



1 alleging claims against Defendants for disability discrimination in violation of the Rehabilitation Act  
2 of 1973 and the Americans with Disabilities Act (“ADA”), violation of the Civil Rights Act, 42 U.S.C.  
3 §1983, and a claim for constructive fraud. Defendants are the Rehabilitation Appeals Board, Health  
4 and Human Services Agency, Department of Rehabilitation, Client Assistance Program, the Dayle  
5 McIntosh Center for Disabled, Access for Independence, Workers Compensation Appeals Board,  
6 Bureau of Rehabilitation, and Sharp Memorial Hospital. In addition to the defendants identified in  
7 the caption, Plaintiff also purports to identify about fifteen individual defendants in the body of the  
8 complaint but has failed to identify those individuals in the caption as required by Fed.R.Civ.P. 10(a).

9 The State of California, on behalf of all named government defendants, moves to dismiss  
10 Plaintiff’s TAC pursuant to Federal Rule of Civil Procedure Rule 8(a)(2) for failure to set forth a short  
11 and plain statement of the claim and for summary judgment pursuant to Federal Rule of Civil  
12 Procedure 56. Defendant State of California also moves to dismiss the constructive fraud and  
13 discrimination claims against the DOR and DIR as barred by judicial immunity, discretionary  
14 immunity, and failure to comply with the Tort Claims Act.

15 Background

16 Wildey is a qualified disabled individual. In 1992, Wildey suffered a job related spinal cord  
17 injury leading to debilitating pain and other related medical problems. (TAC Exh. 1, Social Security  
18 Disability Decision). Plaintiff receives disability benefits pursuant to 9 U.S.C. 7051(c).

19 On February 4, 2004, Wildey applied for vocational rehabilitation services with the DOR.  
20 (TAC Exh. 5, Rehabilitation Appeals Board Decision). Wildey indicated she suffered from several  
21 medical problems, including two brain tumors, a seizure disorder, and insulin dependant diabetes. At  
22 the time, the DOR asked Wildey to attend a medical evaluation to assess her ability to work. (TAC  
23 at p.23). The DOR referred Wildey to Sharp’s Work Re-Entry Program for a three-day vocational  
24 assessment. (TAC at p.23, ¶54.) Because Wildey felt that a consecutive three day assessment would  
25 be too burdensome on account of her severe neurological pain disorders, Sharp agreed to modify the  
26 testing schedule to meet her disability needs. The three day testing schedule was changed to every  
27 other day, rather than three consecutive days. (TAC Exhibit 5 at p.3). Wildey attended the first two  
28 days of the evaluation, but was unable to attend the final day on the advice of her doctor. (TAC at p.

1 25, ¶55.) Sharp prepared an evaluation (“Sharp Report”) noting Wildey’s inability to complete the  
2 assessment because of complaints of pain and indicating her unsuitability for any vocation other than  
3 specialized home-based work.

4 On February 15, 2005, Wildey met with the DOR and proposed starting an alpaca farming  
5 business. (TAC Exh. 5 at p. 3). DOR informed Wildey of its requirement that she have at least one-  
6 year of paid work experience in the field before she could start such a business. Id. Rehabilitation  
7 Counselor Johnson informed Wildey that she did not qualify for assistance from DOR because she did  
8 not have formal training or education and did not have the one year experience as required by  
9 California Code of Regulations §7136.5(b). Wildey questioned the validity of this policy and pursued  
10 her claim further with the DOR. Id.

11 On February 15, 2005 Plaintiff met with Rehabilitation Supervisor Sally Garrett. Wildey  
12 continued to argue in favor of the alpaca breeding business proposal, arguing that she would apply her  
13 office work experience and hire employees to raise the alpaca. (Garret Decl. ¶8). In April, 2005  
14 Wildey submitted her alpaca business plan. On April 22, 2005 Garret again informed Wildey that the  
15 DOR would not recommend the alpaca business plan for approval because she lacked the required  
16 work experience and education as required by the regulations. (Garrett Decl. ¶10). Wildey continued  
17 to dispute that education and experience was a prerequisite for DOR’s assistance in starting an alpaca  
18 breeding business.

