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

JESSE CHAVARRIA,  
  
Plaintiff,  
  
v.  
  
MANAGEMENT & TRAINING  
CORPORATION, a corporation, and  
DOES 1 through 100, inclusive,  
  
Defendants.

Case No.: 3:16-cv-00617-H-RBB  
  
**ORDER DENYING DEFENDANT’S  
MOTION FOR SUMMARY  
JUDGMENT**  
  
[Doc. No. 32]

On December 10, 2015, Plaintiff Jesse Chavarria (“Plaintiff”) filed an action in the California Imperial County Superior Court against Defendant Management & Training Corporation (“Defendant”). (Doc. No. 1-2 at 3.) Plaintiff alleges Defendant improperly terminated him after he sustained a work-related injury in violation of various state laws, including the California Fair Employment and Housing Act (“FEHA”) and the California Family Rights Act (“CFRA”). (*Id.*) On March 10, 2016, Defendant removed the case to the Federal Court for the Southern District of California and filed an answer. (Doc. Nos. 1, 2.) On April 24, 2017, Defendant filed a motion for summary judgment on Plaintiff’s claims. (Doc. No. 32.) On April 26, 2017, the parties filed a joint motion to continue the hearing. (Doc. No. 33.) The same day, the Court granted the motion and continued the hearing to May 30, 2017. (Doc. No. 34.) On May 16, 2017, Plaintiff filed a response in

1 opposition to Defendant’s motion for summary judgment. (Doc. No. 36.) On May 22,  
2 2017, the parties filed a second joint motion to continue the hearing. (Doc. No. 37.) The  
3 Court granted the motion on May 23, 2017 and reset the hearing for June 5, 2017. (Doc.  
4 No. 38.) The parties filed their reply briefs on May 26, 2017. (Doc. Nos. 39, 40.) The  
5 Court held a hearing on the motion on June 5, 2017. Attorneys Geniene B. Stillwell and  
6 Freda Tjoarman appeared on behalf of Plaintiff. Attorney Serafin H. Tagarao appeared  
7 on behalf of Defendant.

### 8 **BACKGROUND**

9 Defendant Management & Training Corporation (“MTC”) operates the Imperial  
10 Regional Detention Center (the “Detention Center”), which houses U.S. Immigration &  
11 Customs Enforcement detainees. (Doc. No. 36-3, Chavarria Decl. ¶ 5.) Plaintiff began  
12 working at the Detention Center as a detention officer in the fall of 2014. (Id. ¶ 6.)

13 Prior to his employment at the Detention Center, Plaintiff worked as a detention  
14 officer and lieutenant at another detention facility in El Centro (the “El Centro Facility”)  
15 from 2009 to 2014. (Id. ¶ 2.) While at the El Centro Facility, Plaintiff suffered an injury  
16 to his left arm and shoulder while restraining a detainee. (Id. ¶ 3.)

17 In early 2015, Plaintiff contends he still had pain in his left arm and shoulder and  
18 was diagnosed with a muscle tear. (Id. ¶ 8.) Plaintiff subsequently took a leave of  
19 absence until September 15, 2015. (Id.) During this time, Plaintiff provided MTC with a  
20 medical report by Dr. McSweeney, which diagnosed Plaintiff with a partial tear of the left  
21 pectoralis major. (Doc. No. 36-3, Chavarria Decl. Ex. B at 2.) As a result of the injury,  
22 Dr. McSweeney opined that Plaintiff was “unable to return to his usual and customary  
23 occupation” and was “precluded from repetitive forceful or heavy pushing or pulling with  
24 the left upper extremity.” (Id. at 4.)

25 After reviewing Dr. McSweeney’s report, MTC terminated Plaintiff. On October  
26 7, 2015, MTC’s Human Resources Manager Brandi Haley (“Haley”), called Plaintiff to  
27 inform him of the decision. (Doc. No. 32-5, Haley Decl. ¶ 8.) Haley followed up the  
28 phone conversation with a letter stating “Your request to extend your leave of absence

1 indefinitely has been denied. . . . Based on medical information received from your  
2 physician you are no longer able to perform the essential functions of your position with  
3 or without an accommodation. We are treating your failure to return to work as a  
4 voluntary resignation, effective as of the date of this letter.” (Doc. No. 36-3 at 18.)

