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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

MARLENE ALSUP,  
Plaintiff,  
v.  
U.S. BANCORP, et al.,  
Defendants.

No. 2:14-CV-01515-KJM-DAD  
  
ORDER

On October 10, 2014, the court heard argument on the defendant’s motion to dismiss. Sheri Leonard appeared for the plaintiff, Marlene Alsup; Emilie Woodhead and Joan Fife appeared for the defendant, U.S. Bancorp. After considering the parties’ arguments, the court GRANTS the defendant’s motion to dismiss with leave to amend.

I. BACKGROUND

On May 23, 2014, plaintiff filed a complaint in Placer County Superior Court. Notice of Removal 2 & Ex. A, ECF No. 1 & 1-1. On June 26, 2014, the defendant removed the action to this court on diversity grounds. *Id.* at 2. The complaint makes the following claims: (1) discrimination on the basis of disability in breach of California Government Code § 12940, *et seq.*; (2) failure to accommodate based on physical disability in violation of California Government Code § 12940 *et seq.*; and (3) failure to engage in an interactive process based on  
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1 physical disability in violation of California Government Code § 12940, *et seq.* Compl. 6–8, ECF  
2 No. 1-1 (Compl.).

3 Plaintiff makes the following allegations: she worked as a regional manager for the  
4 defendant in Roseville, California and rose to the level of vice president. Compl. ¶ 5. At all  
5 times she “performed her duties in a highly satisfactory manner.” *Id.* In September 2012,  
6 plaintiff was assigned a new boss, Jay Bower. *Id.* ¶ 6. From almost the beginning of Mr.  
7 Bower’s employment, he treated plaintiff “in a negative and devaluing manner.” *Id.* He also  
8 “made comments of an unwelcome sexual nature that Plaintiff found offensive.” *Id.*

9 Plaintiff has a history of mental health problems arising from abuse by her father.  
10 *Id.* ¶ 7. Her history includes a diagnosis of bipolar depression in 2006. *Id.* ¶ 8. “Due to feeling  
11 belittled and ridiculed,” plaintiff began to experience severe depression and acute anxiety. *Id.*  
12 Mr. Bower’s actions caused her disability to resurface, and since working with Mr. Bower, she  
13 was diagnosed with Bipolar II and PTSD. *Id.* ¶¶ 7 & 8. “Basically, working with Mr. Bower  
14 opened up memories from [her] past.” *Id.* ¶ 8. In January 2013, plaintiff began seeing a therapist  
15 and a psychologist and was placed on medication. *Id.* ¶ 9. Plaintiff’s mental health began to  
16 affect her not just at work, but in all aspects of her life. *Id.* ¶ 10. She began to suffer “disabling  
17 panic attacks” during her off hours and also “experienced problems sleeping, being motivated,  
18 began losing weight, was unable to concentrate, became hyper-vigilant, experienced a lack of  
19 memory, and basically was feeling exhausted all of the time.” *Id.*

20 On December 18, 2013, plaintiff received a “write-up” from Mr. Bower that  
21 “caused her mental disability to go out of control.” *Id.* ¶ 11. As a result, she scheduled an urgent  
22 appointment with her psychiatrist. *Id.* On December 23, 2013, her doctor placed her on a  
23 medical leave of absence. *Id.* Her doctor informed the defendant she had a diagnosis of Bipolar  
24 II and she should be accommodated under the ADA with “a switch in supervisors.” *Id.* On  
25 February 2, 2014, during her leave of absence, plaintiff sent Ana Wagstaff, an employee in the  
26 defendant’s human resources department, an email to explain that she could no longer work for  
27 Mr. Bower or Mr. Bower’s boss, Alan Leimkuehler; that the circumstances with Mr. Bower “had

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1 become unbearable”; and that she “was willing and ready to transfer out of the Mortgage side”  
2 and had identified two alternative positions. *Id.* ¶ 12.

3 The next day, February 3, 2014, Ms. Wagstaff sent an email and left a voicemail  
4 message for plaintiff to request that they discuss plaintiff’s concerns. *Id.* ¶ 13. Ultimately, Ms.  
5 Wagstaff told plaintiff to contact her “when she felt up to it” because plaintiff was on a leave of  
6 absence. *Id.*

7 On February 16, 2014, plaintiff sent Ms. Wagstaff an email that stated: “[i]n the  
8 past ten days, I’ve had several panic attacks” and said that communicating with Ms. Wagstaff in  
9 person regarding the hostile work environment “isn’t conducive to my health . . . .” *Id.* ¶ 14.  
10 Plaintiff also stated she “would prefer that our communication continue via email at this point.”  
11 *Id.* At this time she “was yearning to go back to work in some new capacity,” because “working  
12 was therapeutic and her mental health . . . had significantly worsened since she had stopped.” *Id.*  
13 ¶ 15.