19 On May 6, 2005, the DOR, acting though Supervisor Garrett, authorized funding for a small  
20 business plan review, and referred Wildey to a business consultant, Oduro Takyi. (Id. at p. 4). A  
21 Short time later, both Wildey and Takyi contacted Garrett to say that they could not work with each  
22 other. (Garrett Decl. ¶12). The DOR informed Wildey that it would not be able to provide her with  
23 the funds to purchase the alpacas, but that it could help her fund other such related activities as  
24 marketing, advertising, and obtaining a business license. The DOR maintains that Wildey was  
25 uncooperative with the business consultant assigned to assist her, failed to complete the requisite  
26 financial forms, and otherwise failed to comply with the DOR’s requirements. (Id. at p. 5). When  
27 DOR offered to send Wildey’s business plan to another consultant for review, Wildey objected. She  
28 insisted that the consultant must have agricultural experience and at least three references. (Garrett

1 Decl. ¶13, 14).

2 Garrett located two consultants for Wildey to talk to, one of whom supplied two references and  
3 had experience reviewing agriculture and farming plans. On September 7, 2005 Garrett sent a letter  
4 to Wildey providing her with the contact information for the consultants. On September 20, 2005  
5 Wildey wrote Garret and informed her that the business consultant did not have the proper  
6 qualifications and that the consultants “mutilated” her business plan. (Garrett Decl. ¶15, 16). In this  
7 letter, Wildey said that she had decided to pursue the purchase of an Alpha Graphics copy business  
8 franchise and would require a grant of about \$500,000 to purchase the franchise and for start up costs.  
9 (Garrett Decl. ¶16).

10 On October 4, 2005 Garrett informed Wildey that the DOR could not provide her with the  
11 funds to purchase an Alpha Graphics franchise because, pursuant to 9 CCR §7137 and 9 CCR §7149,  
12 the purchase of a franchise or construction of a new business was outside the scope of rehabilitation  
13 services that the DOR provides. (Garrett Decl. ¶17). Wildey responded to this letter requesting “small  
14 business forms” from the department, including forms related to established small businesses. (Garrett  
15 Decl. ¶18). As these forms did not apply to Wildey’s situation because she did not already have an  
16 established small business, Garrett believed that Wildey did not understand the instructions that were  
17 given to her. Id.

18 On November 14, 2005 Garrett requested that Wildey come in for a face-to-face meeting with  
19 her and her supervisor, Charles Compton, to discuss her case. Garrett sent this letter because she felt  
20 that Wildey did not seem to understand the DOR’s position and she believed that the issues could be  
21 better addressed in person. Garrett also wanted her supervisor present because of Wildey’s complaints  
22 concerning the handling of her case. (Garrett Decl. 19). At the November 22, 2005 meeting, Wildey  
23 claimed that DOR had lied to her and was seeking a way not to fund her self-employment plan.  
24 (Compton Decl. ¶4). Supervisor Compton explained to Wildey that they no longer had a current plan  
25 to evaluate because Wildey had demanded the return of her plan and did not allow DOR to keep a  
26 copy of the plan. Id. He again explained that Wildey had to submit a completed business plan and  
27 have it reviewed by a consultant before the DOR could make a final decision. Wildey then  
28 complained about the referred business consultants, noting that the first consultant was impossible to

1 work with and that the second was a “minority” and believed that he would hire only African  
2 Americans. (Compton Decl. ¶5; Garrett Decl. ¶22). Compton informed Wildey that her case would  
3 be closed if she refused to cooperate with the DOR and did not submit a business plan for review. Id.  
4 Wildey then pulled out the alpaca plan and the franchise plan and asked Compton to choose which  
5 plan the DOR would approve. Compton then explained that DOR would not pick and choose between  
6 plans but that she would have to decide which one to submit. Wildey then submitted the alpaca  
7 breeding plan. (Compton Decl. ¶6; Garrett Decl. ¶23).

8 After the November 22, 2005 meeting, Compton became concerned about Wildey’s ability to  
9 process verbal information because she had difficulty comprehending the information provided to her  
10 in letters and meetings. Wildey repeatedly brought up the same issues and questions despite the fact  
11 that DOR had responded to her concerns. (Compton Decl. ¶7-9). Compton believed that her  
12 communication and comprehension difficulties would significantly hinder her in running a business  
13 and believed that Wildey should undergo further testing regarding her neurological impairments in  
14 order to evaluate her qualifications for self-employment. (Compton Decl. 9). Garrett agreed with this  
15 decision. (Garrett Decl. ¶24).

16 Compton also reviewed the alpaca business plan and noted that the plan was incomplete. For  
17 instance, Wildey had not completed the marketing plan section, indicating that it was “not applicable.”  
18 He also identified several items where Wildey failed to identify the cost of the items and she did not  
19 complete the forecast of annual income and expense for the proposed business. (Compton Decl. 10).  
20 Wildey was then informed that additional information was required to assess the business plan.

21 On February 1, 2006 Compton, Garrett, Wildey, and Wildey’s daughter met to discuss the  
22 alpaca business plan. Compton explained that the business plan contained obvious mistakes and did  
23 not accurately indicate forecasted income and expenses. When Compton explained the significance  
24 of these problems, Wildey had difficulty understanding these concepts. Wildey requested two months  
25 to correct the business plan. (Compton Decl. ¶12; Garrett Decl. ¶25).