5 On October 13, 2015, Plaintiff replied to Haley’s letter, stating “Your letter  
6 indicates that I requested an extension of indefinite leave of absence which is not  
7 accurate. . . . Furthermore, your letter states that you received information from physician  
8 (sic), stating that I’m no longer able to perform my essential job functions with or without  
9 accommodations. Nowhere does it state that I am unable to perform my essential job  
10 functions with or without accommodation.” (Id. at 21.)

11 In response, Haley sent a letter to Plaintiff on October 28, 2015, which stated:  
12 “Upon receipt of your physician’s correspondence, we reviewed all vacancies at the  
13 facility to determine whether you could be moved into an alternative position. There  
14 were no positions for which you were qualified, that you could perform with or without  
15 reasonable accommodation. As such, we considered you to have voluntary (sic) resigned  
16 your position so that you would be eligible for rehire should you choose to apply for an  
17 open position in the future and can provide a physician’s release authorizing your return  
18 to work.” (Id. at 23.)

## 19 **DISCUSSION**

### 20 **I. SUMMARY JUDGMENT STANDARD**

21 Summary judgment is proper when a moving party shows there is no genuine  
22 dispute of material fact and they are entitled to judgment as a matter of law. Fed. R. Civ.  
23 P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). There is no genuine dispute if  
24 “the record taken as a whole could not lead a rational trier of fact to find for the non-  
25 moving party.” Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574,  
26 587 (1986).

27 The moving party bears the initial burden of producing evidence showing they are  
28 entitled to summary judgment. Celotex Corp., 477 U.S. at 330. The moving party can

1 satisfy this burden in two ways: (1) by presenting evidence that negates an essential  
2 element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving party  
3 failed to establish an essential element of the nonmoving party’s case that the nonmoving  
4 party bears the burden of proving at trial. Id. at 323. If the moving party satisfies their  
5 initial burden, then the burden shifts to the nonmoving party to introduce evidence  
6 showing there is a genuine dispute of material fact. Id. at 331. A fact is material when,  
7 under the governing substantive law, it could affect the outcome of the case. Anderson v.  
8 Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To satisfy its burden, the non-moving  
9 party “may not rest upon mere allegations or denials of his pleadings.” Id. Rather, the  
10 nonmoving party “must present affirmative evidence . . . from which a jury might return a  
11 verdict in his favor.” Id. Facts and inferences are to be viewed in the light most  
12 favorable to the non-moving party. U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962).

## 13 **II. ANALYSIS**

### 14 **A. DISABILITY DISCRIMINATION CLAIM**

15 Defendant moves for summary judgment, arguing Plaintiff cannot establish a  
16 prima facie case because his injury prevented him from performing the essential duties of  
17 a detention officer. (Doc. No. 32-2 at 17.) In opposition, Plaintiff argues that triable  
18 issues of material fact remain as to whether he was able to perform those duties.

19 To establish a prima facie case of disability discrimination under the FEHA,  
20 Plaintiff must show “(1) he suffers from a disability; (2) he is otherwise qualified to do  
21 his job; and (3) he was subjected to adverse employment action because of his disability.”  
22 Faust v. California Portland Cement Co., 150 Cal.App.4th 864, 886 (2007). At summary  
23 judgment, Defendant can satisfy its initial burden under Celotex by “present[ing]  
24 admissible evidence either that one or more of the plaintiff’s prima facie elements is  
25 lacking, or that the adverse employment action was based on legitimate,  
26 nondiscriminatory factors.” Sandell v. Taylor-Listug, Inc., 188 Cal.App.4th 297, 309  
27 (2010). The burden then shifts to Plaintiff to show there are material issues of triable  
28 fact. Id., see also Celotex, 477 U.S. at 330.

