Loans Servicing, LP, 533 F.3d 1031, 1034 (9th Cir. 2008). There is a "strong presumption"  
17 against removal jurisdiction, and the party seeking removal always has the burden of establishing  
18 that removal is proper. Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992). If there is any  
19 doubt as to the propriety of removal, federal jurisdiction must be rejected. Id. at 567. If at any  
20 time before the entry of final judgment it appears that the Court lacks subject matter jurisdiction  
21 over a case removed from state court, it must remand the action to state court. See 28 U.S.C. §  
22 1447(c); Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund, 500 U.S. 72, 87 (1991).

23 For a federal court to exercise diversity jurisdiction, there must be "complete" diversity  
24 between the parties and the amount in controversy requirement must be met. See Strawbridge v.  
25 Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806); 28 U.S.C. § 1332(a). "Complete diversity" means that  
26 "each defendant must be a citizen of a different state from each plaintiff." In re Digimarc Corp.  
27 Derivative Litig., 549 F.3d 1223, 1234 (9th Cir. 2008). For the purposes of diversity jurisdiction,  
28 a corporation is a citizen of any state where it is incorporated and of the state where it has its

1 principal place of business. 28 U.S.C. § 1332(c); see also Indus. Tectonics, Inc. v. Aero Alloy,  
2 912 F.2d 1090, 1092 (9th Cir. 1990). “[A]n LLC is a citizen of every state of which its  
3 owners/members are citizens.” Johnson v. Columbia Props. Anchorage, LP, 437 F.3d 894, 899  
4 (9th Cir. 2006).

5 The notice of removal and the complaint both state that Plaintiff is a citizen of California.  
6 [Compl. ¶ 1; Notice of Removal ¶ 4.] Accordingly, for the Court to have diversity jurisdiction  
7 over this action, none of the Defendants can be a citizen of California. See Digimarc, 549 F.3d at  
8 1234.

9 In its response to the order to show cause, PEG submitted a declaration explaining its  
10 citizenship for diversity purposes. [See Doc. No. 37-1, Declaration of Josephine A. Raimondi  
11 (“Raimondi Decl.”).] PEG is wholly owned by its sole member, Berkeley Alternative Markets  
12 Insurance Services, LLC. [Id. ¶ 3.] Berkeley Alternative Markets Insurance Services, LLC is  
13 wholly owned by its sole member Midwest Employers Casualty Company. [Id. ¶ 4.] Midwest  
14 Employers Casualty Company is incorporated in Delaware and its principal place of business is in  
15 Missouri. [Id. ¶ 5.] Therefore, Midwest Employers Casualty Company’s citizenship for diversity  
16 purposes is Delaware and Missouri, see 28 U.S.C. § 1332(c), and thereby, PEG’s citizenship is  
17 also Delaware and Missouri. See Johnson, 437 F.3d at 899. Because PEG is a citizen of Missouri  
18 and Delaware and Plaintiff is a citizen of California, PEG has met its burden of establishing that  
19 there is complete diversity of citizenship between the parties. See Digimarc, 549 F.3d at 1234.  
20 Accordingly, the Court concludes that it has subject matter jurisdiction over this matter.

## 21 **II. PEG’s objections to Plaintiff’s Exhibits**

22 Plaintiff has submitted various exhibits in support of her opposition to PEG’s motion for  
23 summary judgment. [See Doc. No. 22.] In deciding PEG’s motion for summary judgment, the  
24 Court considers exhibit 10, a letter dated April 12, 2010 from Daryl Tilghman to Plaintiff on  
25 company letterhead with the caption “Re: Notice of Termination”; exhibit 15, a notice of the filing  
26 of Plaintiff’s June 30, 2010 charge dated July 2, 2010 sent from the DFEH to Daryl Tilghman;  
27 exhibit 16, a letter dated August 5, 2010 from PEG’s counsel to the DFEH regarding Plaintiff’s  
28 June 30, 2010 charge, a notification of Respondent’s address signed by Daryl Tilghman on August

1 5, 2010 and received by the DFEH on August 6, 2010, and a letter dated August 24, 2010 from  
2 PEG's counsel to the DFEH regarding Plaintiff's June 30, 2010 charge that was received by the  
3 DFEH on August 25, 2010; exhibit 26, a letter dated January 27, 2011 from Plaintiff's counsel to  
4 the DFEH attaching an amended charge signed by Plaintiff on January 25, 2011; and exhibit 27,  
5 the declaration of Julie A. Cosner. [Doc. Nos. 22-10, 22-15, 22-16, 22-26, 22-27.] PEG objects to  
6 and moves to strike these exhibits. [Doc. No. 30 at 7, 10-11, 14-16.]

7 First, PEG objects to all of these exhibits as irrelevant under Federal Rules of Evidence 401  
8 and 402. [Id.] PEG is incorrect as these exhibits are clearly relevant to Plaintiff's claims and to  
9 the issue of whether Plaintiff exhausted her administrative remedies. Therefore, the Court  
10 **OVERRULES** PEG's objection for lack of relevance.

11 Second, PEG objects to all of these exhibits on the basis that Plaintiff may not offer  
12 evidence that contradicts an admitted fact, citing Valerio v. Andrew Youngquist Construction, 103  
13 Cal. App. 4th 1264, 1271 (2002). [Id.] However, PEG does not state what admitted facts Plaintiff  
14 is attempting to contradict. In its reply, PEG mentions that Plaintiff may not dispute the fact that  
15 PEG was not named in a DFEH charge until May 19, 2011, [Doc. No. 29, Def.'s Reply at 6-7], but  
16 Plaintiff is not submitting these exhibits to dispute that fact. Plaintiff is submitting these exhibits  
17 to dispute the legal consequences of that fact, i.e., whether despite the fact that PEG was not  
18 named in a charge until May 19, 2011, she has still properly exhausted her administrative  
19 remedies. Therefore, the Court **OVERRULES** this objection.