26 In April 2006, Garrett contacted Wildey to remind her that two months had passed and that she  
27 had not submitted the additional information requested to assess her business plan. Garrett also  
28 informed Wildey that based on the lack of progress, her apparent difficulty completing the business

1 plan, and the failure to complete the vocational evaluation, she and Compton believed that further  
2 testing would be appropriate to determine Wildey's current aptitudes and interests. (Garrett Decl.  
3 ¶27). On May 2, 2006 Garrett sent Wildey a letter indicating that if she did not attend further testing  
4 that her case would be closed as they had no further options for proceeding with the case. (Garrett  
5 Decl. ¶27).

6 On May 5, 2006 Wildey sent a ten page letter to Compton requesting an administrative review  
7 of her case. When supervisor Compton was unable to determine the nature of Wildey's request for  
8 administrative review, he invited Wildey to set up a meeting to discuss her case. (Compton Decl.  
9 ¶14). On June 1, 2006 Wildey and her husband met with Garrett and Compton. Compton expressed  
10 his concern that Wildey was not willing to focus on pursuing a realistic vocational goal and asked her  
11 to attend testing with a Vocational Psychologist in order to assess her current abilities, interests and  
12 aptitudes. (Compton Decl. ¶15). The request was made pursuant to 9 CCR §7029.9 which states that  
13 applicants have the responsibility to participate and cooperate to provide information needed to  
14 determine eligibility for services, level of significance of disability, and whether the individual's  
15 chosen employment outcome is consistent with the individuals strengths, priorities, concerns, abilities,  
16 capabilities and interests. (Compton Decl. ¶15). Wildey became angry because she believed that  
17 Compton and Garrett were suggesting that she suffered from mental impairments. (Compton Decl.  
18 ¶16; Garrett Decl. ¶28). Wildey was also informed that if she did not agree to complete vocational  
19 testing, her file would be closed because Wildey had been unable or unwilling to submit a completed  
20 business plan for review after two years. Id.

21 On June 5, 2006 Compton and Garrett jointly decided to close Wildey's file because she  
22 refused to participate with the requested psychological testing, did not submit a completed buisness  
23 plan, and refused to participate with the agency in developing a viable self employment plan.  
24 (Compton Decl. ¶17; Barrett Decl. ¶29).

25 On or about June 28, 2006, Wildey requested a "Fair Hearing" before the Rehabilitation  
26 Appeals Board ("Appeals Board"). (TAC Exh. 5 at p.6). Wildey claimed, among other things, that  
27 the DOR failed to assist her which resulted in an "undue delay" in services, that her case was closed  
28 under duress, that she had fully cooperated with the DOR, and that the DOR specifically looked for

1 errors in her business plan in order to thwart her goal of self-employment. Id.

2 At the hearing before the Appeals Board on January 4, 2007, Wildey, Garrett and Compton  
3 provided testimony about the case and events leading to the termination of services. The Appeals  
4 Board issued a written decision in favor of the DOR, concluding that the closing of Wildey’s case was  
5 justified under Title 9, the California Code of Regulations, and other applicable laws. Following the  
6 hearing, the DOR offered to reopen Wildey’s case if she would agree to cooperate and undergo  
7 another vocational assessment, but Wildey refused. (Compton Decl. ¶20, 21).

8 On June 26, 2007, Wildey initiated the instant federal complaint, claiming, among other things,  
9 that the DOR acted in concert with Sharp and the other named governmental agencies to discriminate  
10 against her based upon her disability. Following the dismissal of Plaintiff’s original, first amended,  
11 and second amended complaints, on June 16, 2009. Plaintiff filed the operative TAC. On October 20,  
12 2009, the court provided notice to the parties that it was converting the pending motions to dismiss  
13 to motions for summary judgment. The parties have submitted additional briefing and this order  
14 ensues.

## 15 DISCUSSION

### 16 Legal Standards

#### 17 Summary Judgment

18 A motion for summary judgment shall be granted where “there is no genuine issue as to any  
19 material fact and . . . the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P.  
20 56(c); Prison Legal News v. Lehman, 397 F.3d 692, 698 (9th Cir. 2005). The moving party bears the  
21 initial burden of informing the court of the basis for its motion and identifying those portions of the  
22 file which it believes demonstrates the absence of a genuine issue of material fact. Celotex Corp. v.  
23 Catrett, 477 U.S. 317, 323 (1986). There is “no express or implied requirement in Rule 56 that the  
24 moving party support its motion with affidavits or other similar materials negating the opponent’s  
25 claim.” Id. (emphasis in original). The opposing party cannot rest on the mere allegations or denials  
26 of a pleading, but must “go beyond the pleadings and by [the party’s] own affidavits, or by the  
27 ‘depositions, answers to interrogatories, and admissions on file’ designate ‘specific facts showing that  
28 there is a genuine issue for trial.’” Id. at 324, 106 S. Ct. At 2553 (citation omitted). The opposing

1 party also may not rely solely on conclusory allegations unsupported by factual data. Taylor v. List,  
2 880 F.2d 1040, 1045 (9th Cir. 1989).