1 To establish he was “otherwise qualified to do his job,” Plaintiff must show he  
2 could perform the essential duties of his job, with or without reasonable accommodations.  
3 Cal. Gov’t Code § 12940 (a)(1); accord Nigro v. Sears, Roebuck and Co., 784 F.3d 495,  
4 497 n.1 (9th Cir. 2015) (“Nigro established that with reasonable accommodations . . . he  
5 was able to perform the essential functions of his position. He was, therefore ‘otherwise  
6 qualified’ to do his job.”). The FEHA defines “essential functions” as “the fundamental  
7 job duties of the employment position the individual with a disability holds . . . . [and]  
8 does not include the marginal functions of the position.” Cal. Gov’t Code § 12926(f). A  
9 duty can be essential because (1) “the reason the position exists is to perform that  
10 function,” (2) there is a “limited number of employees available among whom the  
11 performance of that job function can be distributed,” or (3) “[t]he function [is] highly  
12 specialized, so that the incumbent in the position is hired for his or her expertise or ability  
13 to perform the particular function.” Cal. Gov’t Code § 12926(f)(1)(A)-(C).

14 Defendant argues that Plaintiff cannot establish that he was qualified to do his job  
15 because the evidence shows Plaintiff was unable to restrain and secure assaultive  
16 detainees because of his disability, one of the essential functions listed in the Position  
17 Description of a Detention Officer. (Doc. No. 36-4 at 203.) In support of this  
18 conclusion, Defendant relies primarily on the medical report of Dr. McSweeney. (Doc.  
19 No. 32-3 at 108-12.) In particular, Defendant notes that Dr. McSweeney stated Plaintiff  
20 was “permanent and stationary,” “precluded from repetitive forceful or heavy pushing or  
21 pulling with the left upper extremity,” and could not “return to his usual and customary  
22 occupation.” (Id. at 110-11.)

23 Plaintiff argues in response that Dr. McSweeney’s report is inapposite because it  
24 was rendered in connection with a separate workers’ compensation proceeding and, in  
25 any event, does not support the conclusion that Plaintiff could not perform his essential  
26 functions. The specific limitation mentioned by Dr. McSweeney was that Plaintiff could  
27 not engage in “repetitive forceful or heavy pushing or pulling.” (Doc. No. 32-3 at 111.)  
28 And Plaintiff argues there is no evidence in the record that restraining a detainee would

1 require repetitive forceful action or heavy pushing or pulling. (Doc. No. 36 at 21.)  
2 Furthermore, Plaintiff contends that he is still physically capable of restraining a detainee,  
3 as evidenced by the fact he successfully did so after he had sustained the injury to his  
4 arm. (Doc. No. 36-3, Chavarria Decl. ¶14.) Finally, Plaintiff argues he is able to perform  
5 the essential functions of his job as he successfully passed his use of force test in  
6 September 2014, (Doc. No. 36-4 at 215-16), and satisfactorily performed his duties as a  
7 detention officer for at least six months prior to being terminated despite the injury to his  
8 arm, (Doc. No. 36-4 at 178).

9 Viewing these facts in the light most favorable to Plaintiff, material disputes of fact  
10 remain as to whether Plaintiff could perform the essential functions of his job as a  
11 detention officer. See Liberty Lobby, Inc., 477 U.S. at 265 (“Credibility determinations,  
12 the weight of evidence, and the drawing of legitimate inferences from the facts are jury  
13 functions, not those of a judge.”). Thus, the Court denies Defendant’s motion for  
14 summary judgment as to Plaintiff’s disability discrimination claim.

15 Defendant separately argues that Plaintiff’s disability discrimination claims fails as  
16 a matter of law under California Government Code § 12940 because employing Plaintiff  
17 would threaten the health or safety of Plaintiff or other MTC employees. (Doc. No. 32-2  
18 at 21.) In support of this argument, Defendant relies on Furtado v. State Personnel Bd.,  
19 212 Cal.App.4th 729 (2013), where a California court affirmed a lower court’s  
20 conclusion that a correctional officer who was “unable to disarm, subdue, or apply  
21 restraints to an inmate would be a hazard to others.” Id. at 748. This case, however, is  
22 distinguishable, both procedurally and factually. First, in Furtado, the California Court of  
23 Appeal was reviewing a trial court’s denial of a writ of mandate, not a motion for  
24 summary judgment. The California State Personnel Board (“SPB”) had decided to  
25 demote a correctional officer after determining he was unable to perform the essential  
26 functions of his previous position. Id. at 733. Because the trial court was reviewing the  
27 SPB decision, it only needed to find substantial evidence supporting their conclusion. Id.  
28 at 743. In contrast, when reviewing a motion for summary judgment, the Court must

