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

LUISA C. WILDEY.

Plaintiff,

vs.

STATE OF CALIFORNIA, et al.,

Defendants.

CASE NO. 07cv1154 JM(JMA)

**ORDER GRANTING MOTION TO
DISMISS; GRANTING MOTION TO
STRIKE; GRANTING LEAVE TO
AMEND**

Defendant Sharp Memorial Hospital moves to dismiss Plaintiff's disability discrimination complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and to strike the Second Amended Complaint's ("SAC") request for summary judgment. Plaintiff Luisa Wildey opposes the motion to dismiss but not the motion to strike. Pursuant to Local Rule 7.1(d)(1), this matter is appropriate for decision without oral argument. For the reasons set forth below, the court grants the motion to dismiss, grants the motion to strike, and grants 20 days leave to amend from the date of entry of this order.

BACKGROUND

On October 23, 2009 Plaintiff filed the operative SAC broadly alleging two claims against Defendants for disability discrimination in violation of the Rehabilitation Act of 1973 and the

1 Americans with Disabilities Act (“ADA”) and a claim for constructive fraud. (SAC ¶¶106-116).¹
2 Defendants are the Rehabilitation Appeals Board, Health and Human Services Agency, Department
3 of Rehabilitation, Client Assistance Program, the Dayle McIntosh Center for the Disabled, Access for
4 Independence, Sharp Memorial Hospital, Workers’ Compensation Appeals Board, and Bureau of
5 Rehabilitation. (SAC at p.1). In addition to these Defendants identified in the caption, Plaintiff also
6 purports to identify about 15 individual defendants in the body of the complaint. (SAC ¶¶10-63).

7 Plaintiff is a qualified disabled individual. (SAC ¶1). In 1992, Plaintiff suffered a job related
8 spinal cord injury that caused the loss of neurological systems “that prevents her from performing
9 substantial limitation of a major life activity, such as performing manual tasks, walking, and working.”
10 (SAC ¶4). Plaintiff receives disability benefits pursuant to 9 U.S.C. §7051(C). (SAC ¶71).

11 On February 4, 2004 Plaintiff applied for vocational rehabilitation services with the State of
12 California Department of Rehabilitation (“CDR”). (SAC ¶70). On or about April 8, 2004 the CDR
13 referred Plaintiff to the Sharp-Work-Re-entry Program for Plaintiff to undergo a three day vocational
14 assessment. On June 4, 2004 Plaintiff requested accommodation to the three day vocational
15 assessment because “three consecutive testing days was going to be a painful experience without
16 reasonable accommodations due to her spine condition.” (SAC ¶72). Plaintiff apparently received
17 some accommodation in that the vocational assessment was spread out over a period of time, and not
18 conducted over three consecutive days. (SAC ¶¶72, 73). Plaintiff only attended two days out of the
19 three day assessment period. (SAC ¶73). During the testing procedures that Plaintiff did attend, she
20 allegedly suffered severe pain. (SAC ¶52).

21 In or about October 2004 Plaintiff determined that she could operate a home-based business,
22 raising Alpacas for profit. (SAC ¶76). Plaintiff prepared and submitted a business plan to the
23 Department of Rehabilitation (“DOR”). (SAC ¶76). Apparently, Plaintiff believed that she could
24 obtain a \$350,000 loan or grant from DOR to commence her Alpaca business. (SAC ¶¶88, 89; Oppo
25 at p.6, ¶15). On or about June 2, 2006, Plaintiff met with the DOR District Director and was informed
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27 ¹ Subject matter jurisdiction in this case is based upon federal question jurisdiction, 28 U.S.C.
28 §1331, and the court allegedly has supplemental jurisdiction over the breach of contract claims, 28
U.S.C. §1337. The court declines to reach Plaintiff’s state law breach of contract claims until she
states a valid federal claim.

1 that she could either meet with a DOR psychologist for testing or that her case would be closed. (SAC
2 ¶94). In mid-June Plaintiff received a letter informing her that the June 2, 2006 meeting was an
3 Administrative Review meeting and that if she wanted to apply for further Administrative Review or
4 Mediation, she had to complete the enclosed forms within 30 days. (SAC ¶96). Plaintiff allegedly
5 exhausted all administrative remedies. (SAC ¶101).

6 Based upon the above generally described conduct Plaintiff alleges claims for violation of the
7 Rehabilitation Act, violation of the ADA and constructive fraud. The claim for constructive fraud is
8 apparently premised on Plaintiff's belief that loans or grants were available from DOR to finance her
9 planned alpaca business. (SAC ¶112). Plaintiff alleges that she was deceived into believing that such
10 financial assistance was available and that she learned on January 31, 2006 that such assistance was
11 not available. Id.

12 On April 2, 2008, the court granted defendants Department of Rehabilitation and Department
13 of Industrial Relations' motion to dismiss the First Amended Complaint with leave to amend. Sharp
14 now moves to dismiss all claims in the SAC.