3 The court must examine the evidence in the light most favorable to the non-moving party.  
4 United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Any doubt as to the existence of any issue  
5 of material fact requires denial of the motion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255  
6 (1986). On a motion for summary judgment, when ““the moving party bears the burden of proof at  
7 trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence  
8 were uncontroverted at trial.”” Houghton v. South, 965 F.2d 1532, 1536 (9th Cir. 1992) (emphasis  
9 in original) (quoting International Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1264-65 (5th Cir.  
10 1991), cert. denied, 502 U.S. 1059 (1992)).

#### 11 The Rehabilitation Act and ADA

12 To establish a prima facie case of disability based discrimination under the Americans with  
13 Disabilities Act (“ADA”) and the Rehabilitation Act, a plaintiff must establish all elements of each  
14 statute. To prove a public program or service violates Title II of the ADA, a plaintiff must show:

15 (1) he/she is a qualified individual with a disability; (2) he/she was either excluded from  
16 participation in or denied the benefits of a public entity’s services, programs or activities, or  
17 was otherwise discriminated against by the public entity; and (3) such exclusion, denial of  
18 benefits, or discrimination was by reason of his disability.

19 42 U.S.C. § 12132; Does 1-5 v. Chandler, 83 F.3d 1150, 1154-1155 (9th Cir. 1996.) Similarly,  
20 under Section 504 of the Rehabilitation Act, a plaintiff must show:

21 (1) he/she is an individual with a disability; (2) he/she is otherwise qualified to receive the  
22 benefit; (3) he/she was denied the benefits of the program solely by reason of his disability;  
23 and (4) the program receives federal financial assistance.

24 29 U.S.C. § 794; Weinrich v. Los Angeles County Metropolitan Transp. Auth., 114 F.3d 976, 978 (9th  
25 Cir. 1997). Furthermore, a plaintiff proceeding under Title II of the ADA must, similar to a Section  
26 504 plaintiff, prove that the exclusion from participation in the program was solely by reason of  
27 disability. Id.

#### 28 **Sharp’s Motion for Summary Judgment**

Amongst her many conclusory allegations against Sharp, Wildey claims Sharp was in violation  
of the Rehabilitation Act and Title II of the ADA when it failed to reasonably accommodate her  
disability with regard to the three day vocational assessment requested by the DOR. Wildey also



1 accuses Sharp of making misrepresentations in the Sharp report, and of conspiring to discriminate  
2 against her by providing the “fraudulent” report to the DOR. Specifically, Sharp argues it acted  
3 reasonably to accommodate Wildey by approving a flexible testing schedule. In addition, Sharp  
4 disputes any claims of misrepresentations in its report, and in any case, the report was specifically  
5 excluded by the Appeal’s Board per Wildey’s request and was not used in any determinations made  
6 in her case.

7 As a threshold matter, the court notes that Plaintiff fails to make a prima facie showing that  
8 the conduct at issue violated either the ADA or the Rehabilitation Act and that she was discriminated  
9 against on account of her disability.<sup>1</sup> While there is no dispute that Plaintiff is a qualified individual  
10 with a disability eligible for benefits for purposes of the ADA and the Rehabilitation Act, there is no  
11 evidence that she was excluded from participating in the program as the program is only available to  
12 individuals with disabilities. The primary issue in dispute is whether Sharp, an entity receiving federal  
13 financial assistance, was required to provide Wildey with certain accommodations. The regulations  
14 implementing Title II of the ADA provide:

15 (a) A recipient shall make reasonable accommodation to the known physical or mental  
16 limitations of an otherwise qualified handicapped applicant or employee unless the recipient  
17 can demonstrate that the accommodation would impose an undue hardship on the operation  
18 of its program or activity.

18 (b) Reasonable accommodation may include: (1) Making facilities used by employees readily  
19 accessible to and usable by handicapped persons, and (2) job restructuring, part-time or  
20 modified work schedules, acquisition or modification of equipment or devices, the provision  
21 of readers or interpreters, and other similar actions.

