U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

Sarah T. Weimer, et al., a/k/a
Willa B.,[1] et al.,
Class Agent,

v.

Frank Kendall,
Secretary,
Department of the Air Force,
Agency.

Appeal No. 2023000892

Hearing No. 550-2021-00060X

Agency No. 5P1C2000493C

DECISION

Following its November 23, 2022, final order, the Agency filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) decision to certify a class complaint alleging discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Class Agent worked as an Attorney-Advisor at the Agency's U.S. Air Force Warfare Center, Office of the Staff Judge Advocate, in Nellis Air Force Base, Nevada.

Starting on January 7, 2020, Class Agent initiated EEO counseling and a class complaint alleging that the Agency discriminated against civilian employees based on disability (deaf, hard of hearing, and late-deafened) when it failed to provide reasonable accommodations, including, but not limited to, American Sign Language (ASL) interpreters and Communication Access Realtime Translation (CART) services.

[1] This case has been randomly assigned a pseudonym which will replace Class Agent's name when the decision is published to non-parties and the Commission's website.

On January 12, 2022, an EEOC Administrative Judge (AJ) ordered the parties to each file a statement requesting pre-certification discovery before February 2, 2022. The parties attended an initial conference on February 4, 2022, and the AJ ordered the Agency to produce responsive information to Class Agent's requests by March 18, 2022, without objections to relevance or burden, because the AJ determined that the requests were relevant and not unduly burdensome. The AJ also ordered the Agency to identify a "Most Knowledgeable" designee on the proposed topics by February 18, 2022. Pre-certification Discovery Order.

On February 25, 2022, Class Agent filed a Motion to Compel arguing that the Agency failed to designate appropriate officials who were "Most Knowledgeable," and she requested sanctions. The Agency opposed the motion and asserted that it provided five individuals who were prepared to speak on all deposition topics. On March 7, 2022, the AJ declined to impose sanctions but determined that the Agency's designations were insufficient. The AJ found that the Agency's then Disability Program Manager should have been designated,[2] and authorized Class Agent to depose this individual. Second Pre-certification Discovery Order.

On March 18, 2022, the Agency objected to Class Agent's initial discovery request and raised concerns regarding disclosure of information based on the Privacy Act.[3] However, the Agency noted that responses to Class Agent's request for a list of all civilian deaf and hard of hearing employees was forthcoming.

On April 12, 2022, the AJ issued another order granting Class Agent's unopposed Motion to Compel regarding written interrogatories filed on March 24, 2022. The AJ declined to sanction the Agency but warned that a history of noncompliance was starting to develop such that sanctions may become necessary. Third Pre-certification Discovery Order.

On April 20, 2022, Class Agent filed another Motion to Compel and sought a show cause order and sanctions. The Agency did not oppose Class Agent's motion. However, on April 28, 2022, it submitted a Fourth Supplemental Response to Complainant's Initial Request for Interrogatories, Request for Production of Documents. The Agency asserted its objection to the request for a list of all civilian deaf and hard of hearing employees as an unauthorized disclosure of employees' confidential medical information in violation of the Rehabilitation Act.

The AJ issued a show cause order on May 2, 2022, ordering the Agency to show good cause for its failure to fully comply with the Third Pre-certification Discovery Order. The Agency did not respond to the AJ's order.

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[2] The Disability Program Manager left the Agency for a position at another federal agency, effective June 6, 2022. Disability Program Manager Deposition 1 at 24.

[3] The Commission has previously determined that matters concerning the Privacy Act are not within the regulations enforced by the Commission. See Price v. U.S. Postal Service, EEOC Appeal No. 0120111033 (Dec. 8, 2011).

On May 11, 2022, the AJ notified the parties of an intent to impose sanctions and granted Class Agent leave to file proposed adverse inferences by May 16, 2022, with a response from the Agency due by May 19, 2022. Sanctions Notice.

On May 19, 2022, the Agency filed a Response to Sanctions Notice and asserted that Class Agent's requests for sanctions were unwarranted, inappropriate, and unsupported by the record. Regarding the request for the list of civilian deaf and hard of hearing employees, the Agency explained that it previously provided responsive information, excluding their names and contact information on April 6, 2022; and on May 9, 2022, it had produced the ordered information, under the duress of a sanctions threat. The Agency responded that it should not have to disclose confidential medical information pursuant to the Rehabilitation Act except under limited exceptions, and here, the request for information did not fall into a category of exceptions.