20 Third, PEG objects to exhibits 16, 26 and 27 as inadmissible under Federal Rule of  
21 Evidence 602. [Doc. No. 30 at 11, 14-16.] Rule 602 provides: "A witness may not testify to a  
22 matter unless evidence is introduced sufficient to support a finding that the witness has personal  
23 knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the  
24 witness' own testimony. FED. R. EVID. 602. Exhibits 16 and 26 are documents, and therefore,  
25 Rule 602 is inapplicable as it applies to witness testimony not documents. See id. Exhibit 27 is  
26 witness testimony because it is a declaration. However, the statements in the declaration show that  
27 they are based on personal knowledge as the declarant states that she is the person who prepared  
28 the cover letter for the amended charge and mailed the amended charge with the cover letter to the

1 DFEH. [See Doc. No. 22-27, Cosner Decl. ¶ 2.] Therefore, the Court **OVERRULES** PEG’s  
2 objection for failure to comply with Rule 602.

3 Finally, PEG objects to all of these exhibits for lack of foundation or authentication. [Doc.  
4 No. 30 at 7, 10-11, 14-16.] Federal Rule of Evidence 901(a) requires “authentication or  
5 identification as a condition precedent to admissibility.” Thus, before evidence may be admitted, a  
6 foundation must be laid “by evidence sufficient to support a finding that the matter in question is  
7 what its proponent claims.” Fed. R. Evid. 901(a). “[U]nauthenticated documents cannot be  
8 considered in a motion for summary judgment.” Orr v. Bank of Am., 285 F.3d 764, 773 (9th Cir.  
9 2002).

10 Generally, on a motion for summary judgment, a document is authenticated through  
11 personal knowledge by attaching it to an affidavit, where the affiant is a competent witness who  
12 wrote the document, signed it, used it, or saw others do so. See Las Vegas Sands, LLC v. Nehme,  
13 632 F.3d 526, 533 (9th Cir. 2011) (citing FED. R. EVID. 901(b)(1)). However, documents can also  
14 be authenticated under Federal Rule of Evidence 901(b)(4) ““by review of their contents if they  
15 appear to be sufficiently genuine.”” Id. (quoting FED. R. EVID. 901(b)(4)). Rule 901(b)(4)  
16 provides that authentication can be satisfied by the object’s “[a]pppearance, contents, substance,  
17 internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.”  
18 Fed. R. Evid. 901(b)(4). For example, a letter can be authenticated by reviewing its date, who it is  
19 from, who it is sent to, and what the letter is regarding. See Las Vegas Sands, 632 F.3d at 533-34.

20 Exhibit 27 is properly authenticated as the declaration states that the declarant, Ms. Cosner,  
21 has personal knowledge of the statements set forth in the declaration. [See Doc. No. 22-27,  
22 Cosner Decl. ¶ 1.] See FED. R. EVID. 901(b)(1). In addition, the documents in exhibit 26 are  
23 authenticated because they are referenced in Ms. Cosner’s declaration, and Ms. Cosner states in  
24 the declaration that she prepared the cover letter and mailed the cover letter along with the  
25 amended charge to the DFEH. [See Doc. No. 22-27, Cosner Decl. ¶ 2.] See FED. R. EVID.  
26 901(b)(1); Las Vegas Sands, 632 F.3d at 533.

27 Exhibits 10, 15, and 16 have not been attached to a declaration or affidavit. However, a  
28 review of the contents of these documents show that they appear to be what Plaintiff purports them

1 to be. These documents are all correspondence showing the date of the correspondence, who sent  
2 the correspondence, to whom the correspondence was sent, and the subject matter of the  
3 documents. [See Doc. Nos. 22-10, 22-15, 22-16.] Taken in conjunction with the circumstances,  
4 these exhibits appear to be sufficiently genuine. See Brown v. Kyle, 2011 U.S. Dist. LEXIS  
5 85343, at \*8-9 (E.D. Cal. Aug. 3, 2011) (finding prison records authenticated under Rule 901(b)(4)  
6 after reviewing their appearance and content); Las Vegas Sands, LLC v. Nehme, 2011 U.S. Dist.  
7 LEXIS 80531, at \*6-10 (D. Nev. Jul. 21, 2011) (finding letter authenticated under Rule 901(b)(4)  
8 after reviewing its appearance and content). Moreover, it is not clear that exhibits 15 and 16 need  
9 to be authenticated because the Court may take judicial notice of these two exhibits since they are  
10 part of the DFEH administrative record. See Mack v. South Bay Beer Distribs., 798 F.2d 1279,  
11 1282 (9th Cir. 1986). In addition, if PEG genuinely disputed the authenticity of these documents,  
12 it should have “made specific objections as to those [documents]” rather than just a “bare  
13 objection . . . for lack of proper authentication.” Brown, 2011 U.S. Dist. LEXIS 85343, at \*9.  
14 Therefore, the Court **OVERRULES** PEG’s objection for lack of foundation and authentication.

15 In sum, the Court **OVERRULES** all of PEG’s objections. Accordingly, the Court  
16 **DENIES** PEG’s motion to strike exhibits 10, 15, 16, 26 and 27 of Plaintiff’s notice of lodgement  
17 in support of her opposition to PEG’s motion for summary judgment.

### 18 **III. PEG’s Motion for Summary Judgment**

#### 19 **A. Legal Standard for a Motion for Summary Judgment**

20 Summary judgment is proper where the pleadings and materials demonstrate “there is no  
21 genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law.”  
22 Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A material issue of fact  
23 is a question a trier of fact must answer to determine the rights of the parties under the applicable  
24 substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is genuine  
25 “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Id.