20 (c) In determining pursuant to paragraph (a) of this section whether an accommodation would  
21 impose an undue hardship on the operation of a recipient's program or activity, factors to be  
22 considered include:

22 (1) The overall size of the recipient's program or activity with respect to number of  
23 employees, number and type of facilities, and size of budget;

23 (2) The type of the recipient's operation, including the composition and structure of the  
24 recipient's workforce; and

24 (3) The nature and cost of the accommodation needed.

25 45 C.F.R. § 84.12; see, e.g. Duvall v. County of Kitsap, 260 F.3d 1124, 1136 (finding hearing  
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27  
28 <sup>1</sup> There is nothing in the record to show that Plaintiff was excluded from the vocational training  
program, a program only available to disabled individuals, or was otherwise discriminated against  
because of her disability.

1 impaired plaintiff presented a triable issue of fact as to violations of the ADA and Rehabilitation Act  
2 by defendants for failing to reasonably accommodate his disability in denying him the use of videotext  
3 display at his trial). The Sharp report, (TAC, Exh. 36), indicates that Wildey was granted certain  
4 accommodations. On May 12, 2004, she was referred to Sharp to conduct a three day vocational  
5 assessment. Wildey expressed concern that the anticipated three consecutive days of testing presented  
6 a hardship for her. Sharp accommodated Plaintiff's concern and implemented a flexible schedule.  
7 Moreover, during the two days of testing that she did attend, she was given numerous breaks, was  
8 permitted to lie down when necessary, was given a high back chair, and was provided ice packs which  
9 she utilized throughout the day to help alleviate her pain. (Vocational Evaluation Report, TAC Exh.  
10 36 ¶¶ 5-6). Wildey, however, did not appear for the third day of testing. While Wildey represents that  
11 she did not attend the third day of testing on the advice of her doctor, she does not explain why she  
12 never completed the assessment. Wildey argues that Sharp could have provided a closer location for  
13 the testing site, she was sent to the wrong testing program (Oppo. to motion to dismiss, p.3:9-10), one  
14 day of vocational testing should have been adequate to assess her abilities, (Rehabilitation Appeals  
15 Board Decision, Docket No. 54-3 at p.7), and she could have been provided with additional  
16 accommodations such as an ergonomic chair for her spine and platforms for her legs and arms. These  
17 arguments are insufficient to create a genuine issue of material fact that Sharp failed to accommodate  
18 Plaintiff's disability.

19 Furthermore, Sharp persuasively argues that Plaintiff cannot demonstrate any damages arising  
20 from the incomplete report. The decision to close Plaintiff's case before DOR was unrelated to the  
21 report prepared by Sharp. Moreover, the Sharp report was not considered by the DOR. DOR even  
22 requested that Plaintiff undergo another evaluation but Plaintiff refused to do so. (Rehabilitation  
23 Appeals Board Decision, Docket No. 54-3 at p.11). Accordingly, Plaintiff cannot attribute to Sharp  
24 any failure to obtain funding for the alpaca business.

25 On the present record, Plaintiff also fails to establish that she is entitled to damages under  
26 either the ADA or the Rehabilitation Act. Wildey is seeking injunctive relief to remove federal  
27 funding from Sharp and to order changes in Sharp's policies as well as compensatory and punitive  
28 damages of \$100 million dollars. Provisions of the ADA and the Rehabilitation Act require remedies

1 available under those statutes be construed the same as remedies under Title VI of the Civil Rights  
2 Act of 1964. Ferguson v. City of Phoenix, 157 F.3d 668, 673 (citing 42 U.S.C. § 12133 (ADA); 29  
3 U.S.C. § 794a(a)(2) (Rehabilitation Act)). The Supreme Court established that “private individuals  
4 c[an] not recover compensatory damages under Title VI except for intentional discrimination.”  
5 Alexander v. Sandoval, 532 U.S. 275, 282 (2001)(quoting Guardians Association v. Civil Service  
6 Commission of the City of New York, 463 U.S. 582, 584 (1983)).

7       Therefore, to recover monetary damages under Title II of the ADA or the Rehabilitation Act,  
8 a plaintiff must prove intentional discrimination on the part of the defendant. Ferguson, 157 F.3d at  
9 674. To determine what constitutes intentional discrimination, the 9th Circuit has chosen to utilize  
10 the “deliberate indifference” standard. Duvall 260 F.3d at 1138-39 (noting the deliberate indifference  
11 standard rather than the discriminatory animus standard is better suited to the remedial goals of Title  
12 II of the ADA). “Deliberate indifference requires both knowledge that a harm to a federally protected  
13 right is substantially likely, and a failure to act upon that likelihood.” Id. at 1139 (citing City of Canton  
14 v. Harris, 489 U.S. 378, 389). This includes notice and some opportunity to conform. Id. “When the  
15 plaintiff has alerted the public entity to his need for accommodation (or when the need for  
16 accommodation is obvious, or required by statute or regulation), the public entity is on notice that an  
17 accommodation is required, and the plaintiff has satisfied the first element of the deliberate  
18 indifference test.” Id. The second element of the test, failure to act, can only be satisfied by conduct  
19 that is more than negligent, meaning conduct involving some form of deliberateness. Id.