1 view the facts in the light most favorable to the non-moving party. Second, Furtado is  
2 factually distinguishable because there the plaintiff repeatedly failed his fitness-for-duty  
3 examination on account of his impairment and the SPB found he was unable to subdue an  
4 inmate. Id. at 756. In contrast here, there remain material questions of fact as to what  
5 functions Plaintiff can or cannot perform—including whether he can use force to restrain  
6 a detainee.

### 7 **B. FAILURE TO ACCOMMODATE CLAIM**

8 Under the FEHA, it is an unlawful employment practice to fail to provide a  
9 disabled employee with reasonable accommodations that enable the employee to perform  
10 the essential functions of their job. Cal. Gov't Code § 12940(m). To establish a prima  
11 facie case of failure to accommodate under the FEHA, Plaintiff must show “(1) the  
12 plaintiff has a disability under the FEHA, (2) the plaintiff is qualified to perform the  
13 essential functions of the position, and (3) the employer failed to reasonably  
14 accommodate the plaintiff’s disability.” Lui, 211 Cal.App.4th at 971.

15 Based on the present record, the Court agrees with Plaintiff that triable issues of  
16 fact remain as to whether Plaintiff could perform the essential functions of his job. As a  
17 result, the Court denies Defendant’s motion for summary judgment on the failure to  
18 accommodate claim on the grounds that Plaintiff cannot satisfy that element.

19 Additionally, Defendant argues that summary judgment is proper because  
20 Defendant attempted to reasonably accommodate Plaintiff’s disability. In opposition,  
21 Plaintiff argues that reasonable accommodations were available but not offered.

22 Whether an employer’s actions were reasonable is inherently factual and “the  
23 employer cannot prevail on summary judgment . . . unless it establishes through  
24 undisputed facts that (1) reasonable accommodation was offered and refused; (2) there  
25 simply was no vacant position within the employer’s organization for which the disabled  
26 employee was qualified and which the disabled employee was capable of performing  
27 with or without accommodation; or (3) the employer did everything in its power to find a  
28 reasonable accommodation, but the informal interactive process broke down because the

1 employee failed to engage in discussions in good faith.” King v. United Parcel Service,  
2 Inc., 152 Cal.App.4th 426, 442-43 (2007) (quoting Jensen v. Wells Fargo Bank, 85  
3 Cal.App.4th 245, 256 (2000)). Defendant has not presented any evidence that it offered  
4 Plaintiff any accommodations, nor that Plaintiff failed to engage in good faith  
5 discussions. As such, the Court assesses whether Plaintiff was qualified to perform any  
6 vacant position within the organization.

7 At the time Plaintiff was terminated, there were at least two vacant positions at the  
8 El Centro Facility: Laundry Worker – Detainee Lead and Cook II – Detainee Lead.  
9 (Doc. No. 32-2 at 24.) Defendant argues Plaintiff could not perform the essential  
10 functions of these roles because they required constant lifting and moving objects and  
11 also required supervising detainees.

12 Plaintiff argues in opposition that he was capable of performing the essential  
13 functions of either open position. (Doc. No. 36 at 24.) Dr. McSweeney did not say that  
14 Plaintiff could not lift objects, only that he could not engage in “repetitive forceful or  
15 heavy pushing or pulling.” (Doc. No. 32-3 at 108-12.) And in his deposition, Warden  
16 Rathman testified that the only pulling motion that was required of a cook was opening  
17 the cooler doors but did not know how heavy the doors were or whether Plaintiff could  
18 open them. (Doc. No. 36-4 at 184-85.) Furthermore, Plaintiff asserts in his declaration  
19 that based on his observations of both the Laundry Worker and Cook position he would  
20 be able to perform their essential duties. (Doc. No. 36-3, Chavarria Decl. ¶15.)