26 The moving party bears “the initial responsibility of informing the district court of the basis  
27 for its motion.” Celotex, 477 U.S. at 323. To satisfy this burden, the movant must demonstrate  
28 that no genuine issue of material fact exists for trial. Id. at 322. Where the moving party does not



1 have the ultimate burden of persuasion at trial, it may carry its initial burden of production in one  
2 of two ways: “The moving party may produce evidence negating an essential element of the  
3 nonmoving party’s case, or, after suitable discovery, the moving party may show that the  
4 nonmoving party does not have enough evidence of an essential element of its claim or defense to  
5 carry its ultimate burden of persuasion at trial.” Nissan Fire & Marine Ins. Co., v. Fritz Cos., 210  
6 F.3d 1099, 1106 (9th Cir. 2000). To withstand a motion for summary judgment, the non-movant  
7 must then show that there are genuine factual issues which can only be resolved by the trier of  
8 fact. Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 738 (9th Cir. 2000). The non-moving  
9 party may not rely on the pleadings alone, but must present specific facts creating a genuine issue  
10 of material fact through affidavits, depositions, or answers to interrogatories. Fed. R. Civ. P.  
11 56(c); Celotex, 477 U.S. at 324.

12 The court must review the record as a whole and draw all reasonable inferences in favor of  
13 the non-moving party. Hernandez v. Spacelabs Med. Inc., 343 F.3d 1107, 1112 (9th Cir. 2003).  
14 However, unsupported conjecture or conclusory statements are insufficient to defeat summary  
15 judgment. Id.; Surrell v. Cal. Water Serv. Co., 518 F.3d 1097, 1103 (9th Cir. 2008). Moreover, the  
16 court is not required “to scour the record in search of a genuine issue of triable fact,” Keenan v.  
17 Allan, 91 F.3d 1275, 1279 (9th Cir.1996) (citations omitted), but rather “may limit its review to  
18 the documents submitted for purposes of summary judgment and those parts of the record  
19 specifically referenced therein.” Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1030  
20 (9th Cir. 2001).

21 **B. Failure to Exhaust Administrative Remedies**

22 **1. Failure to Exhaust Administrative Remedies Against PEG**

23 PEG argues that it is entitled to summary judgment on Plaintiff’s first five causes of action  
24 because Plaintiff failed to timely exhaust her administrative remedies against it. [Def.’s Mot. at 3-  
25 5.] PEG’s argument is two part. First, PEG argues that Plaintiff never filed a DFEH charge  
26 naming PEG as a defendant prior to bringing the present lawsuit. [Id. at 3-4.] Second, PEG  
27 argues that Plaintiff did not name it as a defendant in a charge until she filed an amended charge  
28 on May 19, 2011 and that amended charge is barred by the applicable statute of limitations. [Id. at

1 2-4.] In response, Plaintiff argues that she did not have to specifically name PEG in her original  
2 DFEH charge because PEG had notice of the charge and participated in the DFEH administrative  
3 proceedings. [Doc. No. 20-1, Pl.’s Opp’n at 7-9.]

4 Plaintiff’s first five causes of action are brought pursuant to the California Fair  
5 Employment and Housing Act (“FEHA”), California Government Code §§ 12900 et seq. [Compl.  
6 ¶¶ 28-71.] “Under the FEHA, the employee must exhaust the administrative remedy provided by  
7 the statute by filing a complaint with the [DFEH] and must obtain from the [DFEH] a notice of  
8 right to sue in order to be entitled to file a civil action in court based on violations of the FEHA.”  
9 Romano v. Rockwell Int’l, Inc., 14 Cal. 4th 479, 492 (1996) (citing CAL. GOV’T CODE §§ 12960,  
10 12965(b)).

11 California Government Code § 12960 delineates the procedures by which aggrieved  
12 employees are to state their DFEH charges. Saavedra v. Orange County Consol. Transp. Serv.  
13 Agency, 11 Cal. App. 4th 824, 826 (1992). It provides in part:

14 Any person claiming to be aggrieved by an alleged unlawful practice may file with  
15 the department a verified complaint in writing which shall state the name and  
16 address of the person, employer, labor organization or employment agency alleged  
17 to have committed the unlawful practice complained of and which shall set forth the  
18 particulars thereof and contain such other information as may be required by the  
19 department.

20 CAL. GOV’T CODE § 12960(b) (emphasis added). Based on this language, California courts have  
21 held that “section 12960 clearly mandates that aggrieved persons set forth in their DFEH  
22 complaint the names of persons alleged to have committed the unlawful discrimination.” Cole v.  
23 Antelope Valley Union High Sch. Dist., 47 Cal. App. 4th 1505, 1515 (1996) (emphasis in  
24 original). “In order to bring a civil lawsuit under the FEHA, the defendants must have been named  
25 in the caption or body of the DFEH charge.” Id.

26 Section 12960 also provides the applicable statute of limitations for a plaintiff to bring a  
27 DFEH charge under the FEHA. See Romano, 14 Cal. 4th at 492. It provides that no DFEH charge  
28 for violations of the FEHA may be filed “after the expiration of one year from the date upon which  
the alleged unlawful practice or refusal to cooperate occurred.” CAL. GOV’T CODE § 12960(d); see  
Romano, 14 Cal. 4th at 492.

Plaintiff filed her first DFEH charge on June 30, 2010, and named Defendant Preferred

1 Employers Insurance Company (“PEIC”) in the caption of the charge, named Daryl Tilghman in  
2 the body of the charge, and did not specifically name PEG in either the caption or body of the  
3 charge. [Doc. No. 18-1, Ex. C.] PEG was not named in the caption or body of a DFEH charge  
4 until Plaintiff filed her amended charge on May 19, 2011. [Id. Ex. E.] Both the June 30, 2010  
5 charge and the May 19, 2011 amended charge allege that the unlawful conduct occurred on April 9  
6 and 12, 2010. [Id. Exs. C, E.] Plaintiff filed the present action in state court on January 31, 2011.  
7 [Compl.] Based on these facts, PEG argues that Plaintiff did not timely exhaust her administrative  
8 remedies against it because PEG was not named in a DFEH charge as required by section  
9 12960(b) until May 19, 2011, and that charge is time barred under section 12960(d) because it was  
10 filed more than a year after the alleged unlawful conduct occurred, April 9 and 12, 2010. [Def.’s  
11 Mot. at 3-5.]