20       Here, under the present record, there is no indication that Sharp was deliberately indifferent  
21 to Plaintiff’s needs. The record shows that Sharp adopted a flexible testing schedule, provided  
22 Plaintiff with numerous breaks, permitted her to lie down when necessary, provided a high back chair,  
23 and provided with ice backs which she utilized throughout the day to help alleviate her pain.  
24 (Vocational Evaluation Report, TAC Exh. 36 ¶¶ 5-6). The factual record demonstrates that Sharp was  
25 not deliberately indifferent to Plaintiff’s needs.

26       In sum, the court enters summary judgment in favor of Sharp and against Plaintiff on all claims  
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28

1 alleged in the TAC.<sup>2</sup>

2 **The State's Motion for Summary Judgment**

3 The TAC alleges several claims against the State of California and several of its agencies: one  
4 claim is for illegal disability discrimination under Title II of the ADA and the Rehabilitation Act,  
5 another for violations under 42 U.S.C. section 1983, and the other for constructive fraud. Although  
6 somewhat difficult to decipher, it appears the disability discrimination claim is based on the DOR's  
7 decision to close Plaintiff's case and the Appeals Board's decision to uphold the determination of the  
8 DOR. The fraud claim appears to be based on actions of the DOR and the DIR and its employees who  
9 worked with Wildey on her application for rehabilitation services and on an earlier worker's  
10 compensation case. It also appears Wildey partially bases these claims on some concerted effort  
11 between DOR and Sharp employees to deny her benefits.

12 The ADA and Rehabilitation Act Claims

13 DOR and DIR have come forward with evidence to show that the agencies and the employees  
14 assigned to assist Wildey, did not discriminate against her in order to deny her benefits. The record  
15 shows that DOR worked with Wildey for over two years in an attempt to help her attain any benefits  
16 that may have been available to her. It was only after several failed attempts to get Wildey to  
17 cooperate by engaging in further testing and completing necessary paperwork, that the decision to  
18 close her case was finally made. It is also important to note that the DOR recognized the possibility  
19 of Wildey's case being re-opened upon her further cooperation. This is indicative of the DOR's  
20 continued desire to work with Wildey to attain suitable and appropriate goals for someone in her  
21 unique position. Therefore, because Wildey has failed to raise any genuine issue of material facts  
22 supporting a claim of discrimination on the part of DOR, DIR, or its employees, and, for the reasons  
23 set forth below, the court grants summary judgment in favor of these Defendants and against Plaintiff.

24 Although the TAC is 49 pages long and her opposition 167 pages long, she fails to create a  
25 genuine issue of material fact or law in support of a claim of discrimination or fraud by any of the

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27 <sup>2</sup> For the same reasons set forth above, the court grants judgment in favor of Sharp on the  
28 fraud/conspiracy claim. Wildey has failed to identify any specific conduct on the part of Sharp or its  
employees that would subject them to liability under either a theory of fraud or conspiracy to  
discriminate.

1 named State defendants. Pursuant to the California Code of Regulations, DOR was required to  
2 evaluate Wildey's skills and abilities for the purpose of determining her eligibility for services and  
3 vocational rehabilitation needs. 9 CCR §7128. The record demonstrates that the termination of  
4 services to Wildey was not based on her disability, but on her failure to participate with the required  
5 vocational testing and her failure to develop a complete business plan, despite DOR's efforts to assist  
6 Plaintiff in developing the business plan.

7 Plaintiff's opposition fails to rebut the material evidence submitted by DOR. For example,  
8 Plaintiff argues that

9 Plaintiff had shown that she met all the requirements of both, the ADA and the  
10 Rehabilitation Act. Defendants, DOR and DIR knew or should have known that the  
11 indifference of their employees to protect plaintiffs rights as a qualified individual with  
12 a disability were and are intentionally done with acts of discriminatory practices. The  
DOR and DIR employees . . . knew or should have known that plaintiff met the  
requirements of state and federal laws, but chose to intentionally perpetuate the  
discriminatory acts.