21 On this record, Defendant has not established that the undisputed facts show there  
22 were no vacant positions Plaintiff could perform. King, 152 Cal.App.4th at 373-74. As  
23 such, Defendant is not entitled to summary judgment of this claim.

### 24 **C. INTERACTIVE PROCESS CLAIM**

25 California Government Code § 12940(n) makes it unlawful for “an employer . . . to  
26 fail to engage in a timely, good faith, interactive process with the employee or applicant  
27 to determine effective reasonable accommodations, if any, in response to a request for  
28 reasonable accommodation by an employee or applicant.” Cal. Gov’t Code § 12940(n);

1 see also Nadaf-Rahrov v. Neiman Marcus Group, Inc., 166 Cal.App.4th 952, 980 (2008).  
2 “The interactive process is designed to bring [employer and employee] together to speak  
3 freely and to determine whether a reasonable, mutually satisfactory accommodation is  
4 possible.” Gelfo v. Lockheed Martin Corp., 140 Cal.App.4th 34, 61 (2006) (quoting  
5 Jensen, 85 Cal.App.4th at 261-62). An employer is liable under § 12940(n) when they  
6 bear the responsibility for a breakdown in that interactive process. Nadaf-Rahron, 166  
7 Cal.App.4th at 985.

8 Defendant moves for summary judgment on the interactive process claim, arguing  
9 that Plaintiff never requested a reasonable accommodation and, in any event, Defendant  
10 engaged in good faith dialog with Plaintiff. (Doc. No. 32-2 at 27-28.) Plaintiff opposes,  
11 arguing questions of fact remain as to whether Defendant’s behavior was reasonable.  
12 (Doc. No. 36 at 29.)

#### 13 1. Plaintiff’s Request

14 Generally, an employer’s duty to engage in the interactive process is not triggered  
15 until the employee makes a request. See Cal. Gov’t Code § 12940(n) (“in response to a  
16 request”); Robinson v. HD Supply, Inc., 2012 WL 5386293, \*7 (E.D. Cal. Nov. 1, 2012);  
17 Scotch v. Art Institute of California-Orange County, Inc., 173 Cal.App.4th 986, 1013  
18 (2009) (“Where the disability, resulting limitations, and necessary reasonable  
19 accommodations, are not open, obvious and apparent to the employer, . . . the initial  
20 burden rests primarily upon the employee . . . to specifically identify the disability and  
21 resulting limitations, and to suggest reasonable accommodations.”). However, “no magic  
22 words are necessary, and the obligation arises once the employer becomes aware of the  
23 need to consider an accommodation.” Gelfo, 140 Cal.App.4th at 62, n.22.

24 Defendant’s Human Resource Manager, Haley, recalled Plaintiff asking her to  
25 “help him out.” (Doc. No. 36-4 at 110.) And Haley testified that she understood this to  
26 mean that Plaintiff was asking for accommodations:

27 Q: So I guess going back to my original question, when Mr. Chavarria  
28 presented his release to return to work with those permanent restrictions, did

1 you view him at that point as requesting reasonable accommodation of his  
2 restrictions?

3 A: Yes.

4 (Id. at 64.) As such, a reasonable juror could conclude that Defendant was aware  
5 of the need to consider accommodations for Plaintiff and the duty to engage in the  
6 interactive process was triggered.

## 7 2. Good Faith Interactive Process

8 During the interactive process, “[e]ach party must participate in good faith,  
9 undertake reasonable efforts to communicate its concerns, and make available to the  
10 other information which is available, or more accessible, to one party.” Gelfo, 140  
11 Cal.App.4th at 62 n.22. Defendant claims it engaged in the good faith interactive process  
12 by exploring all available vacant positions and remaining in contact with Plaintiff. (Doc.  
13 No. 32-2at 29.) Plaintiff offers contrary facts that raise a triable issue of material fact  
14 regarding whether Defendant complied with its obligation to participate in good faith in  
15 the interactive process.