12 In response, Plaintiff argues that she properly exhausted her administrative remedies  
13 against PEG because PEG had notice of the June 30, 2010 charge and participated in the agency’s  
14 investigation and conciliation efforts. [Pl.’s Opp’n at 7-9.] In making this argument, Plaintiff  
15 relies on Sosa v. Hiroaka, 920 F.2d 1451 (9th Cir. 1990). [Pl.’s Opp’n at 7.] In Sosa, the Ninth  
16 Circuit stated that the administrative exhaustion requirement is satisfied against an unnamed party  
17 “if the unnamed party had notice of the EEOC conciliation efforts and participated in the EEOC  
18 proceedings.” 920 F.2d at 1459.

19 PEG argues that Sosa is not persuasive authority and should not be applied to the present  
20 case.<sup>3</sup> First, PEG points out that Sosa is a case interpreting the exhaustion requirements of Title  
21 VII discrimination claims under federal law, and Plaintiff’s claims are under the California  
22 statutory scheme FEHA. [Def.’s Reply at 3.] However, because of the similarity between state  
23 and federal employment discrimination laws, California courts have relied upon federal authority  
24 interpreting Title VII in determining the meaning of analogous provisions of the FEHA. See Guz

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25  
26 <sup>3</sup> PEG also argues that Sosa is distinguishable because in Sosa the additional defendants were  
27 named in the body of the charge. However, PEG appears to be incorrect. In Sosa, the court stated that  
28 the charge only alleged that “the District,” the named respondent in the charge, acted “through its  
Administrators.” 920 F.2d at 1458. If the word “Administrators” was sufficient to name the  
additional defendants in Sosa, then the word “employer” in Plaintiff’s June 30, 2010 charge would  
also be sufficient to name PEG. Therefore, the Court rejects PEG’s argument that Sosa is  
distinguishable on this basis.

1 v. Bechtel National, Inc., 24 Cal. 4th 317, 354 (2000); Romano, 14 Cal. 4th at 498. PEG argues  
2 that while California courts may rely on federal authority in interpreting the substantive provisions  
3 of FEHA, they have not relied on federal authority in interpreting FEHA’s administrative  
4 exhaustion requirement. PEG is incorrect. Not only do California courts rely on Title VII federal  
5 precedent in interpreting FEHA’s administrative exhaustion requirement, but the California Court  
6 of Appeal relied on federal precedent in interpreting section 12960(b) to require that defendants be  
7 named in the DFEH charge. See Valdez v. City of Los Angeles, 231 Cal. App. 3d 1043, 1061  
8 (1991) (relying on precedent from the Fourth Circuit and the Western District of Louisiana); see  
9 also e.g., Nazir v. United Airlines, Inc., 178 Cal. App. 4th 243, 266-67 (2009) (relying on Title VII  
10 federal precedent in interpreting FEHA’s administrative exhaustion requirement); Holland v.  
11 Union Pacific Railroad Co., 154 Cal. App. 4th 940, 946 & n.6 (2007) (same).

12 PEG also argues Sosa is not persuasive authority because California courts do not apply  
13 equitable exceptions to FEHA’s exhaustion requirement since the requirement is jurisdictional, not  
14 procedural unlike Title VII’s administrative exhaustion requirement. [Def.’s Reply at 3 (citing  
15 Okoli v. Lockheed Technical Operations Co., 36 Cal. App. 4th 1607, 1613 (1995); Miller v.  
16 United Airlines, Inc., 174 Cal. App. 3d 878, 890 (1985).] PEG is incorrect on this point as well.  
17 “Although California courts describe exhaustion as a jurisdictional prerequisite to suit under  
18 FEHA, this label does not implicate the trial court’s fundamental subject matter jurisdiction.”  
19 Rodriguez v. Airborne Express, 265 F.3d 890, 900 (9th Cir. 2001); accord. Holland, 154 Cal. App.  
20 4th at 946. Therefore, the FEHA administrative exhaustion requirement like the Title VII  
21 requirement is subject to equitable exceptions, such as waiver, estoppel, and tolling. See Holland,  
22 154 Cal. App. 4th at 946; Rodriguez, 265 F.3d at 900; see also, e.g., Keiffer v. Bechtel Corp., 65  
23 Cal. App. 4th 893, 896-900 (1998) (applying the equitable doctrine of waiver to FEHA’s  
24 administrative exhaustion requirement).

25 Finally, PEG argues that the Sosa exception should not be applied to FEHA cases because  
26 California courts have clearly interpreted the language in section 12960(b) to require that a  
27 plaintiff must name the defendant either in the caption or the body of the DFEH charge. [Def.’s  
28 Reply at 3-4.] PEG argues that this is a bright-line rule that does not allow for any exceptions. In

1 support of this contention, PEG argues that in fashioning this rule the California Court of Appeal  
2 in Valdez v. City of Los Angeles recognized the general policy of liberally construing allegations  
3 in FEHA charges but did not apply this policy to the requirement of naming defendants in the  
4 charge. See 231 Cal. App. 3d at 1060-61. However, in fashioning this rule the Valdez court went  
5 on to note that it is based on the policy that “[f]or a claimant to withhold naming of known or  
6 reasonably obtainable defendants at the administrative complaint level is neither fair under  
7 [FEHA] in its purpose of advancing speedy resolutions of claims nor fair to known, but unnamed  
8 individuals, who at a later date are called upon to ‘personally’ account in a civil lawsuit without  
9 having been afforded a right to participate at the administrative level.” Id. at 1061; see also Cole,  
10 47 Cal. App. 4th at 1513-15 (explaining that the purpose of this requirement is to ensure that  
11 potential defendants are brought within the scope of the administrative proceedings conducted by  
12 the DFEH). Because Sosa creates an exception only where the unnamed party has both notice and  
13 has participated in the administrative proceedings, the exception is consistent with this policy and  
14 is fair to the unnamed defendant. In addition, in establishing the requirement that defendants must  
15 be named in the charge, the court in Valdez stated that it was adopting the requirement as  
16 expressed by the Fourth Circuit and a district court in the Fifth Circuit. See Valdez, 231 Cal. App.  
17 3d at 1061 (citing Mickel v. S.C. State Emp’t Serv., 377 F.2d 239, 242 (4th Cir. 1967); White v. N.  
18 La. Corp. 468 F.Supp. 1347, 1349 (W.D. La. 1979)). Both the Fourth Circuit and the Fifth Circuit  
19 have recognized that the requirement of naming a defendant in the administrative charge is not an  
20 absolute requirement and have applied the exception from Sosa where a defendant had notice of  
21 the charge and participated in the administrative proceedings. See, e.g., Alvarado v. Bd. of  
22 Trustees, 848 F.2d 457, 460 (4th Cir. 1988); Marks v. Prattco, Inc., 607 F.2d 1153, 1156 (5th Cir.  
23 1979); Johnson v. Wal-Mart Stores East, L.P., 2011 U.S. Dist. LEXIS 60354, at \*8 (W.D.N.C.  
24 Jun. 6, 2011). Accordingly, the exception from Sosa should be applied to FEHA’s administrative  
25 exhaustion requirement, specifically California Government Code § 12960(b).