On June 1, 2022, the AJ issued a Limited Stay and Protective Order. The AJ recognized that the Agency's filing included a request to not produce requested information due to a potential violation of the Rehabilitation Act in disclosing medical information about employees without their consent. The AJ noted that the Agency generally raised issues with disclosure during the February 4th videoconference, and the AJ had suggested that the Agency propose a protective order or develop stipulations to address the concerns. The AJ added that he had informed the parties that he did not see any privacy concerns but was receptive to the parties' views. The AJ imposed a limited stay order on the Agency's production of relevant information and a limited protective and confidentiality order on the already-produced information. The AJ informed the parties of an intent to consider the following options: (a) providing an opt-in or opt-out authorization to putative class members; (b) reconsidering the order to produce the subject information; or (c) entry of a protective order and removing the limited stay.

The Agency's Disability Program Manager was deposed on June 1, and 2, 2022. Class Agent subsequently filed a Motion to Compel for responsive documents referenced by the Disability Program Manager during her deposition. The Agency did not oppose the motion. On June 21, 2022, Class Agent filed a renewed motion for class certification. The Agency also filed an amended opposition to class certification and response to the limited stay order and motion for sanctions on June 21, 2022.

On October 13, 2022, the AJ issued a Decision Certifying Class. As an initial matter, the AJ noted that the class members include employees, applicants, or former employees of the Agency who are d/Deaf.[4] Class Agent identified centralized Agency policies and practices that allegedly resulted in the Agency's failure to accommodate, such as denied access to ASL interpreters; CART; and videophones and other accessibility technologies and services.

Class Agent detailed a process in which the Agency failed to consider its resources as a whole when determining whether to grant reasonable accommodation requests.

[4] The AJ noted that "d/Deaf" referred to those who are deaf or have serious difficulty hearing, and the term would encompass both disabilities associated with deafness and language/culture.

Specifically, managers did not budget for reasonable accommodations, and funding was a unit-level challenge. Due to a lack of a formal process to fund accommodations, requests often had to be elevated to the Major Commander or higher headquarters, which created delays in providing accommodations. The AJ noted that the Disability Program Manager testified that she frequently attempted to raise a centralized process because the current process increased obstacles to funding reasonable accommodations.

Regarding ASL interpretation services, Class Agent asserted that, despite employing over 700 d/Deaf employees, the Agency only provided ASL interpretation 152 times since 2018. The AJ stated that the Agency did not provide any contrary evidence that it provided ASL interpretation services on more occasions. The Disability Program Manager also testified that she was aware of other organizations obtaining standing contracts for interpreters with secret or top-secret clearance, but she was unaware of any efforts by the Agency to obtain interpretive services for this type of work.

Class Agent also identified instances when employees were informed that CART services were unavailable, including for participation in the EEO process. Class Agent explained that employees utilized the Federal Relay Services, but this service was terminated in February 2022.[5] The Agency was aware of complications with connecting videophones and captioned telephones since 2018, and rather than addressing the complications in a unified way, they were handled on a case-by-case basis, and in many instances, the issues were never resolved. The record also showed that the Agency was aware of consistent complaints that mandatory trainings were not captioned, and there was no plan to ensure that videos were consistently captioned.

The Agency also conceded that it did not designate sufficient qualified personnel to implement its Disability Program in 2018 and 2020. The Agency only had three fulltime employees responsible for processing reasonable accommodation requests and relied upon 85 collateral duty Disability Program managers. The Disability Program Manager testified that a Disability Program manager should be a fulltime job at most installations, and that a quarter of the Agency's installations do not even have a designated Disability Program manager.