16 Plaintiff points out that Defendant did not comply with its own internal policies in  
17 dealing with Plaintiff. Haley testified in her deposition that Defendant’s policy was to  
18 have an in-person meeting between herself, Warden Rathman, and the person requesting  
19 a leave or accommodation that was denied. (Doc. No. 36-4 at 66.) Haley, however,  
20 admitted this meeting never happened in Plaintiff’s case. (Id.) Similarly, Defendant’s  
21 internal policy titled “Persons with Disabilities” states that “upon the applicant or  
22 employee’s request for reasonable accommodation, the human resources manager must  
23 prepare the request for reasonable accommodation form.” (Doc. No. 36-4 at 201.)  
24 Haley, however, admitted she did not fill out a Reasonable Accommodation Form for  
25 Plaintiff. (Doc. No. 36-4 at 65.) And the parties dispute whether there were vacant  
26 positions open that would accommodate Plaintiff’s disability. (Doc. No. 36-4 at 8.)

27 Finally, “[w]hether a specific accommodation was ‘reasonable’ and whether an  
28 employer engaged in a good faith interactive process with a disabled employee are

1 traditional questions of fact.” Ludovico v. Kaiser Permanente, 57 F.Supp.3d 1176, 1201  
2 (N.D. Cal. 2014). This case is no different. Given the disputed issues of material fact,  
3 the Court denies summary judgment on this claim.

#### 4 **D. PUBLIC POLICY CLAIM**

5 Defendant argues Plaintiff’s wrongful termination in violation of public policy  
6 claim fails for the same reason as his FEHA claim of disability discrimination. (Doc. No.  
7 32-2 at 23, n.4.) But triable issues of material fact remain as to whether Defendant  
8 violated the FEHA’s prohibition on disability discrimination. As a result, a triable issue  
9 as to the one precludes summary judgment as to the other. See City of Moorpark v.  
10 Superior Court, 18 Cal.4th 1143, 1161 (1998) (“We conclude that disability  
11 discrimination can form the basis of a common law wrongful discharge claim.”); c.f.,  
12 Faust v. California Portland Cement Co., 150 Cal.App.4th 864, 886 (“Because Faust has  
13 viable claims for violation of the CFRA, it necessarily follows that a triable issue exists  
14 with respect to the fourth cause of action for wrongful termination in violation of public  
15 policy.”).

#### 16 **E. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM**

17 Defendant moves for summary judgment on Plaintiff’s claim of intentional  
18 infliction of emotion distress (“IIED”), arguing that claim is barred by workers’  
19 compensation and Defendant neither engaged in outrageous conduct nor acted with intent  
20 to cause extreme or severe distress. Plaintiff opposes, arguing that the claim is not barred  
21 by workers’ compensation and there are triable issues of fact.

22 To establish a prima facie case of IIED, Plaintiff must show that Defendant  
23 engaged in (1) extreme and outrageous conduct, (2) with the intent to cause, or reckless  
24 disregard of the probability of causing, emotional distress, and (3) Defendant’s conduct  
25 was the actual and proximate cause of Plaintiff’s severe or extreme emotional distress.  
26 Hughes v. Pair, 46 Cal.4th 1035, 1050 (2009). Conduct is extreme and outrageous when  
27 it “exceed[s] all bounds of that usually tolerated in a civilized community.” Hughes, 46  
28 Cal.4th at 1050. “[M]ere insults, indignities, threats, annoyances, petty oppressions, or

1 other trivialities” are not enough. Id. at 1051. However, [t]here is no bright line standard  
2 for judging outrageous conduct, and a case-by-case appraisal of conduct is required.  
3 Corkill v. Preferred Employers Group, LLC, 2011 WL 5975678, \*14 (S.D. Cal. Nov. 28,  
4 2011) (citing Cochran v. Cochran, 65 Cal.App.4th 488, 494 (1998)).