26 On July 2, 2010, the DFEH sent Daryl Tilghman, notice of Plaintiff’s June 30, 2010 DFEH  
27 charge. [Doc. No. 22-15, Ex. 15.] On August 6, 2010, the DFEH received a notification of  
28 respondent’s address signed by Mr. Tilghman that listed PEG as respondent’s legal name. [Doc.

1 No. 22-16, Ex. 16.] On August 24, 2010, PEG’s counsel sent the DFEH an eight-page letter  
2 responding to the allegations in Plaintiff’s June 30, 2010 DFEH charge. [Id.] The response states  
3 that PEG is the proper respondent in Plaintiff’s matter and that Preferred Employer Insurance  
4 Company was erroneously named in the complaint. [Id.] These documents clearly show that PEG  
5 had notice of the June 30, 2010 DFEH charge and participated in the administrative proceedings  
6 related to that charge.<sup>4</sup> Therefore, Plaintiff properly exhausted her claims against PEG even  
7 though PEG was not specifically named in the June 30, 2010 DFEH charge.<sup>5</sup> See *Sosa*, 920 F.2d  
8 at 1459. Furthermore, because the June 30, 2010 charge was filed only a few months after the  
9 allegedly unlawful activity occurred, April 9 and 12, 2010, the June 30, 2010 charge was filed well  
10 within the one year statute of limitations under section 12960(d). Accordingly, the Court **DENIES**  
11 PEG’s motion for summary judgment of Plaintiff’s first five causes of action on the basis of failure  
12 to timely exhaust her administrative remedies against PEG.

13 2. Failure to Exhaust Administrative Remedies As To All Claims

14 PEG argues that it is entitled to summary judgment on Plaintiff’s first and fifth causes of  
15 action—denial of family/medical leave and failure to engage in the interactive process—because  
16 Plaintiff did not exhaust her administrative remedies with respect to these specific FEHA claims.  
17 [Def.’s Mot. at 5-8.] Specifically, PEG argues that Plaintiff’s June 30, 2010 DFEH charge did not  
18 contain allegations reasonably related to those two causes of action. [Id.]

19 As previously stated, prior to filing a civil action alleging FEHA violations, a plaintiff must  
20 exhaust her administrative remedies by filing a DFEH charge. *Romano*, 14 Cal. 4th at 492. “To  
21 exhaust his or her administrative remedies as to a particular act made unlawful by the [FEHA], the  
22 claimant must specify that act in the administrative complaint, even if the complaint does specify  
23 other cognizable wrongful acts.” *Martin v. Lockheed Missiles & Space Co.*, 29 Cal. App. 4th

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24  
25 <sup>4</sup> The Court notes that at the hearing on this motion, PEG conceded that it had notice of  
Plaintiff’s June 30, 2010 DFEH charge.

26  
27 <sup>5</sup> In addition, a finding that Plaintiff properly exhausted her administrative remedies against  
28 PEG is particularly compelling in this case because PEG had represented to Plaintiff that PEIC not  
PEG was her employer and that PEIC was responsible for terminating her employment. [See Doc. No.  
22-10, Ex. 10 (April 12, 2010 letter from Mr. Tilghman to Plaintiff on PEIC letterhead stating:  
“Therefore, effective today, April 12, 2010, we must terminate your employment with Preferred  
Employers Insurance Company.”).]

1 1718, 1724 (1994). Therefore, the judicial complaint may encompass only discrimination claims  
2 that are “like and reasonably related to” the allegations of the DFEH charge. Nazir v. United  
3 Airlines, Inc., 178 Cal. App. 4th 243, 266 (2009) (quoting HON. MING W. CHIN ET AL., CAL.  
4 PRACTICE GUIDE: EMPLOYMENT LITIGATION ¶ 16:195 (The Rutter Group 2008)). This means that  
5 the administrative exhaustion requirement is satisfied if the allegations of the civil action are  
6 within the scope of the DFEH charge, any DFEH investigation actually completed, or any  
7 investigation that might reasonably have been expected to grow out of the charge. Id. In  
8 determining whether a particular claim has been exhausted, “what is submitted to the DFEH must .  
9 . . be construed liberally in favor of plaintiff.” Id. at 268; see also id. at 266-67 (“Administrative  
10 charges are to be construed liberally because they are often drafted by claimants without the  
11 assistance of counsel.”). It is sufficient that the DFEH be apprised, in general terms, of the alleged  
12 discriminatory parties and the alleged discriminatory acts. Id. at 267.

13 i. Denial of Family/Medical Leave

14 Plaintiff’s first cause of action is for denial of family/medical leave and wrongful  
15 termination in violation of California Government Code § 12945.2. [Compl. ¶¶ 28-35.] Plaintiff  
16 alleges that her employer improperly counted 191 hours of prior leave against her medical leave  
17 and refused to grant her further medical leave to which she was entitled. [Id. ¶¶ 20-21.] In  
18 addition, Plaintiff alleges that the decision to terminate her was motivated by her use of medical  
19 leave. [Id. ¶ 25.]