14 On February 20, 2014, Ms. Wagstaff responded to plaintiff’s email and said they  
15 would need to have a face-to-face conversation. *Id.* ¶ 16. Ms. Wagstaff wrote, “[a]s I understand  
16 it, your request for accommodation is directly related to your complaint that your managers have  
17 created a work environment you find ‘hostile.’” *Id.* Ms. Wagstaff wrote that she stood “ready to  
18 assist” plaintiff as soon as she was medically capable of discussing her concerns in a live  
19 communication. *Id.*

20 Plaintiff responded to Ms. Wagstaff via email on March 4, 2014, stating she was  
21 not making a “retaliation harassment” complaint, but was asking for a medical accommodation  
22 “based on management style which had triggered a long term medical condition.” *Id.* ¶ 17.  
23 Ms. Wagstaff replied via email on the same day, stating she was writing in response “to  
24 [plaintiff’s] request for accommodation for the medical condition you claim has been triggered by  
25 a management style.” *Id.* ¶ 18. She also stated, “[t]he accommodation you are demanding is to  
26 be placed in a new job of your choosing,” and that first she would like to know more about  
27 plaintiff’s claim of a hostile work environment. *Id.*  
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1           On the same day, plaintiff sent a responsive email that included a detailed outline  
2 of Mr. Bower’s and Mr. Leimkuehler’s inappropriate actions. *Id.* ¶ 19. Plaintiff “confirmed that  
3 she was not demanding to be placed in a new job of her choosing, but would be flexible.” *Id.*  
4 She also stated, “[b]ecause of severe and serious issues in my past (which [Mr. Bower] also  
5 knows about), working in that environment has re-activated PTSD in addition to depression,  
6 anxiety, and panic attacks.” *Id.*

7           Plaintiff and Ms. Wagstaff eventually spoke by telephone. *Id.* ¶ 20. In that  
8 conversation Ms. Wagstaff said if plaintiff could not work for Mr. Bower and Mr. Leimkuehler  
9 she needed to continue her disability leave. *Id.* Ms. Wagstaff also stated that if plaintiff’s  
10 disability was not extended, she would be terminated for vacating her job. *Id.* Ms. Wagstaff  
11 asked plaintiff to request specific restrictions that would allow her to keep working with  
12 Mr. Bower and Mr. Leimkuehler, “and would not discuss a transfer at all.” *Id.* When plaintiff  
13 asked for clarification as to what Ms. Wagstaff would consider an appropriate restriction,  
14 Ms. Wagstaff said she would not give an example. *Id.* Plaintiff could visualize no restrictions  
15 other than a transfer away from Mr. Bower. *Id.* ¶ 21. “Mr. Bower’s voice, mannerisms, physical  
16 stature, age, looks, domineering personality, and behavior exasperate[ed] and trigger[ed]  
17 Plaintiff’s disability.” *Id.*

18           On March 27, 2014, plaintiff’s doctor wrote to Ms. Wagstaff that plaintiff “cannot  
19 be in the same proximity nor have any communication whatsoever with Mr. Jay Bower.” *Id.*  
20 ¶ 22. Until plaintiff was placed under a different manager, she would “continue[] to have  
21 numerous physical and emotional problems,” including “PTSD, severe depression and an acute  
22 anxiety with panic attacks.” *Id.* The work environment with Mr. Bower was “unhealthy[,]  
23 detrimental and not conducive [sic] to her continued recovery.” *Id.*

24           On April 7, 2014, defendant informed plaintiff that her transfer request was  
25 denied. *Id.* ¶ 23. Defendant “continues to deny a transfer and/or analyze whether or not any  
26 reasonable accommodation exists through the interactive process.” *Id.* At the hearing, the parties  
27 confirmed plaintiff no longer works for defendant.

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1 II. STANDARD

2 Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a complaint  
3 may be dismissed for failure to state a claim upon which relief can be granted. A court may  
4 dismiss “based on the lack of a cognizable legal theory or the absence of sufficient facts alleged  
5 under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.  
6 1990). In making this determination, the court must construe the complaint in the light most  
7 favorable to the plaintiff and accept as true the factual allegations of the complaint. *Erickson v.*  
8 *Pardus*, 551 U.S. 89, 93-94 (2007) (per curiam). This rule does not apply to “a legal conclusion  
9 couched as a factual allegation,” *Papason v. Allain*, 478 U.S. 265, 286 (1986) (citations omitted),  
10 nor to “allegations that contradict matters properly subject to judicial notice,” or to material  
11 attached to or incorporated by reference into the complaint. *Sprewell v. Golden State Warriors*,  
12 266 F.3d 979, 988-89 (9th Cir. 2001), *opinion amended on denial of reh’g*, 275 F.3d 1187.