13 (Oppo. ¶62). The conclusory allegations asserted by Plaintiff are insufficient to raise a genuine issue  
14 of material fact. Wildey merely makes conclusory allegations to the effect that because her case was  
15 closed and she was denied benefits, that she was discriminated against and that the named defendants  
16 acted fraudulently. She simply fails to identify facts linking any discrimination based solely on her  
17 disability or fraudulent conduct on the part of the DOR or its employees to the denial of her claims.<sup>3</sup>

18 (Oppo. ¶¶16-46). Wildey largely claims that each individual conspired to perpetuate this supposed  
19 discrimination and did so in retaliation for her pursuing her claims. But, again these are merely  
20 conclusory allegations without supporting facts to suggest some concerted plan to discriminate and/or  
21 perpetuate a fraud against Wildey, the very type of disabled individual the DOR is charged with  
22 assisting. In fact, the evidentiary record clearly demonstrates that Wildey's claims and grievances  
23 were given all due consideration and there is nothing in the facts provided by any party supporting an  
24 alternate conclusion. It appears that Wildey was unhappy with the way her case was being handled  
25 by the DOR and is in essence challenging the adequacy of the DOR's services and not illegal  
26 disability discrimination.

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28 <sup>3</sup> The court further notes that the evidentiary record even fails to establish that the alleged  
discrimination was a motivating factor in the denial of program assistance.

1 Further, the issue of whether DOR acted appropriately in deciding to terminate Wildey's  
2 benefits is an issue that has already been litigated and upheld by the Rehabilitation Appeals Board.  
3 When a state administrative agency acting in a judicial capacity resolves disputed issues of fact  
4 properly before it in a proceeding which afforded the parties an adequate opportunity to litigate,  
5 federal courts give preclusive effect to the administrative determination. See Doe v. Pfromer, 148  
6 F.3d 73, 80 (9<sup>th</sup> Cir. 1998). While Plaintiff objects to the court taking judicial notice of the DOR  
7 decision, the court rejects her argument because, pursuant to FRE 201, the court may appropriately  
8 take judicial notice of the Rehabilitation Appeal Board decision.

9 The Fraud/Constructive Fraud Claims

10 Though somewhat difficult to decipher, Wildey's constructive fraud claim is based primarily  
11 on her belief that misrepresentations were made to her by individual employees of the DOR and DIR  
12 during the benefit application process and her Worker's Compensation Appeal. Specifically, Wildey  
13 claims that DOR employees made misrepresentations to her regarding the amount of assistance she  
14 would receive with her business plan and the availability of funding for her business and college  
15 education. Wildey also includes vague allegation about the conduct of the DIR judge's decision in  
16 her case.

17 In order to establish intentional fraud a plaintiff must prove each of the following elements:  
18 (1) false representation or concealment of fact; (2) knowledge of falsity; (3) intent to induce reliance;  
19 (4) justifiable reliance; and (5) damages. Aguilera v. Pirelli Armstrong Tire Corp., 223 F.3d 1010,  
20 1016 (9<sup>th</sup> Cir. 2000) (applying California law, however, basic elements of fraud are the same across  
21 jurisdictions). To establish constructive fraud, all elements of actual fraud, except the element of intent  
22 to deceive, must be established. See AMJUR FRAUD § 9. Further, allegations of fraud must comply  
23 with Rule 9(b)'s particularity requirement which provides that, "in all averments of fraud or mistake,  
24 the circumstances constituting fraud or mistake shall be stated with particularity." FRCP Rule 9(b);  
25 Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168  
26 (1993).

27 Here, Wildey has failed to allege or establish a factual basis showing that she is entitled to a  
28 claim of legal or constructive fraud. First, it is not clear what exact misrepresentations were made to

1 Wildey and/or concealed from her during her contact with the DOR. The interaction between Wildey  
2 and the DOR and any conversations between the parties regarding the type and amount of assistance  
3 Wildey would receive is better characterized as a misunderstanding or mis-communication rather than  
4 as fraudulent inducement on the part of the DOR as Wildey fails to establish any reason why the DOR  
5 would want to induce her reliance in any way to her detriment and to its benefit. Indeed, as already  
6 mentioned above, the very purpose of the DOR is to assist individuals like Wildey in obtaining  
7 benefits; not to make false representations in order to induce reliance and cause harm to its applicants.<sup>4</sup>

8 The 42 U.S.C. § 1983 Claim

9 It is well-established that neither the state nor its officials acting in their official capacities are  
10 “persons” subject to liability under 42 U.S.C. 1983. Will v. Michigan Department of State Police, 491  
11 U.S. 58, 71 (1989). “Section 1983 provides a federal forum to remedy many deprivations of civil  
12 liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for  
13 alleged deprivations of civil liberties.” Id. at 65. Indeed, “a suit against a state official in his or her  
14 official capacity is not a suit against the official but rather is a suit against the official’s office.  
15 Brandon v. Holt, 469 U.S. 464, 471 (1985).