20 Section 12945.2(a) creates a general prohibition “for any employer . . . to refuse to grant a  
21 request by any employee with more than 12 months of service with the employer, and who has at  
22 least 1,250 hours of service with the employer during the previous 12-month period, to take up to a  
23 total of 12 workweeks in any 12-month period for family care and medical leave.” CAL. GOV’T  
24 CODE § 12945.2(a). Section 12945.2(l) also makes it unlawful “for an employer . . . to discharge,  
25 fine, suspend, expel, or discriminate against, any individual because of . . . (1) [a]n individual’s  
26 exercise of the right to family care and medical leave provided by subdivision (a).” Id. §  
27 12945.2(l).

28 PEG argues that Plaintiff’s June 30, 2010 DFEH charge does not identify “denial of

1 family/medical leave” as one of the types of discrimination being claimed, even though the DFEH  
2 form has a box for identifying this type of discrimination. [Def.’s Mot. at 6-7.] PEG further  
3 argues that this situation is similar to the case Okoli v. Lockheed Technical Operations Co., where  
4 the California Court of Appeal found that the plaintiff had not exhausted his retaliation claim when  
5 the DFEH charge only contained a claim for racial discrimination. [Id. at 5.]

6 Although Plaintiff did not check the box for “denial of family/medical leave” on the June  
7 30, 2010 DFEH charge, the charge alleges that Plaintiff “was out on approved CFRA/FMLA<sup>6</sup>  
8 leave from February 18, 2010 to April 12, 2010.” [Doc. No. 18-1, Ex. C.] The charge further  
9 alleges that Plaintiff requested an extension of her leave to June 15, 2010, but she was terminated  
10 on April 12, 2010. [Id.] These allegation apprise the DFEH of the alleged discriminatory acts in  
11 general terms: that she requested an extension of her family/medical leave and her employer  
12 denied the extension and terminated her. In addition, this is different from the Okoli case where  
13 the plaintiff added allegations in support of an unlawful retaliation claim that occurred after the  
14 filing of the DFEH charge. See Okoli, 36 Cal. App. 4th at 1617. Here, the alleged improper  
15 conduct is all related to the same events in April 2010 prior to the filing of the June 30, 2010  
16 charge. See Baker v. Children’s Hosp. Medical Ctr., 209 Cal. App. 3d 1057, 1065 (finding  
17 administrative exhaustion requirement satisfied where “allegations of harassment and differential  
18 treatment,” although not specifically mentioned in the charge, “encompass[ed] the allegations of  
19 discrimination in [the] DFEH complaint”). Therefore, Plaintiff’s claim for denial of  
20 family/medical leave is within the scope of the investigation that might reasonably have been  
21 expected to grow out of the June 30, 2010 charge.

22 Indeed, PEG’s August 24, 2010 response to the charge shows that the allegations related to  
23 her claim for denial of family/medical leave were addressed during the DFEH’s investigation of  
24 the charge.<sup>7</sup> In the response, PEG stated that Plaintiff was terminated on April 12, 2010 due to her

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25  
26 <sup>6</sup> This stands for California Family Rights Act/Family and Medical Leave Act.

27 <sup>7</sup> In Wills v. Superior Court, the California Court of Appeal expressly declined to decide  
28 whether a plaintiff may exhaust its administrative remedies when information an employer provides  
to the DFEH suggests a potential claim. 195 Cal. App. 4th 143, 153-57 (2011). In that case, the court  
warned that “a rule permitting an employee to satisfy the exhaustion requirement based on information  
the employer voluntarily provided on an uncharged claim may discourage employers from providing



1 failure to return after the expiration of her approved leave. [Doc. No. 22-16, Ex. 16 at 2.] The  
2 response also stated that PEG granted Plaintiff 12 workweeks of leave to care for her critically ill  
3 sister and for her own overlapping medical needs. [Id.] The response further states that Plaintiff  
4 requested an extension of her leave and that PEG was unable to grant the request and informed  
5 Plaintiff that she must return to work or be terminated. [Id. at 2-3.] Because the allegations  
6 related to Plaintiff’s claim for denial of family/medical leave were within the scope of the DFEH  
7 investigation that was conducted and what would have been uncovered by a reasonable  
8 investigation, Plaintiff exhausted her administrative remedies with respect to this cause of action.  
9 See Nazir, 178 Cal. App. 4th at 266-69.

10 Although the Court concludes that Plaintiff exhausted her claim for denial of  
11 family/medical leave through her June 30, 2010 charge, Plaintiff has also presented evidence  
12 showing that she attempted to file an amended charge on January 27, 2011 that listed “use of  
13 CFRA/FMLA leave” as a basis for her claims. [Doc. No. 22-26, Ex. 26; Doc. No. 22-27, Cosner  
14 Decl. ¶ 2.] PEG argues that Plaintiff could not have exhausted her administrative remedies  
15 through this document because there is no evidence that the DFEH or PEG ever received it. [Doc.  
16 No. 17-1 at 8; Doc. No. 29 at 8.]

17 California Government Code § 12960(b) mandates that a plaintiff file a verified charge in  
18 writing with the DFEH. Cole, 47 Cal. App. 4th at 1515. A charge is considered filed with the  
19 DFEH when “it is date-stamped ‘received’ by the department.” 2 C.C.R. § 10001(n). Because the  
20 January 27, 2011 charge does not have a date-stamp on it, [see Doc. No. 22-26, Ex. 26], it does not

21 \_\_\_\_\_  
22 a comprehensive response to DFEH’s investigation, thereby undermining DFEH’s ability to  
23 investigate unlawful employment practices.” Id.

24 Although the Wills court declined to address the issue, the Court concludes that it is proper  
25 to consider PEG’s response in determining whether Plaintiff exhausted her administrative remedies.  
26 In Nazir, the California Court of Appeal stated that the “administrative exhaustion requirement is  
27 satisfied if the allegations of the civil action are *within the scope of* . . . any [DFEH] investigation  
28 actually completed.” 178 Cal. App. 4th at 266 (emphasis in original). The response is part of the  
DFEH investigation. In addition, the court in Wills appeared to be cautious about relying on  
statements in the employer’s response because in that case, the court noted that the DFEH charge did  
not mention disability discrimination at all and it was only mentioned in the employer’s response to  
the DFEH. See Wills, 195 Cal. App. 4th at 153-54. Here, in addition to PEG’s response, the DFEH  
charge itself contains allegations stating that Plaintiff was on medical/family leave, requested an  
extension of her leave, and was terminated shortly thereafter.