13 III. ANALYSIS

14 A. Discrimination on the Basis of Disability

15 In order to make out a prima facie case of disability discrimination, a plaintiff must  
16 show she “(1) suffered from a disability, or was regarded as suffering from a disability; (2) could  
17 perform the essential duties of the job with or without reasonable accommodations, and (3) was  
18 subjected to an adverse employment action because of the disability or perceived disability.”  
19 *Wills v. Superior Court*, 195 Cal. App. 4th 143, 159-60 (2011) (citations omitted).

20 Under the California Fair Employment and Housing Act (FEHA), a mental  
21 disability is “any mental or psychological disorder or condition, such as an intellectual disability,  
22 organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a  
23 major life activity.” Cal. Gov’t Code § 12926(j)(1). “A mental or psychological disorder or  
24 condition limits a major life activity if it makes the achievement of the major life activity  
25 difficult.” Cal. Gov’t Code § 12926(j)(1)(B). Here, the plaintiff alleges a diagnosis of bipolar  
26 disorder. The FEHA specifically defines bipolar disorder as a mental disability within its  
27 protections. *Id.* § 12926.1(c).

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1 Defendant contends that because plaintiff's mental illness arose from her inability  
2 to get along with her supervisor and its only effect on her job was to render her unable to work  
3 with that supervisor, it does not give rise to a disability within the meaning of the FEHA, citing  
4 this court's decision in *Gliha v. Butte–Glenn Community College District*, No. 12-02781, 2013  
5 WL 3013660, at \*5 (E.D. Cal. June 14, 2013). In *Gliha*, this court stated that “an inability to get  
6 along with one's supervisor does not give rise to a disability within the meaning of either the  
7 FEHA or the ADA.” *Id.* The plaintiff in *Gliha* claimed discrimination and failure to  
8 accommodate on the basis of a perceived disability, passive aggressive disorder, with which he  
9 had never been diagnosed. *Id.* at \*3-4. In dismissing that plaintiff's claims this court ruled that  
10 passive aggressive disorder was not contemplated as a disability by the FEHA. *Id.* at \*5.

11 Defendant also cites *Hobson v. Raychem Corp.*, a case decided under the FEHA,  
12 as well as numerous other cases interpreting the ADA, for the proposition that an inability to get  
13 along with one's supervisor does not give rise to a disability. See Am. Mot. Dismiss 3, ECF No.  
14 6 (citing *Hobson v. Raychem Corp.*, 73 Cal. App. 4th 614, 628 (1999), *overruled on other*  
15 *grounds by Colmenares v. Braemer Country Club, Inc.*, 29 Cal. 4th 1019, 1031 (2003)). The  
16 *Hobson* court stated that “federal courts interpreting the ADA and all California courts  
17 interpreting the FEHA have uniformly declined to extend protection to persons whose alleged  
18 disabilities rendered them unable to perform a particular job even though they might have been  
19 physically able to work in a different position.” 73 Cal. App. 4th at 628; *See also Benson v. Cal.*  
20 *Corr. Peace Officers Ass'n*, No. 08-0886, 2010 WL 682285, at \*6 (E.D. Cal. Feb. 24, 2010)  
21 (holding the plaintiff did not show her work-related stress substantially limited her major life  
22 activity of working when she claimed “that the only obstacle to the performance of her job was  
23 the stress of reporting to [her supervisor.]”); *Wellington v. Lyon Cnty. Sch. Dist.*, 187 F.3d 1150,  
24 1154 (9th Cir. 1999) (“The inability to perform a single, particular job does not constitute a  
25 substantial limitation in the major life activity of working.” (citation and internal quotation marks  
26 omitted)); *Baker v. Cnty. of Merced*, No.10-2377, 2011 WL 2708936, at \*5 (E.D. Cal. July 12,  
27 2011) (“[T]he only indication is that [plaintiff's] stress and high blood pressure prevented her

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1 from performing a single, particular job with [defendant]. This is insufficient to allege a  
2 substantial limitation of a major life activity.”).

3 Plaintiff claims the facts of her case are more similar to *Kraus v. Shinseki*,  
4 846 F. Supp. 2d 936, 949 (N.D. Ill. 2012), a case brought based on a similar statute, 29 U.S.C.  
5 § 791 *et seq.* In *Kraus*, the court found there was a triable issue of fact as to whether plaintiff was  
6 substantially limited in a major life activity for purposes of establishing a claim of failure to  
7 reasonably accommodate, but not disability discrimination. *Id.* at 948-49. *Kraus* does not apply,  
8 even persuasively, to plaintiff’s disability discrimination claim.