The AJ certified the class to consist of the following, "general class and specific sub-issues": all d/Deaf civilian employees who are currently employed by the Agency, as well as all d/Deaf civilians who either applied for civilian employment with the Agency, or were so employed at any time between January 1, 2018, and the present, who were discriminated against or denied reasonable accommodations because the Agency has:

a) Failed to ensure that anyone who is authorized to grant or deny requests for reasonable accommodation, or to make hiring decisions, is aware that all

[5] The U.S. General Services Administration maintained a contract to provide telecommunication services for individuals who are deaf, hard of hearing, deaf-blind, and/or have speech disabilities to access federal agencies until February 13, 2022.

resources available to the Agency, as a whole, must be considered when determining whether a denial of reasonable accommodation based on cost;

b) Failed to provide a common fund for accommodations, such that accommodations for d/Deaf employees are denied because of cost;

c) Failed to ensure that d/Deaf employees have access to ASL services;

d) A centralized discriminatory policy or practice that puts the onus of requesting accommodations on d/Deaf employees every time, even when the need for the accommodation is known to the Agency, and has not changed;

e) Failed to implement a streamlined and standardized process for connecting videophones and other assistive devices for d/Deaf employees to base networks and ensuring that they function;

f) Failed to whitelist assistive technology for d/Deaf employees working in secure areas;

g) Failed to ensure that trainings, presentations, and videos are accessible for d/Deaf employees; and

h) Failed to adequately staff its Disability Program; appoint qualified Disability Program managers; and/or ensure proper training of individuals with the power to approve and deny accommodations for d/Deaf employees.

The AJ found that the class complaint established commonality and typicality. Specifically, Class Agent and class members were d/Deaf employees who reported instances of discrimination based on a discriminatory policy or practice or were denied reasonable accommodations. The AJ noted that each sub-issue addressed a specific policy or practice that will be common to some or all of the general class. The AJ further highlighted that the class was focused on Agency policies and practices, and not on lower-level discretionary decisions. While the Agency argued that Class Agent relied on conclusory statements and there was a lack of specificity, the AJ found that the Agency did not address each sub-issue, and it does not grapple with the identified policies and practices, and it failed to provide evidence that the allegations were one-off instances at dispersed installations. The AJ also noted that the Agency did not address the testimony of the Disability Program Manager that there were persistent issues across virtually all installations.

Regarding the common fund, the AJ found that courts have explained that a failure to have a common fund was a common question in Bates v. United Parcel Service, 204 F.R.F. 440 (N.D. Cal. 2001). The AJ concluded that Class Agents identified centralized policies and practices that affected all putative class members.

See also Tessa L. v. Dep't of Agriculture, EEOC Appeal No. 0720170021 (Nov. 9, 2017) (a change in policy "caused everyone to suffer lack of reasonable accommodation").

The Agency took issue with Class Agent's decision to not depose the Agency's named witnesses, but the AJ found that the Agency did not provide testimony from any of them to undercut the evidence offered by Class Agent and other class members, including the testimony provided by the Disability Program Manager. Further, the AJ determined that the Disability Program Manager managed the Agency's centralized policies and practices that allegedly resulted in the failure to accommodate d/Deaf employees. The AJ concluded that the elements of commonality and typicality were met.

Regarding numerosity, the AJ stated that, while there is no specific numerical cut-off point, generally 30 class members was a lower threshold. Here, the AJ found that the Agency's 2020 Total Workforce Distribution by Disability Status Report ("2020 Status Report") showed that more than 700 Agency employees identified as deaf or having serious difficulty hearing; and the Disability Program Manager testified that she believed that there were more than one thousand such individuals. The Agency argued that numerosity could only be met based on "ill-gotten" evidence from the pre-certification discovery process, but the AJ responded that the Agency admitted to 2,589 self-identified deaf or hard of hearing individuals in its opposition brief. The AJ concluded that it was reasonable to find that there were at least 40 individuals to establish numerosity.

The AJ also found that adequacy of representation was satisfied. The AJ determined that there were no conflicts of interest with Class Agent and other class members; and if a conflict arises, Class Agent may seek to withdraw from the role. The AJ also noted that the attorneys satisfied the adequacy requirement with no conflicts of interest, and they are qualified and committed to vigorously prosecuting the complaint.

In addition, the AJ declined to impose sanctions but reminded the Agency that past noncompliance may be considered in new instances of noncompliance. The AJ also ordered the Agency to produce the requested documents referenced in the Disability Program Manager's deposition based on Class Agent's unopposed motion.