5 Plaintiff contends that material questions of fact remain as to whether Defendant’s  
6 conduct was extreme and outrageous and whether Defendant had the requisite intent.  
7 (E.g., Doc. No. 36-2 at 16-17.) Plaintiff has offered facts to show that Defendant failed  
8 to follow its own affirmative action and disability accommodation policy. (Doc. No. 36-  
9 4 at 66, 201.) Finally, Plaintiff has offered facts tending to show that Defendant failed to  
10 reasonably engaged in the interactive process or explore reasonable accommodations.  
11 (E.g., Doc. No. 36-3 at 18-23.)

12 Courts have found that “discriminatory acts can constitute outrageous conduct.”  
13 Boehler, 2015 WL 12743688, \*3. However, merely establishing facts that support a  
14 violation under the FEHA is not enough to meet the extreme and outrageous standard.  
15 Corkill, 2011 WL 5975678, \*15 (“Therefore, a claim of discrimination under the FEHA  
16 is not sufficient by itself to sustain a claim for intentional infliction of emotional  
17 distress.”) Viewing the facts in the light most favorable to Plaintiff, material issues of  
18 fact remain.

19 Similarly, material issues of triable fact remain as to Defendant’s intent. Plaintiff  
20 must show that Defendant engaged in “conduct intended to inflict injury or engaged in  
21 with the realization that injury will result.” Potter v. Firestone Tire & Rubber Co., 6  
22 Cal.4th 965, 1001 (1993). Viewed in the light most favorable to Plaintiff, Plaintiff has  
23 offered evidence that Defendant failed to follow its own policies when dismissing him  
24 (e.g., Doc. No. 36-4 at 66), mischaracterized his request for accommodations as a request  
25 for indefinite leave (id. at 109-11), and determined that reasonable accommodations were  
26 unavailable without fully exploring the available options, (compare Doc. No. 36-4 at 171  
27 with id. at 18), At this stage, these facts are sufficient to raise a triable issue of intent.  
28

1 Defendant also argues that Plaintiff’s IIED claim fails because it is barred by  
2 workers’ compensation. Workers’ compensation generally provides the exclusive  
3 remedy for employees injured as a result of their employment. Livitsanos v. Superior  
4 Court, 2 Cal.4th 744, 754 (1992); Yau v. Santa Margarita Ford, Inc., 229 Cal.App.4th  
5 144, 161 (2014) (“Physical and emotional injuries sustained in the course of employment  
6 are preempted by the workers’ compensation scheme”); Cal. Lab. Code § 3602 (“the  
7 right to recover compensation is, except as specifically provided in this section and  
8 Sections 3706 and 4558, the sole and exclusive remedy of the employee or his or her  
9 dependents against the employer”). As an exception to this general rule, relief is not  
10 barred where “the employer’s conduct . . . exceeds the risks inherent in the employment  
11 relationship.” Livitsanos, 2 Cal.4th at 754.

12 In Miklosy v. Regents of Univ. of Cal., 44 Cal.4th 876 (2008), the California  
13 Supreme Court revisited the exceptions to workers’ compensation and held that a claim  
14 for IIED in a whistleblower retaliation case was barred because it did not exceed the risks  
15 inherent in an employment relationship. Id. at 902-03 (quoting Shoemaker v. Myers, 52  
16 Cal.3d 1, 23 (1990) (“Even if such conduct may be characterized as intentional, unfair or  
17 outrageous, it is nevertheless covered by the workers’ compensation exclusivity  
18 provisions.”); see also Yau, 229 Cal.App.4th at 161 (rejecting an IIED claim in a  
19 whistleblower wrongful termination case). Post-Miklosy, no California appellate court  
20 has addressed whether IIED claims arising from disability discrimination are barred. See  
21 Negherbon v. Wells Fargo Bank, 2015 WL 6163570, \*10 (N.D. Cal. Oct. 21, 2015)  
22 (“The parties do not cite—and this Court is not aware of—any post-Miklosy California  
23 appellate cases addressing the issue of whether an allegation of IIED arising from illegal  
24 discrimination and harassment is barred by Miklosy.”)