9 Plaintiff also attempts to distinguish many of the cases holding an employee is not  
10 disabled if she cannot get along with her supervisor, because they relied on “working” as a major  
11 life activity and were decided under the ADA, not the FEHA. Opp’n 9, ECF No. 9. Courts “have  
12 looked to decisions and regulations interpreting the ADA to guide construction and application of  
13 the FEHA,” if the FEHA provision in question is similar to the one in the ADA. *Hastings v. Dep’t*  
14 *of Corr.*, 110 Cal. App. 4th 963, 973 n.12 (2003) (citations omitted). Here, the ADA requires a  
15 disability to “substantially” limit a major life activity, whereas the FEHA requires only that a  
16 major life activity be limited. *See Colmenares*, 29 Cal. 4th at 1031. The plaintiff claims she has  
17 alleged limitations of major life activities, including working, sleeping and thinking. Opp’n 7-8,  
18 ECF No. 9 (citing *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053, 1061 (9th Cir. 2005) (both  
19 sleeping and thinking major life activities under the ADA), *abrogated on other grounds by Univ.*  
20 *Tex. Sw. Med. Cntr. v. Nassar*, 133 S. Ct. 2517 (2013)).

21 Plaintiff’s arguments are misplaced. The California Supreme Court has ruled that  
22 “the FEHA requires employees to prove that they are qualified individuals under the statute just  
23 as the federal ADA requires.” *Green v. State*, 42 Cal. 4th 254, 258 (2007). It is true relevant  
24 ADA cases focus on the requirement that the disability substantially limit the major life activity  
25 of working. But in order to make out a prima facie case for disability discrimination under the  
26 FEHA, plaintiff must allege she could perform the essential duties of the job with or without  
27 reasonable accommodations. *See Wills*, 195 Cal. App. 4th at 159-60. Because the plaintiff’s  
28 claimed disability stems from her inability to get along with her supervisor, and the only effect it

1 had on her job was to render her unable to work with that supervisor, she has not and cannot  
2 allege she could perform the duties of her job with or without reasonable accommodations.

3 Plaintiff cites *Bagatti v. Department of Rehabilitation*, 97 Cal. App. 4th 344,  
4 359-61 (2002), to support her assertion that she is not required to prove she is a qualified  
5 individual. Opp'n 9-10, ECF No. 9. Like *Kraus*, *Bagatti* does not apply here. *Bagatti* addressed  
6 not a claim for discrimination, but one for failure to reasonably accommodate under § 12940(m).  
7 See *Green*, 42 Cal. 4th at 265. Another state appellate court has disapproved of *Baghatti's*  
8 analysis in *Nadaf-Rahrov v. Neiman Marcus Group, Inc.*, 166 Cal. App. 4th 952, 975 (2008)  
9 (“Under *Baghatti's* approach, however, an employer could be held liable for failing to  
10 accommodate an employee even if it engaged in a good faith interactive process and determined  
11 no accommodation was possible . . . . We disagree, therefore, with *Bagatti's* analysis.”) (citations  
12 omitted).

13 Because the plaintiff's alleged disability only precludes her from working for a  
14 particular supervisor, she does not state a claim for disability discrimination.

15 B. Failure to Accommodate

16 The FEHA makes it unlawful for an employer “to fail to make reasonable  
17 accommodation for the known physical or mental disability of an . . . employee.” Cal. Gov't  
18 Code § 12940(m). The elements of a failure to accommodate claim are “(1) the plaintiff has a  
19 disability under the FEHA, (2) the plaintiff is qualified to perform the essential functions of the  
20 position, and (3) the employer failed to reasonably accommodate the plaintiff's disability.”  
21 *Scotch v. Art Inst. of Cal.-Orange Cty., Inc.*, 173 Cal. App. 4th 986, 1009–10 (2009). The  
22 employer's obligation to provide disabled employees with a reasonable accommodation does not  
23 require it to provide “the best accommodation or the accommodation the employee seeks.”  
24 *Hanson v. Lucky Stores*, 74 Cal. App. 4th 215, 228 (1999).

25 Defendant asserts that plaintiff does not state a claim for failure to accommodate  
26 because the accommodation plaintiff requests, a transfer to a supervisor other than her own, is per  
27 se unreasonable. Mot. 5, ECF No. 6. Plaintiff argues she asked for two different  
28 accommodations: a change in supervisor or a transfer to an open, available job position. Opp'n



1 11, ECF No. 9. She also contends that defendant refused to allow her to apply for these positions.  
2 *Id.* at 12. She does not allege defendant prevented her from applying for any other jobs  
3 internally. In any event, the two accommodations plaintiff identifies are functionally identical: a  
4 transfer to a different position under a new supervisor.