Regarding the list of civilian deaf and hard of hearing employees, the AJ found that Class Agent provided supporting legal authority for her request, and her arguments were well-founded. See, e.g., Scott v. Leavenworth Unified School District, 190 F.R.D. 583, 587 (D. Kan. 1999) ("Congress never intended for a defendant charged with violating the [Americans with Disabilities Act ("ADA")] to use the ADA's confidentiality provisions to impede a plaintiff's ability to discover facts that might help the employee establish his/her claims."). To compare, the Agency had not independently identified legal authorities prohibiting disclosure. The AJ further noted that Class Agent asserted that she did not oppose entry of an appropriate protective order, and that the Agency never responded to the invitation, despite being the party assessing the interest in protecting the information.

However, the AJ determined that a class list should not be produced at this time and extended the limited stay and protective order indefinitely. The AJ noted that if the certification decision is accepted, then the parties' arguments are moot, and a notice procedure and class list would be addressed during the post-certification process.

The AJ added that the Agency argues that Class Agent produced insufficient information, and on the other hand, withheld the relevant information, and it declined to identify stipulations to obviate the subject production. Further, the Agency made no effort to advise the AJ of its objections until its filing on May 19, 2022. The AJ highlighted that the Agency did not file any motion or oppose Class Agent's discovery motions, and it failed to respond to the AJ's show cause order. The AJ concluded that the class complaint met the criteria for certification.

The Agency issued a final order rejecting the AJ's decision and filed the instant appeal. Class Agent opposed the Agency's appeal.

ANALYSIS AND FINDINGS

Medical Information Confidentiality and Disclosure

The Agency objects to Class Agent's request for a list of all civilian deaf and hard of hearing employees as a violation of the Rehabilitation Act. Under the Rehabilitation Act, information "regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record." 29 C.F.R. § 1630.14(c)(1); see also 42 U.S.C. § 12112(d)(4)(C). This requirement applies to all medical information, including information that an individual voluntarily discloses. See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA), No. 915.002, at 4 (July 26, 2000). Employers may share confidential medical information only in limited circumstances: supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations; first aid and safety personnel may be told if the disability might require emergency treatment; and government officials investigating compliance with the ADA and Rehabilitation Act must be given relevant information on request. 29 C.F.R. § 1630.14(c)(1).

The Agency asserts that it is obligated to keep confidential information related to employees' medical conditions and histories with limited exceptions. We note that the Agency is correct in identifying that the obligation to keep information about employees' medical conditions and histories lies with the Agency. However, while the Agency attempts to place blame with the AJ, we find that the AJ acted appropriately.

We note that an AJ has full responsibility for the adjudication of the complaint, including overseeing the development of the record, and has broad discretion in the conduct of hearings. 29 C.F.R. § 1614.109(a), (e). Given the AJ's broad authority to regulate the conduct of a hearing, a party claiming that the AJ abused his or her discretion faces a very high bar.

Trina C. v. U.S. Postal Serv., EEOC Appeal No. 0120142617 (Sept. 13, 2016), citing Kenyatta S. v. Dep't of Justice, EEOC Appeal No. 0720150016 n.3 (June 3, 2016) (responsibility for adjudicating complaints pursuant to 29 C.F.R. § 1614.109(e) gives AJs wide latitude in directing terms, conduct, and course of administrative hearings before EEOC).

It is undisputed that when the Agency initially raised privacy concerns during the initial conference on February 4, 2022, the AJ informed the Agency that it should propose a solution, such as a protective order. However, the Agency failed to file a motion for a protective order or submit any other proposal to the AJ to address its privacy concerns. Rather, the Agency did not raise its concerns before the AJ until after it released the information.

The AJ noted that the Agency did not submit objections to the production of information due to concerns of a violation of the Rehabilitation Act until its Response to Sanctions Notice on May 19, 2022, which is supported by the record. While the Agency asserts that it raised privacy concerns in its March 4, 2022, opposition to a motion to compel, a review of the Agency's opposition brief reveals no mention of any privacy concerns, and it only provided arguments related to the designation of "Most Knowledgeable" officials.

On March 18, 2022, the Agency filed an opposition to Class Agent's requested information. However, the Agency only raised concerns based on the Privacy Act, and not as a violation of the Rehabilitation Act. In addition, the Agency stated that a "response to this interrogatory was forthcoming" for the list of civilian deaf and hard of hearing employees. Agency's Objections and Responses to Complainant's Initial Request for Interrogatories, Requests for Production of Documents, and Requests for Admission at 4, 5. On April 28, 2022, the Agency filed its Fourth Supplemental Response to Complainant's Initial Request for Interrogatories, Request for Production of Documents, in which it raised objections of an unauthorized disclosure of employees' confidential medical information under the Rehabilitation Act. However, the certificates of service for these filings reveal that the Agency did not send them to the AJ.