16 Here, the §1983 claim suffers from numerous defects. First and foremost, to state a §1983  
17 claim the threshold inquiry is whether the claimant has identified a right cognizable under the Civil  
18 Rights Act. Baker v. McCollan, 443 U.S. 137, 140 (1979). Plaintiff simply fails to identify that  
19 she was deprived of any cognizable constitutional or other substantive federal right.<sup>5</sup> Second,  
20 Wildey has brought her § 1983 action against the DOR and the DIR as state agencies. Wildey also  
21 names individual state employees acting in their official capacity.<sup>6</sup> Because the DOR, the DIR, and  
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23 <sup>4</sup> The court also notes that Plaintiff failed to comply with the California Tort Claims Act by  
24 administratively pursuing her state law claims. This is another basis for dismissal of her state law  
claims.

25 <sup>5</sup> Assuming a violation of the Rehabilitation Act or the ADA is intended by Plaintiff to serve  
26 as the substantive predicate for her §1983 claim, then, as already demonstrated above, these claims  
cannot survive summary judgment on this evidentiary record.

27 <sup>6</sup>It should be noted that although Wildey appears to intend to name these individual State  
28 employees as defendants, she has failed to name them in the caption as required by Federal Rules of  
Civil Procedure Rule 10(a). Wildey has been given two opportunities to cure this defect yet has failed  
to do so.

1 their officials are not persons within the meaning of section 1983, Wildey's federal civil rights action  
2 fails as a matter of law because these entities are not persons for purposes of 42 U.S.C. §1983. Will,  
3 491 U.S. at 65.

#### 4 Immunity

5 In addition to her claims of discrimination on the part of DOR, DIR and their employees, the  
6 focus of Wildey's discrimination claim appears to be the decision of the Appeals Board to uphold the  
7 closure of her case and deny her benefits. (TAC ¶¶30, 69). Wildey is barred from pursuing any  
8 claims for monetary relief against the DIR on this basis because the members of the Board are entitled  
9 to judicial immunity.

10 Judges and those performing judge-like functions are absolutely immune from damage liability  
11 for acts performed in their official duties. Stump v. Sparkman, 435 U.S. 349, 355-56 (1978). Judicial  
12 immunity also extends to administrative law bodies and officers acting in a judicial or quasi-judicial  
13 capacity, functionally equivalent to that of a judge. Butz v. Economou, 438 U.S. 478, 512-513 (1978);  
14 Romano v. Bible, 169 F.3d 1182, 1186 (9th Cir. 1999).

15 Here, the Appeals Board and its members were acting in a judicial capacity when conducting  
16 the hearing in Wildey's case. The Appeals Board was created pursuant to the Rehabilitation Act, 29  
17 U.S.C. § 722 and conducts its hearings pursuant to Chapter 12 of Title 9 of the California Code of  
18 Regulations. These regulations set forth structured formal procedures offering an applicant a fair  
19 opportunity to be heard, describe the responsibilities of the applicant and the hearing officers, and  
20 detail the remedial procedures available to an applicant dissatisfied with the results of their hearing.  
21 See Title 9, California Code of Regulations §§ 7354-7358. Therefore, the Appeals Board and its  
22 officers are entitled to absolute immunity from Wildey's ADA and Rehabilitation Act claims.

23 Additionally, though difficult to decipher, it appears Wildey's claims directed toward the DIR  
24 (which she refers to as the Worker's Compensation Appeals Board in her TAC) are based exclusively  
25 on the actions of the Workers Compensation Appeals Judge Susan England's refusal to overturn a  
26 decision made by a doctor who conducted an earlier medical examination in Wildey's worker's  
27 compensation case. (TAC p. 30, ¶ 69). Apart from the ambiguity of this claim, any claim that Wildey  
28 intends to raise against the DIR are barred by Judge England's judicial immunity. The scope of




1 judicial immunity is broad and a judge will not be deprived of immunity even if the action taken was  
2 in error, was done maliciously, or was in excess of his authority. Stump, 435 U.S. at 355-56.

3 In sum, the court grants Sharp's converted summary judgment motion in its entirety and grants  
4 DOR and DIR's motion for summary judgment in its entirety. Finally, the court notes that the only  
5 remaining defendant who has been served with the summons and complaint and appeared in this  
6 action is defendant Access to Independence. (Docket No. 36). The court requests Magistrate Judge  
7 Adler to conduct a Case Management Conference, if appropriate, to move this case forward.

8 **IT IS SO ORDERED.**

9 DATED: March 18, 2010

10   
11 Hon. Jeffrey T. Miller  
United States District Judge

12 cc: All parties  
13 Magistrate Judge Adler  
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