5 Plaintiff also argues defendant should have offered other accommodations, such as  
6 “telecommuting, a longer leave of absence to allow [p]laintiff to obtain necessary treatment, [and]  
7 changes to supervisory method.” Opp’n 12, ECF No. 9. These allegations do not appear in her  
8 complaint, and she does not allege she raised these accommodations during her discussions with  
9 Ms. Wagstaff. *Id.* Rather, plaintiff relies on *Scotch*, 173 Cal. App. 4th at 1018, to support her  
10 argument that she must be allowed to present these potential accommodations now. In *Scotch*,  
11 the court determined that the plaintiff should be permitted to identify a specific, reasonable  
12 accommodation that he would have discovered during the interactive process had the employer  
13 engaged in the interactive process. *Id.* at 1018–19. Here, plaintiff has not alleged the reasonable  
14 accommodations she now suggests were unavailable to her at the time of the interactive process.  
15 In addition, as discussed below, defendant fulfilled its duty to engage in the interactive process.  
16 Plaintiff is not now permitted to raise these new potential accommodations for the first time.

17 In support of its argument that plaintiff’s requested accommodations were  
18 unreasonable as a matter of law, defendant cites *Gazzano v. Stanford Univ.*, No. 12-05742, 2014  
19 WL 794803, at \*4 n.59 (N.D. Cal. Feb. 27, 2014). In *Gazzano*, although the plaintiff did not raise  
20 a reasonable accommodation claim, the court noted, “even if the claim had been properly raised,  
21 the accommodation requested is *per se* unreasonable, and [the defendant] would not have been  
22 required to provide it.” *Id.* The *Gazzano* court cited the *EEOC Enforcement Guidance on*  
23 *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*,  
24 Question 33, which reads, “[a]n employer does not have to provide an employee with a new  
25 supervisor as a reasonable accommodation.” 1999 WL 33305876, at \*24 (Oct. 17, 2002).  
26 Defendant also relies on *Weiler v. Household Fin. Corp.*, 101 F.3d 519, 526-27 (7th Cir. 1996), in  
27 which the Seventh Circuit held that the ADA’s reasonable accommodation requirement does not

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1 require an employer to transfer a disabled employee to a different supervisor because the  
2 supervisor causes the employee stress and stress-related disorders.

3 Plaintiff argues that the relevant language in *Gazzano* is dicta and attempts to  
4 distinguish *Weiler* on the grounds that the employer in that case offered the plaintiff other  
5 positions, which the plaintiff refused. *Weiler*, 101 F.3d at 526. She also cites *Kennedy v. Dresser*  
6 *Rand Co.*, 193 F.3d 120, 122-23 (2d Cir. 1999), in which the court held that in the Second  
7 Circuit, “the question of whether a requested accommodation is a reasonable one must be  
8 evaluated on a case-by-case basis. A per se rule stating that the replacement of a supervisor can  
9 never be a reasonable accommodation is therefore inconsistent with our ADA case law.” *Id.* at  
10 122-23. But the *Kennedy* court also determined there is a presumption “that a request to change  
11 supervisors is unreasonable, and the burden of overcoming that presumption (i.e., of  
12 demonstrating that, within the particular context of the plaintiff’s workplace, the request was  
13 reasonable) therefore lies with the plaintiff.” *Id.* Even under the analysis set forth in *Kennedy*,  
14 plaintiff’s allegations in this case do not state a claim because she has not alleged facts that would  
15 overcome the presumption her requested accommodation was unreasonable.

16 Plaintiff also cites *Diaz v. Federal Express Corp.*, 373 F. Supp. 2d 1034 (C.D. Cal.  
17 2005), to argue it is an issue of fact whether a transfer to another supervisor is a reasonable  
18 accommodation. *Diaz* resolved a motion for summary judgment. Moreover, in *Diaz*, the court  
19 did not consider whether a transfer to a different supervisor was a reasonable accommodation.  
20 Rather, the employer had claimed the plaintiff was not qualified to perform the essential duties of  
21 his job because of problems with his attendance. *Id.* at 1060. The plaintiff contended his absences  
22 resulted from depression brought on by a hostile work environment involving his manager and  
23 second-level supervisor. *Id.* at 1061. The *Diaz* court held that this created a triable issue of fact  
24 as to whether the plaintiff was a qualified individual under the FEHA. *Id.* It also determined that  
25 the defendant’s knowledge of the plaintiff’s disability—and the defendant’s obligation to engage  
26 in the interactive process to identify whether a reasonable accommodation would have been  
27 possible—was a triable issue of fact. *Id.* at 1058-59, 1062.