1 appear to have been filed with the DFEH as required by section 12960(b). However, Plaintiff has  
2 presented evidence showing that her counsel in this matter did mail this amended charge to the  
3 DFEH on January 27, 2011. [Doc. No. 22-26, Ex. 26; Doc. No. 22-27, Ex. 27, Cosner Decl. ¶ 2.]  
4 In a reasonable investigation, Plaintiff would expect the DFEH to file a charge that she sent to it.  
5 Therefore, a reasonable investigation of the January 27, 2011 charge would have uncovered  
6 Plaintiff’s claim for denial of family/medical leave, and Plaintiff exhausted her claim through the  
7 January 27, 2011 charge as well as the June 30, 2011 charge. Accordingly, the Court **DENIES**  
8 PEG’s motion for summary judgment of Plaintiff’s first cause of action for failure to exhaust her  
9 administrative remedies for that specific claim.

10 ii. Failure to Engage in the Interactive Process

11 Plaintiff’s fifth cause of action is for failure to engage in the interactive process in violation  
12 of California Government Code § 12940(n). [Compl. ¶¶ 63-71.] Plaintiff alleges that on April 9,  
13 2010, she requested an accommodation from Mr. Tilghman of being able to work part-time for a  
14 temporary period. [Id. ¶¶ 21, 65.] Plaintiff alleges that Mr. Tilghman failed to participate in a  
15 timely good-faith interactive process with her and summarily rejected her suggested  
16 accommodation. [Id. ¶¶ 21, 67.]

17 Section 12940(n) provides that it is unlawful “[f]or an employer . . . to fail to engage in a  
18 timely, good faith, interactive process with the employee or applicant to determine effective  
19 reasonable accommodations, if any, in response to a request for reasonable accommodation by an  
20 employee or applicant with a known physical or mental disability or known medical condition.”  
21 CAL. GOV’T CODE § 12940(n). “The ‘interactive process’ required by the FEHA is an informal  
22 process with the employee or the employee’s representative, to attempt to identify a reasonable  
23 accommodation that will enable the employee to perform the job effectively.” Wilson v. Cnty of  
24 Orange, 169 Cal. App. 4th 1185, 1195 (2009). When engaging in the interactive process, “[b]oth  
25 employer and employee have the obligation ‘to keep communications open’ and neither has ‘a  
26 right to obstruct the process.’” Scotch v. Art Institute of Cal., 173 Cal. App. 4th 986, 1013 (2009).

27 PEG argues that Plaintiff’s June 30, 2010 charge does not contain any claim for failure to  
28 engage in the interactive process. [Doc. No. 17-1 at 7-8.] Although the June 30, 2010 charge does

1 not specifically use the phrase “failure to engage in the interactive process,” the charge alleges that  
2 Plaintiff “was denied a reasonable accommodation and terminated” on April 9, 2010. [Doc. No.  
3 18-1, Ex. C.] The charge further alleges that Plaintiff requested to return to work part-time, but  
4 this request was refused by Mr. Tilghman and Plaintiff was terminated because her employer did  
5 not want to reasonably accommodate her. [Id.] These allegations apprise the DFEH of the alleged  
6 discriminatory acts: that she requested an accommodation and her employer denied the request and  
7 terminated her. In addition, PEG’s August 24, 2010 response to the charge addressed these  
8 allegations and stated that Plaintiff was not a qualified individual with a known disability, so “the  
9 mutual obligation to explore accommodations never arose.”<sup>8</sup> [Doc. No. 22-16, Ex. 16 at 5.]  
10 Therefore, the allegations related to Plaintiff’s claim for failure to engage in the interactive process  
11 were within the scope of the DFEH investigation that was conducted and what would have been  
12 uncovered by a reasonable investigation, and Plaintiff exhausted her administrative remedies with  
13 respect to this cause of action in the June 30, 2010 charge. See Nazir, 178 Cal. App. 4th at 266-  
14 69; see also Baker, 209 Cal. App. 3d at 1065.

15 In addition to the June 30, 2010 charge, the January 27, 2011 charge that Plaintiff  
16 attempted to file with the DFEH lists as a claim “failure to engage in the interactive process.”  
17 [Doc. No. 22-26, Ex. 26.] Although it appears that this charge was never filed, in a reasonable  
18 investigation, Plaintiff would expect the DFEH to file a charge that she sent to it. See supra  
19 section II.B.i. Therefore, a reasonable investigation of the January 27, 2011 charge would have  
20 uncovered Plaintiff’s claim for failure to engage in the interactive process, and Plaintiff exhausted  
21 her claim through the January 27, 2011 charge as well as the June 30, 2011 charge. Accordingly,  
22 the Court **DENIES** PEG’s motion for summary judgment of Plaintiff’s fifth cause of action for  
23 failure to exhaust her administrative remedies for that specific claim.

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26 <sup>8</sup> It is also proper to consider PEG’s response in determining whether Plaintiff exhausted her  
27 administrative remedies with respect to her claim for failure to engage in the interactive process. The  
28 response is part of the investigation that was actually conducted, and in addition to PEG’s response,  
the DFEH charge itself contains allegations stating that Plaintiff requested a reasonable  
accommodation of part-time work, which her employer refused, and she was terminated shortly  
thereafter. See supra note 4.

1           **C.       Intentional Infliction of Emotional Distress**

2           PEG argues that it is entitled to summary judgment of Plaintiff’s claim for intentional  
3 infliction of emotional distress because she has failed to show that PEG engaged in any extreme  
4 and outrageous conduct, a required element of her claim. [Def.’s Mot. at 8-10.] Plaintiff argues  
5 that PEG engaged in “outrageous conduct” when it discriminated against her on the basis of her  
6 mental disability, failed to accommodate her, failed to engage in the interactive process with her  
7 and wrongfully terminated her. [Pl.’s Opp’n at 12.]