We find that the Agency did not prove an abuse of AJ discretion because the AJ responded to the Agency's concerns by providing guidance on February 4, 2022, and the Agency did not timely comply with the AJ's instructions. The AJ correctly noted that the Agency did not file its objections until May 19, 2022. However, this was after the Agency supplied the requested information to Class Agent on May 9, 2022. The AJ immediately responded by issuing a stay order on the request for information and a protective order on any information already provided by the Agency. To the extent that the Agency requests that the Commission reverse the AJ's certification of the class complaint based on this matter, we decline to do so.

Designation of Most Knowledgeable Person

The Agency argues that Federal Rule of Civil Procedure 30(b)(6) imposes an obligation on the organization to select an individual to testify and that the party seeking discovery is not entitled to insist on a specific person as the corporate representative which it believes to have the "most" knowledge of a given matter. Class Agent responds that the Agency's argument is irrelevant because the federal sector EEO administrative process is not bound by the Federal Rules of Civil Procedure. In addition, the AJ stated that the Disability Program Manager was not a witness whose testimony "binds" the Agency.

We find that Class Agent correctly highlights that the federal sector EEO administrative process is not bound by the Federal Rules of Civil Procedure. See Bedynek-Stumm v. Dep't of Veterans Affairs, EEOC Request No. 0520110587 (Nov. 15, 2011). In addition, the AJ noted that it was not necessary to determine if the Disability Program Manager "binds" the Agency with her testimony. Rather, the AJ found that her testimony was "illustrative" and unopposed by any witness that the Agency designated as having the ability to bind it. AJ Decision, Footnote 3.

The AJ determined that testimony from the Disability Program Manager should be obtained due to the nature of her position in managing the Agency's centralized policies and practices that allegedly resulted in the failure to accommodate d/Deaf employees. We note that the Agency did not explain why the Disability Program Manager was an inappropriate witness and simply takes issue with the AJ's purported heavy reliance on her deposition. Agency Appeal Brief at 35. Further, the AJ determined that the Agency's proffered designations were insufficient when finding that the Disability Program Manager should have been designated. Second Pre-Certification Discovery Order at 1. The Agency did not dispute the AJ's conclusion that the initial five designees were insufficient.

The Agency characterizes the Disability Program Manager's evidence as "only highly speculative views and beliefs," but if offers no arguments or evidence to show that any of her testimony was false. Agency Appeal Brief at 35. In addition, a review of the record shows that the Disability Program Manager was personally aware of, and actively involved in, matters related to some of the class members' accommodation requests. For example, when Class Agent learned of the termination of the Federal Relay Services, she initially contacted a Program Analyst in the Defense Information Systems Agency, who responded that the Agency was working to find a solution to continue the support of the relay conference captioning and video relay interpreting services, but that there would be an interruption of service. Class Agent subsequently contacted the Disability Program Manager, who asked that Class Agent copy her on future emails regarding the Agency's transition of the relay services.

In addition, the Agency attested that the information provided in its Third Supplemental Response was compiled by the Disability Program Manager. Id. at 11-12. We find that this confirms that the Disability Program Manager has direct knowledge regarding various Agency policies and practices that resulted in the delay or denial of reasonable accommodations for the

class members. As such, we find that the Agency did not meet its burden to show an abuse of discretion when the AJ ordered the approval of the Disability Program Manager's deposition.

Class Certification

EEOC Regulation 29 C.F.R. § 1614.204(a)(2) states that a class complaint is a written complaint of discrimination filed on behalf of a class by the agent of the class alleging that: (i) the class is so numerous that a consolidated complaint of the members of the class is impractical; (ii) there are questions of fact common to the class; (iii) the claims of the agent are typical of the claims of the class; and (iv) the agent of the class, or if represented, the representative will fairly and adequately represent the interests of the class. EEOC Regulation 29 C.F.R. § 1614.204(d)(2) provides that a class complaint may be dismissed if it does not meet the four requirements of a class complaint or for any of the procedural grounds for dismissal set forth in 29 C.F.R. § 1614.107. The class agent, as the party seeking certification of the class, carries the burden of proof, and it is his obligation to submit sufficient probative evidence to demonstrate satisfaction of the four regulatory criteria. Anderson, et al. v. Dep't of Def., EEOC Appeal No. 01A41492 (Oct. 18, 2005); Mastren, et al. v. U.S. Postal Serv., EEOC Request No. 05930253 (Oct. 27, 1993).