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1 Here, unlike in *Diaz*, the court considers defendant’s motion to dismiss. The court  
2 assumes plaintiff’s allegations are true. Under these allegations, plaintiff is not a qualified  
3 individual and defendant knew about plaintiff’s alleged disability. As discussed more fully  
4 below, assuming the plaintiff’s allegations are true, the defendant fulfilled its duty to engage in an  
5 interactive process to determine if a reasonable accommodation existed.

6 Plaintiff does not present any relevant California case. Neither has the court  
7 located any California case other than *Gazzano*. Outside California, however, the overwhelming  
8 majority of courts have held a plaintiff may not couch a request for transfer as an accommodation  
9 for her disability, and many specifically hold that a transfer is an unreasonable accommodation as  
10 a matter of law. *See, e.g., Gaul v. Lucent Technologies, Inc.*, 134 F.3d 576, 581 (3d Cir. 1998)  
11 (employee’s proposed accommodation, transfer away from coworkers’ stress, unreasonable as  
12 matter of law); *Prichard v. Dominguez*, No. 05-0040, 2006 WL 1836017, at \*13-14 (N.D. Fla.  
13 June 29, 2006) (requested transfer accommodation under a different supervisor unreasonable as  
14 matter of law); *Ozlek v. Potter*, No. 05-0257, 2006 WL 964484, at \*5 (E.D. Pa. Apr. 13, 2006)  
15 (plaintiff’s only requested accommodation, transfer to position outside supervision of his  
16 management team, not reasonable); *Kolpas v. G.D. Searle & Co.*, 959 F. Supp. 525, 530 (N.D. Ill.  
17 1997) (“It is not a reasonable accommodation for an employer to . . . transfer an employee to a  
18 position under another supervisor.”); *Lewis v. Zilog, Inc.*, 908 F. Supp. 931, 948 (N.D. Ga. 1995)  
19 (“[p]laintiff’s request to accommodate . . . disability [by transfer] is unreasonable and not a  
20 reasonable accommodation under the ADA as a matter of law”); *Adams v. Alderson*, 723 F. Supp.  
21 1531, 1531-32 (D.D.C. 1989), *aff’d sub nom. Adams v. G.S.A.*, No. 89-5265, 1990 WL 45737  
22 (D.C. Cir. Apr. 10, 1990) (requested accommodation, transfer of plaintiff or supervisor or both,  
23 “is clearly not one reasonably expected of [the employer]”). *But see, e.g., Kennedy*, 193 F.3d at  
24 122-23 (declining to adopt this rule as a matter of law, but finding a rebuttable presumption that  
25 transfer is an unreasonable accommodation).

26 As noted, cases interpreting the ADA are persuasive authority for interpreting the  
27 FEHA. *See Hastings*, 110 Cal. App. 4th at 973 n.12. Based on the considerable persuasive  
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1 authority cited above, the plaintiff's requested accommodation, transfer to a new position under a  
2 new supervisor, is unreasonable as a matter of law.

3 Even without the benefit of the out-of-state cases described above, plaintiff has not  
4 stated a claim. Plaintiff's work environment could not have been modified or adjusted in a  
5 manner that would have enabled the plaintiff to perform the functions of her job. In *Nadaf-*  
6 *Rahrov*, the court held "an employer is liable under section 12940(m) for failing to accommodate  
7 an employee *only if* the work environment could have been modified or adjusted in a manner that  
8 would have enabled the employee to perform the essential functions of the job." 166 Cal. App.  
9 4th at 975 (emphasis added). Because the plaintiff here alleges the only possible accommodation  
10 would have been her transfer to a different supervisor, and has made no allegations that her  
11 workplace could have been modified or adjusted such that she could perform the essential  
12 functions of her job, she does not state a claim for failure to accommodate.

### 13 C. Failure to Engage in the Interactive Process

14 Under the FEHA, it is unlawful for an employer "to fail to engage in a timely,  
15 good faith, interactive process with the employee . . . to determine effective reasonable  
16 accommodations, if any, in response to a request for reasonable accommodation by an employee  
17 . . . with a known physical or mental disability or known medical condition." Cal. Gov't Code  
18 § 12940(n). "[T]he interactive process requires communication and good-faith exploration of  
19 possible accommodations between employers and individual employees with the goal of  
20 identify[ing] an accommodation that allows the employee to perform the job effectively." *Nadaf-*  
21 *Rahrov*, 166 Cal. App. 4th at 984 (citations omitted).

22 Defendant contends it engaged in the interactive process because (1) plaintiff  
23 refused to engage with the defendant to determine a reasonable accommodation and insisted on  
24 an accommodation that was per se unreasonable; and (2) plaintiff's allegations and the underlying  
25 communications the plaintiff incorporates by reference demonstrate that the defendant engaged in  
26 the interactive process. Mot. 6, ECF No. 6.