8           The elements of a cause of action for intentional infliction of emotional distress are: (1)  
9 extreme and outrageous conduct by defendant; (2) intention to cause or reckless disregard of the  
10 probability of causing emotional distress; (3) severe emotional suffering; and (4) actual and  
11 proximate causation of the emotional distress. Cole v. Fair Oaks Fire Protection Dist., 43 Cal. 3d  
12 148, 155 n.7 (1970). For conduct to be extreme and outrageous it must be “so extreme as to  
13 exceed all bounds of that usually tolerated in a civilized community.” Cervantez v. J.C. Penney  
14 Co., 24 Cal. 3d 579, 593 (1979). “Liability ‘does not extend to mere insults, indignities, threats,  
15 annoyances, petty oppressions, or other trivialities.’” Molko v. Holy Spirit Assn., 46 Cal. 3d 1092,  
16 1122 (1988).

17           California courts have explained “that employment discrimination . . . can cause emotional  
18 distress and that such distress is compensable under traditional theories of tort law.” See Murillo  
19 v. Rite Stuff Foods, Inc., 65 Cal. App. 4th 833, 848 (1998). Generally, courts have found an  
20 employer’s conduct to be outrageous when the employer “(1) abuses a relation or position which  
21 gives him power to damage the [employee’s] interest; (2) knows the [employee] is susceptible to  
22 injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that  
23 the acts are likely to result in illness through mental distress.” Cole, 43 Cal. 3d at 155 n.7.

24           “Whether a defendant’s conduct can reasonably be found to be outrageous is a question of  
25 law that must initially be determined by the court; if reasonable persons may differ, it is for the  
26 jury to determine whether the conduct was, in fact, outrageous.” Berkley v. Dowds, 152 Cal. App.  
27 4th 518, 534 (2007). There is no bright line standard for judging outrageous conduct, and a  
28 case-by-case appraisal of conduct is required. Cochran v. Cochran, 65 Cal. App. 4th 488, 494

1 (1998).

2 In opposing summary judgment, Plaintiff has only put forth a one-page declaration stating:  
3 “Defendants’ outrageous conduct caused me to suffer substantial emotional distress including but  
4 not limited to, anguish, fright, nervousness, grief, anxiety, worry, shock, humiliation.” [Doc. No.  
5 22-28, Declaration of Chrysti Corkill (“Corkill Decl.”) ¶ 2.] This evidence is insufficient to  
6 withstand a motion for summary judgment. The declaration only contains a conclusory statement  
7 that she was injured due to “Defendants’ outrageous conduct.” [Id.] The declaration does not  
8 state any facts showing that PEG engaged in outrageous conduct. A declaration is too conclusory  
9 to be cognizable when it “state[s] only conclusions, and not ‘such facts as would be admissible in  
10 evidence.’” United States v. Shumway, 199 F.3d 1093, 1104 (9th Cir. 1999).

11 The only facts that Plaintiff points to in support of her claim that PEG engaged in  
12 outrageous conduct are the allegations in her complaint and her notice of termination. [See Doc.  
13 No 20, Plaintiff’s Statement of Material Facts and Evidentiary References at 46-48.] Plaintiff may  
14 not rely on the pleadings in her complaint to create a genuine issue of material fact on a motion for  
15 summary judgment. See FED. R. CIV. P. 56(c); Celotex, 477 U.S. at 324. In addition, the notice of  
16 termination at most shows a personnel management decision by PEG to terminate Plaintiff’s  
17 employment after she failed to return to work on April 12, 2010. Personnel management activity  
18 by itself is “insufficient to support a claim of intentional infliction of emotional distress, even if an  
19 improper motivation is alleged.” Janken v. GM Hughes Electronics, 46 Cal. App. 4th 55, 80  
20 (1996); accord. Helgeson v. Am. Int’l Group, Inc., 44 F. Supp. 2d 1091, 1095-97 (S.D. Cal. 1999).

21 At the hearing, Plaintiff argued that where a plaintiff has proven a violation of the FEHA,  
22 then there is necessarily intentional infliction of emotional distress. Plaintiff is incorrect.  
23 Although California courts have stated that employment discrimination may cause intentional  
24 infliction of emotional distress, Murillo, 65 Cal. App. 4th at 848, California courts have also stated  
25 that personnel management activity even when an improper motivation is alleged is insufficient by  
26 itself to support a claim for intentional infliction of emotional distress. Janken, 46 Cal. App. 4th at  
27 80. Therefore, a claim of discrimination under the FEHA is not sufficient by itself to sustain a  
28 claim for intentional infliction of emotional distress. See, e.g., id. (affirming demurrer of claim


1 for intentional infliction of emotional distress where plaintiff had properly alleged a claim for age  
2 discrimination). To withstand a motion for summary judgment, Plaintiff was required to present  
3 evidence showing that PEG engaged in outrageous conduct. Plaintiff failed to do so, and  
4 therefore, summary judgment is appropriate. See Yurick, 209 Cal. App. 3d at 1129-30; Schneider  
5 v. TRW, Inc., 938 F.2d 986, 992-93 (9th Cir. 1991). Accordingly, the Court **GRANTS** PEG's  
6 motion for summary judgment of Plaintiff's claim for intentional infliction of emotional distress.

7 **CONCLUSION**

8 For the reasons stated above, the Court **GRANTS IN PART** and **DENIES IN PART**  
9 PEG's motion for summary judgment. Specifically, the Court **DENIES** PEG's motion for  
10 summary judgment of Plaintiff's first five causes of action for failure to exhaust her administrative  
11 remedies, and the Court **GRANTS** PEG's motion for summary judgment of Plaintiff's claim for  
12 intentional infliction of emotional distress.

13 **IT IS SO ORDERED.**

14 **DATED:** November 28, 2011

15   
16 **IRMA E. GONZALEZ, Chief Judge**  
17 **United States District Court**