Numerosity

The numerosity prerequisite states that the potential class must be sufficiently numerous so that a consolidated complaint by the members of the class, or individual, separate complaints from members of the class is impractical. See 29 C.F.R. § 1614.2014(a) (2)(i). The focus in determining whether the class is sufficiently numerous for certification is the number of persons affected by the Agency's alleged discriminatory practice(s). See White, et. al. v. Dep't of the Air Force, EEOC Appeal No. 01A42449 (Sept. 1, 2005). The Commission has held that the relevant factors to determine whether the numerosity requirement has been met are the size of the class, the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action at issue, and the size of each member's claim. Carter, et. al. v. U.S. Postal Serv., EEOC Appeal No. 01A24926 (Nov. 14, 2003). In determining whether the class is sufficiently numerous, the AJ needs to consider the number of persons who possibly could have been affected by the agency's discriminatory practices and who, thus, may assert claims. Simon V., et al. v. Dep't of Justice, EEOC Appeal No. 0720110008 (Sept. 15, 2015), request for recon. denied, EEOC Request No. 0520160037 (Feb. 11, 2016).

The Agency challenges the AJ's determination to certify the class and asserts that the six named members fails to satisfy the numerosity requirement. The Agency states that, despite noting that 2,589 Agency employees had self-identified as deaf or hard of hearing, the AJ's conclusion that there were at least 40 individuals is without support. The Agency argues that certification of the class "cannot be grounded on such shoddy and faulty reasoning." Agency Appeal Brief at 28. However, we are not persuaded that the AJ erred in finding numerosity, and the Agency's description of the AJ's finding as "shoddy and faulty" is without merit.

While the Agency acknowledges that it admitted that 2,589 Agency employees had self-identified as deaf or hard of hearing, it provided no explanation for why this information should not be relied upon. Further, the AJ noted that the Agency's 2020 Status Report showed that more than 700 Agency employees identified as deaf or having serious difficulty hearing. The Commission has found that numerosity in a class was established when there were approximately 40 deaf or hard of hearing employees who possibly could have been affected by an agency's decision regarding the funding related to interpreting services, and thus, may assert claims. Tessa L. v. Dep't of Agriculture, supra. Based on the evidence from the Agency's 2020 Status Report and own admission in its filings of 2,589 d/Deaf Agency employees, we find that the Agency did not prove an error in the AJ's conclusion that there were at least 40 individuals who may assert claims to satisfy the numerosity requirement for class certification.

Commonality and Typicality

With regard to commonality and typicality, the purpose of these requirements is to ensure that a class agent possesses the same interests and has experienced the same injury as the members of the proposed class. See Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147 (1982). While these two criteria tend to merge and are often indistinguishable, they are separate requirements. Id. Commonality requires that there be questions of fact common to the class; that is, that the same agency action or policy affected all members of the class. The Class Agents must establish some evidentiary basis from which one could reasonably infer the operation of an overriding policy or practice of discrimination. Belser, et al. v. Dep't of the Army, EEOC Appeal No. 01A05565 (Dec. 6, 2001). Typicality, on the other hand, requires that the claims, or discriminatory bases, alleged by a class agent be typical of the claims of the class, so that the interests of the putative class members are encompassed within a class agent's claim. Falcon, 457 U.S. at 156. The underlying rationale of the typicality and commonality requirement is that the interests of the class members be fairly encompassed within the class agent's claim. Falcon, 457 U.S. at 147.

The Agency contends that Class Agent failed to present evidence that her interests are aligned with the putative class members; that there are common questions among her and the putative class members and that her claims arise from the same events and are premised on the same legal theory. The Agency argues that Class Agent is attempting to serve as the class representative by asserting claims which may not be shared by any other class members based on her allegations. Agency Appeal Brief at 31. However, the Agency did not provide more than broad assertions. Further, we find that the AJ properly explained that commonality and typicality were met in this case. Specifically, the class encompassed d/Deaf employees who reported instances of discrimination based on a discriminatory policy or practice, or they were denied reasonable accommodations due to a policy or practice identified in the sub-issues; and the focus is on Agency policies and practices and not lower-level discretionary decisions. AJ Decision at 10.