27 In support of its position, defendant has submitted four emails and one letter  
28 referenced in plaintiff's complaint, which it asks the court to consider under the doctrine of

1 incorporation by reference. Mot. 7, ECF No. 6. Wagstaff Decl. ¶¶ 3-7 & Exs. A-E, ECF No. 6-1  
2 to 6-6. Under this doctrine, the court may take into account “documents whose contents are  
3 alleged in the complaint and whose authenticity no party questions, but which are not physically  
4 attached to the [plaintiff’s] pleading.” *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1160  
5 (9th Cir. 2012) (quoting *Knieval v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2003)). *See also Gliha*,  
6 2013 WL 3013660, at \*3 (when considering motion to dismiss, court may consider, based on  
7 incorporation by reference doctrine, documents whose contents are alleged in complaint,  
8 including performance evaluations and documents regarding plaintiff’s dismissal). “A court ‘may  
9 treat such a document as part of the complaint, and thus may assume its contents are true for  
10 purposes of a motion to dismiss under Rule 12(b)(6).’” *Davis*, 691 F.3d at 1160 (quoting *United*  
11 *States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003)).

12           Plaintiff does not challenge the authenticity of the documents defendant seeks to  
13 incorporate by reference. Instead, she argues the doctrine of incorporation by reference is meant  
14 only to “prevent a plaintiff with a legally deficient claim from surviving a motion to dismiss  
15 simply by failing to attach a dispositive document on which it relied.” Opp’n 15, ECF No. 9  
16 (internal quotation marks and alterations omitted) (citing *Pension Benefit Guar. Corp. v. White*  
17 *Consolidated Industries, Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993)). Courts in this circuit have  
18 not limited the application of the incorporation by reference doctrine to the situation plaintiff  
19 suggests. *See Knieval*, 393 F.3d at 1076-77 (incorporating by reference web pages surrounding a  
20 photograph at issue in defamation action); *Aviation Co. LLC v. Bank of Am., Corp.*, No. 13-  
21 00162, 2013 WL 5707329, at \*4 n.2 (D. Haw. Oct. 18, 2013) (incorporating by reference back of  
22 check when front of check was attached to complaint). Ninth Circuit law permits consideration  
23 of the materials defendant submits.

24           The complaint includes allegations that show Ms. Wagstaff, from defendant’s  
25 human resources department, repeatedly attempted to engage the plaintiff in an interactive  
26 process. Compl. ¶¶ 13, 16, 18, 20, 23, ECF No. 1-1. Plaintiff alleges Ms. Wagstaff asked to have  
27 a live conversation with her, while plaintiff attempted to communicate only through email. *Id.*

28 //

1 ¶¶ 13, 14, 16, 20. The plaintiff alleges Ms. Wagstaff asked plaintiff to request specific  
2 restrictions that would allow her to keep working with her supervisors. *Id.* ¶ 20.

3 A review of the documents incorporated by reference confirms the conclusion that  
4 defendant attempted to explore options for accommodation of plaintiff. In her email dated  
5 March 4, referenced in the complaint at paragraph 18, Ms. Wagstaff attempted to engage plaintiff  
6 in a conversation about her disability and requests for accommodation:

7 The interactive process involves a two-way communication  
8 between an employer and an employee like you regarding potential  
9 job assistance to help you to perform your job. While you have  
10 stated that the specific accommodation you want is to be placed into  
11 a new job under new management, the interactive process requires  
12 more information from you. This does not mean that we need or  
want your detailed medical history or condition; we do need  
information about what makes [your supervisor's] behavior and  
interactions problematic for you so we can talk about possible  
accommodations—a different job or something else—that will  
allow you to return to work.

13 Wagstaff Decl. Ex. C at 2, ECF No. 6-4. In her letter dated March 27, referenced in the  
14 complaint in paragraph 22, Ms. Wagstaff proposed three possible courses:

15 [I]f you wish to remain employed with U.S. Bank, you have the  
16 following options: (1) continue your disability leave, consistent  
17 with U.S. Bank's policies and procedures[;] (2) return to work in  
18 your current position, with or without a reasonable accommodation,  
upon your physician's releasing you to return to work; or (3) apply  
19 for vacant positions with U.S. Bank. As you know, our action plan  
would ordinarily prevent you from being considered for other  
positions, but we have waived that condition in order to permit you  
to apply for other positions.

20 *Id.* Ex. E at 2, ECF No. 6-6.

21 Plaintiff contends that her reluctance to participate in live conversations was a  
22 result of her mental health condition. Opp'n 14-15, ECF No. 9 (citing *Bultemeyer v. Fort Wayne*  
23 *Cnty. Sch.*, 100 F.3d 1281, 1285 (7th Cir. 1996)). In *Bultemeyer*, the court stated that “[i]n a case  
24 involving an employee with mental illness, the communication process becomes more difficult. It  
25 is crucial that the employer be aware of the difficulties, and help the other party determine what  
26 specific accommodations are necessary.” *Id.* at 1285 (citations omitted). The allegations here,  
27 however, show defendant met this requirement by suggesting possible courses forward.