25 The parties offer no federal court case law on whether IIED claims, based on  
26 disability discrimination, are barred by the workers’ compensation exclusive remedy. As  
27 to other forms of discrimination, federal district courts have found that some forms of  
28 discrimination exceed the risks inherent in employment. E.g., Elowson v. Jea Senior

1 Living, 2015 WL 2455695, \* 5 (E.D. Cal. May 22, 2015); Negherbon, 2015 WL  
2 6163570, \*10. However, these cases dealt with different forms of discrimination than  
3 that alleged here. See Elowson, 2015 WL 2455695, \*5 (“discrimination based on race,  
4 religion, age, or gender is not a normal risk inherent in employment”); Rascon v.  
5 Diversified Maintenance Systems, 2014 WL 1572554, \*9 (E.D. Cal. April 17, 2014)  
6 (“Gender or race based harassment and discrimination are actions that exceed the risks  
7 inherent in the employment relationship.”); Webber v. Nike USA, Inc., 2012 WL  
8 4845549, \*5 (S.D. Cal. Oct. 9, 2012) (age discrimination); see also City of Moorpark v.  
9 Superior Court, 18 Cal.4th 1143, 1155 (1998) (“Therefore, a section 132a violation, like  
10 sexual and racial discrimination, falls outside the compensation bargain.”). Determining  
11 whether Defendant’s conduct falls outside of risks inherent in the employment  
12 relationship would benefit from additional factual development. As such, the Court  
13 denies without prejudice Defendant’s motion for summary judgment on Plaintiff’s IIED  
14 claim.

#### 15 **F. PUNITIVE DAMAGES**

16 In California, punitive damages are available under Civil Code § 3294 where a  
17 defendant is “guilty of oppression, fraud, or malice.” Cal. Civ. Code § 3294(a). Such  
18 conduct must be proven by clear and convincing evidence. Punitive damages can be  
19 awarded for violations of the FEHA and for intentional infliction of emotional distress.  
20 Myers v. Trendwest Resorts, Inc., 148 Cal.App.4th 1403, 1435-36 (2007); McInteer v.  
21 Ashley Distribution Services, Ltd., 40 F.Supp.3d 1269, 1295 (C.D. Cal. 2014). But not  
22 every violation of the FEHA is sufficient and the Court expects further development of  
23 the record on whether Plaintiff’s intentional infliction of emotional distress claim is  
24 barred by the workers’ compensation exclusive remedy. E.g., Achal v. Gate Gourmet,  
25 Inc., 114 F.Supp.3d 781, 798, 815 (N.D. Cal. 2015) (allowing FEHA claim but  
26 dismissing punitive damages).

27 Viewing the facts in the light most favorable to Plaintiff, triable issues of fact  
28 remain on claims that theoretically could support a punitive damages prayer for relief.

1 See Cloud v. Casey, 76 Cal.App.4th 895, 912 (1999) (“The jury could properly conclude  
2 that the corporations intentionally discriminated . . . then attempted to hide the illegal  
3 reason for their decision with a false explanation, and that in this, they acted in a manner  
4 that was base, contemptible or vile.”). As such, the Court denies Defendant’s motion for  
5 summary judgment as to the punitive damages prayer for relief.

6 **G. CFRA CLAIMS**

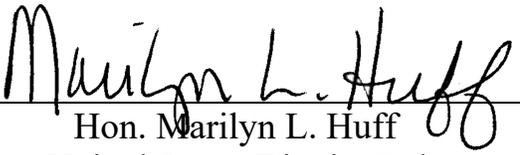
7 Plaintiff has voluntarily dismissed his claims based on the CFRA. (Doc. No. 36 at  
8 7.) As a result, the Court denies Defendant’s motion for summary judgment on these  
9 claims as moot.

10  
11 **CONCLUSION**

12 For the foregoing reasons, the Court denies Defendant’s motion for summary  
13 judgment on all remaining claims.

14 **IT IS SO ORDERED.**

15 DATED: June 5, 2016

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17 \_\_\_\_\_  
18 Hon. Marilyn L. Huff  
19 United States District Judge  
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