The Commission previously found that commonality and typicality were established when a putative class consisted of a uniform group of individuals, who are all deaf or hard of hearing, and alleged denial of specific accommodations, such as the lack of consistent and reliable sign language interpreter services.

The lack of centralized funding was the "glue" that held together the reasons for the alleged discrimination experienced by each class member. Further, typicality was shown when the basic premise underlying the claims of a class agent and class members is the same; namely, a lack of centralized funding caused everyone to suffer a lack of reasonable accommodation. Tessa L. v. Dep't of Agriculture, supra.

Similarly, in this case, Class Agent's allegations of a failure to accommodate include a lack of central funding as a cause of the Agency's denial or delay in granting the class members' accommodations. The Agency's Affirmative Employment Program (AEP), Special Emphasis Programs (SEPS), and Reasonable Accommodation Policy, AFI36-205 section 8.3.3.6.1 stipulates that, "[i]n general, each organization will bear the cost of providing reasonable accommodations."

Class Agent testified that the vast majority of her requests for ASL interpreters were denied, unfilled, or simply gone unanswered; and there were instances when her supervisors contacted headquarters to obtain her accommodations but did not receive responses. Class Agent averred that the Agency has no central process, funds, or contract to enable supervisors and commanders to provide ASL interpreters or CART services. Supplemental Declaration of [Class Agent] in Support of Claimant's Motion for Class Certification at 2. One class member's supervisor corroborated that he had challenges in providing accommodations due to issues with obtaining funding. Supervisory Engineering Technician Affidavit at 4.

Class Agent also responds that the AJ highlighted numerous centralized Agency policies, practices, and systemic failures that led to the alleged discrimination against her and other d/Deaf employees, such as failing to consistently provide captioning for training videos. The record shows that in January 2022, Class Agent was unable to take required training because they were not captioned. The Commandant of the Judge Advocate General's School acknowledged that the trainings were not in compliance, and while they were working to obtain transcriptions for Class Agent, this approach was not sustainable, effective, or efficient.

In addition, in August 2020, the Secretary of Defense ordered mandatory training for all employees, and Class Agent and other class members had to request accommodations because the training videos lacked captioning. A Chief of Operations Security explained that the videos were not captioned because including the captioning would have extended the development date. Evidence supports Class Agent's claims that the Agency's practices consistently resulted in a delay or denial of reasonable accommodations for her and other class members. Accordingly, we find that the Agency did not establish that the AJ erred in finding that the class members suffered from common matters and that Class Agent's experiences were typical of the class.

Adequacy of Representation

We note that the Agency did not provide any arguments related to the adequacy of representation. As such, we find no reason to disturb the AJ's conclusion that Class Agent and the current attorneys were adequate to represent the interests of the class.

The Agency argues that the AJ erred in allowing improper pre-certification discovery and allowing this information to find that class certification was met. However, we find that other evidence in the record supports the certification of the class, as described above.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's final order rejecting the AJ's certification of the class and REMAND the complaint for further processing, in accordance with the ORDER below.

ORDER

The Agency is ORDERED to perform the following:

1. Notify class members of the accepted class claim within fifteen (15) calendar days of the date this decision is issued, in accordance with 29 C.F.R. § 1614.204(e).

2. Forward a copy of the class complaint file and a copy of the notice to the Hearings Unit of EEOC's Los Angeles District Office within thirty (30) calendar days of the date this decision is issued. The Agency must request that an Administrative Judge be appointed to hear the certified class claim, including any discovery that may be warranted, in accordance with 29 C.F.R. § 1614.204(f).

3. Within fifteen (15) calendar days of the date this decision is issued, produce the documents and categories of documents identified as items 1-4 at pages 3-5 of Class Agent's Motion to Compel Responsive Documents, submitted on June 14, 2022.

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation of the Agency's actions.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored.

Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated**. See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0920)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at https://publicportal.eeoc.gov/Portal/Login.aspx

Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests.

Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

Carlton M. Hadden, Director
Office of Federal Operations

April 5, 2023
Date