28 ////

1 Plaintiff also appears to suggest that defendant should have engaged in the  
2 interactive process with someone other than her. Opp’n 14-15, ECF No. 9 (citing *Claudio v.*  
3 *Regents of the Univ. of Cal.*, 134 Cal. App. 4th 224, 247 (2005) and *Hanson v. Lucky Stores, Inc.*  
4 74 Cal. App. 4th 215 (1999)). However, the cases plaintiff cites do not require the employer to  
5 engage with someone other than the employee, but rather allow the practice in certain limited  
6 circumstances. See *Claudio*, 134 Cal. App. 4th at 247 (“[O]rdinarily the employee cannot force  
7 the employer to go through the employee’s attorney for the interactive process, [but] here there  
8 were unusual circumstances.”); *Hanson*, 74 Cal. App. 4th at 229 (determining employer  
9 sufficiently engaged in interactive process where employer discussed accommodations with  
10 employee’s doctor and specialists). Unlike the plaintiff in *Claudio*, plaintiff here did not identify  
11 or request that defendant engage with an attorney.

12 Construing the allegations of the complaint and the documents incorporated by  
13 reference in the light most favorable to plaintiff, it may be an issue of fact whether the plaintiff  
14 refused to engage with defendant to determine a reasonable accommodation; however, defendant  
15 fulfilled its duty to engage in a timely, good faith interactive process with plaintiff for the  
16 purposes of determining effective reasonable accommodations. Plaintiff’s claim for failure to  
17 engage in the interactive process is dismissed.

#### 18 IV. LEAVE TO AMEND

19 Federal Rule of Civil Procedure 15(a)(2) provides “[t]he court should freely give  
20 leave [to amend a pleading] when justice so requires,” and the Ninth Circuit has “stressed Rule  
21 15’s policy of favoring amendments.” *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149,  
22 1160 (9th Cir. 1989). “In exercising its discretion [regarding granting or denying leave to amend]  
23 ‘a court must be guided by the underlying purpose of Rule 15—to facilitate decision on the merits  
24 rather than on the pleadings or technicalities.’” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183,  
25 186 (9th Cir. 1987) (quoting *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981)).  
26 However, “the liberality in granting leave to amend is subject to several limitations. Leave need  
27 not be granted where the amendment of the complaint would cause the opposing party undue  
28 prejudice, is sought in bad faith, constitutes an exercise in futility, or creates undue delay.” *Ascon*

1 *Properties*, 866 F.2d at 1160 (internal citations omitted). In addition, a court should look to  
2 whether the plaintiff has previously amended the complaint, as “the district court’s discretion is  
3 especially broad ‘where the court has already given a plaintiff one or more opportunities to amend  
4 [its] complaint.’” *Id.* at 1161 (quoting *Leighton*, 833 F.2d at 186 n.3).

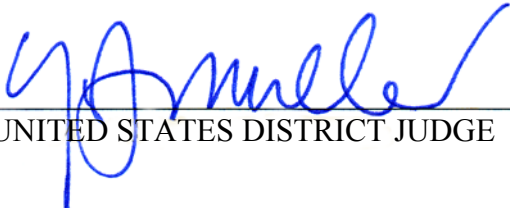
5 Here the court grants plaintiff leave to amend, if she is able to do so consonant  
6 with Federal Rule of Civil Procedure 11. To state a claim for discrimination on the basis of a  
7 disability under the FEHA, the plaintiff must allege she “was subjected to an adverse employment  
8 action because of the disability or perceived disability.” *Wills*, 195 Cal. App. 4th at 159-60. The  
9 complaint did not allege an adverse employment action, but, as the parties confirmed at hearing,  
10 defendant terminated plaintiff after the complaint was filed. In addition, plaintiff informed the  
11 court of her intention, should she be granted leave to amend, to allege facts to show defendant’s  
12 decision to terminate her was motivated by her alleged disability. For these reasons, and because  
13 the court perceives no prejudice or bad faith, plaintiff is granted leave to amend her complaint.

14 V. CONCLUSION

15 In each of the three causes of action alleged, plaintiff has not stated a claim upon  
16 which relief can be granted. The defendant’s motion to dismiss is GRANTED with leave to  
17 amend. The plaintiff shall file an amended complaint, if at all, no later than twenty-one days  
18 from the date of this order.

19 IT IS SO ORDERED.

20 DATED: January 13, 2015.

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23 UNITED STATES DISTRICT JUDGE  
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