DISCUSSION

16 | Legal Standards

17 Federal Rule of Civil Procedure 12(b)(6) dismissal is proper only in "extraordinary" cases.
18 United States v. Redwood City, 640 F.2d 963, 966 (9th Cir. 1981). Courts should grant 12(b)(6) relief
19 only where a plaintiff's complaint lacks a "cognizable legal theory" or sufficient facts to support a
20 cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). Courts
21 should dismiss a complaint for failure to state a claim when the factual allegations are insufficient "to
22 raise a right to relief above the speculative level." Bell Atlantic Corp v. Twombly, __ 550 U.S. __, 127
23 S.Ct. 1955 (2007) (the complaint's allegations must "plausibly suggest[]" that the pleader is entitled
24 to relief). The defect must appear on the face of the complaint itself. Thus, courts may not consider
25 extraneous material in testing its legal adequacy. Levine v. Diamanthuset, Inc., 950 F.2d 1478, 1482
26 (9th Cir. 1991). The courts may, however, consider material properly submitted as part of the
27 complaint. Hal Roach Studios, Inc. v. Richard Feiner and Co., 896 F.2d 1542, 1555 n.19 (9th Cir.
28 1989).

1 Finally, courts must construe the complaint in the light most favorable to the plaintiff. Concha
2 v. London, 62 F.3d 1493, 1500 (9th Cir. 1995), cert. dismissed, 116 S. Ct. 1710 (1996). Accordingly,
3 courts must accept as true all material allegations in the complaint, as well as reasonable inferences
4 to be drawn from them. Holden v. Hagopian, 978 F.2d 1115, 1118 (9th Cir. 1992). However,
5 conclusory allegations of law and unwarranted inferences are insufficient to defeat a Rule 12(b)(6)
6 motion. In Re Syntex Corp. Sec. Litig., 95 F.3d 922, 926 (9th Cir. 1996).

7 **The Motion to Dismiss**

8 In order to state either an ADA or Rehabilitation Act claim, Plaintiff must satisfy the elements
9 of each statute:

10 To prove a public program or service violates Title II of the ADA, a plaintiff
11 must show: (1) he is a “qualified individual with a disability”; (2) he was either
12 excluded from participation in or denied the benefits of a public entity's services,
13 programs or activities, or was otherwise discriminated against by the public entity; and
14 (3) such exclusion, denial of benefits, or discrimination was by reason of his disability.
15 See 42 U.S.C. § 12132 (emphasis added); Does 1-5 v. Chandler, 83 F.3d 1150,
16 1154-1155 (9th Cir.1996). Similarly, under Section 504 of the Rehabilitation Act, a
plaintiff must show: (1) he is an “individual with a disability”; FN3 (2) he is
“otherwise qualified” to receive the benefit; (3) he was denied the benefits of the
program solely by reason of his disability; and (4) the program receives federal
financial assistance.See 29 U.S.C. § 794 (emphasis added); Bonner v. Lewis, 857 F.2d
559, 562-63 (9th Cir.1988); Doherty v. Southern College of Optometry, 862 F.2d 570,
573 (6th Cir.1988).

17 Weinrich v. Los Angeles County Metropolitan Transp. Auth., 114 F.3d 976, 978 (9th Cir. 1997).
18 Furthermore, a “plaintiff proceeding under Title II of the ADA must, similar to a Section 504 plaintiff,
19 prove that the exclusion from participation in the program was ‘solely by reason of disability.’” Id.
20 (quoting Does 1-5 v. Chandler, 83 F.3d 1150, 1155 (9th Cir. 1996)).

21 Sharp moves to dismiss the complaint on the ground that Plaintiff cannot allege that she was
22 harmed by any of Sharp’s conduct. In the Decision of the Rehabilitation Appeals Board, the court
23 noted that District Administrator Compton

24 testified it became increasingly difficult to make any progress in appellant’s case
25 because every meeting held became a contention as to whether the Department was
26 following regulations. She objected to any request made of her by the Department; she
27 seemed to believe the request was either inappropriate, unnecessary, or not applicable
to her. He testified the Department agreed to set aside and ignore the evaluation done
by Sharp since appellant had concerns about its validity, but in doing so, another
evaluation to determine her aptitude and interest was necessary.

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1 (SAC Exh. 5).²

2 Here, the court grants Sharp's motion for two reasons. First, as set forth by Sharp, Plaintiff
3 fails to adequately identify how she was harmed by Sharp's conduct. Plaintiff requested that Sharp,
4 the contractor selected to perform the vocational evaluation, accommodate her disability. Sharp
5 spread the three day assessment out over a period of time in order to accommodate Plaintiff's
6 disability. Sharp never completed the assessment. Further, the report prepared by Sharp was not
7 considered in determining Plaintiff's eligibility for benefits and therefore, as currently pled, Plaintiff
8 fails to state a claim. Second, Plaintiff fails to adequately identify how Sharp allegedly failed to
9 comply with its obligations under the Rehabilitation Act or the ADA. Such allegations are
10 indispensable in stating either a Rehabilitation Act or ADA claim against Sharp. Absent such basic
11 allegations, Plaintiff fails to state a claim. The court grants Plaintiff 20 days leave to amend from the
12 date of entry of this order to file a Third Amended Complaint.

13 Finally, the court grants Sharp's unopposed motion to strike the SAC's request that the court
14 grant her summary judgment. As Plaintiff's requests is not one made under Federal Rule of Civil
15 Procedure 56, the request is stricken.

16 In sum, the court grants the motion to dismiss, grants the motion to strike, and grants Plaintiff
17 leave to amend.

18 **IT IS SO ORDERED.**

19 DATED: February 2, 2009



20
21 Hon. Jeffrey T. Miller
United States District Judge

22 cc: All parties

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28 ² Both parties agree that the court may properly take judicial notice of the decision by the
Rehabilitation Appeals Board.