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In the Certification of:

Sarah Weimer, et al.,

Class Agent,

v.

Department of the Air Force,

Agency.

Hearing No. 550-2021-00060X
Agency No. 5P1C2000493CH20

Date: October 13, 2022

DECISION CERTIFYING CLASS

The captioned matter comes before me pursuant to 29 C.F.R. § 1614.204(d)(7) for a ruling as to whether it should be certified as a class complaint. Complainant Sarah Weimer (Class Agent) contacted the Agency's EEO office to initiate counseling for her complaint on January 7, 2020. *See* Agency's Amended Opposition to Class Certification, dated June 21, 2022 (Opposition). After describing her allegations to the EEO Counselor and an unsuccessful counseling period, Complainant filed a formal complaint on April 21, 2020. Complainant File (CF) at 8. An Acknowledgement Order was issued by the Commission on November 6, 2020, followed by an amended order dated November 9, 2020. However, these orders did not address the complaint as a class complaint. The Agency submitted the Complaint File to the Commission on November 13, 2020, which also included the complaint files for Matthew Wambold and Shelia Burg, as well as the completed report of investigation for Hugo Perez—additional putative class members/agents.

An Acknowledgment and Order for Class Certification was issued on January 27, 2021, requiring class certification submissions no later than 15 days from receipt. The parties filed their submissions, which the Class Agent supplemented at various points thereafter. While the case was originally docketed in the San Francisco District Office, it was transferred to the Los Angeles District Office on January 12, 2022. I informed the parties on January 20, 2022 that I had been assigned to preside over this complaint. I ordered each party to file a statement of whether the party was requesting pre-certification discovery before February 2, 2022 at noon (PT), and to explain the relevance of any proposed requests. I also scheduled an initial conference for February 4, 2022, requiring the Agency to provide American Sign Language (ASL) interpretive services; this order was supplemented with a requirement to provide Communication Access Realtime Translation (CART) upon the Class Agent's request.

Following the initial conference, I issued orders to the Agency to produce responsive information to the Class Agent's requests on or before March 18, 2022, without objection based on relevance or burden, as I had already reviewed the requests and determined them relevant and not unduly burdensome. I explained that privileges could be invoked if applicable. I also ordered the Agency to identify a "Most Knowledgeable" designee regarding topics proposed by the Class Agent on or before February 18, 2022.

On February 25, 2022, the Class Agent filed a motion to compel, requesting compliance with the Discovery Order, dated February 4, 2022, arguing that the Agency had failed to designate appropriate persons most knowledgeable for topics approved in the order. The Class Agent also requested sanctions. The Agency filed a response on March 4, 2022, arguing that it had complied with the order and that the order did not require Agency-wide designations for the topics. By order dated March 7, 2022, I declined to impose sanctions for Agency noncompliance; and I found the designations insufficient, determining that the Air Force Disability Program Manager Kendra Duckworth Shock should have also been designated, explaining my reasoning for that determination.

The Class Agent filed a second motion to compel on March 24, 2022, as well as a request for a show-cause order, arguing that the Agency had failed to provide written responses to interrogatories by the ordered deadline. The Agency did not oppose the motion to compel, nor did it seek an extension regarding its production. On April 14, 2022, I issued an order granting the Class Agent's unopposed motion; I also declined to impose sanctions but warned "that a history of repeated noncompliance is beginning to develop such that the imposition of sanctions may become necessary."

On April 20, 2022, the Class Agent filed a motion to compel compliance regarding the Third Pre-Certification Discovery Order, seeking a show-cause order and sanctions. The Agency left the Class Agent's motion unopposed. In light of the history of noncompliance, and the Agency's lack of opposition to the Class Agent's motions, I issued a show-cause order on May 2, 2022, ordering "the Agency to file, a submission, together with a supportive declaration …, showing good cause why, as appropriate, the Agency failed to comply with item nos. 1-7 in the Third Pre-Certification Discovery Order," before May 9, 2022 at noon (PDT). The Agency did not file the ordered declaration. As the Agency did not respond to the show-cause order, in a notice dated May 11, 2022, I informed the parties I intended to impose sanctions pursuant to the show-cause order issued May 2, 2022, and for the reasons stated in the Class Agent's motion to compel filed May 9, 2022, specifically noting I intended to impose a sanction drawing adverse inferences and/or considering certain matters established. I granted the Class Agent leave to file proposed adverse inferences or matters considered to be established and a response period for the Agency.

The Class Agent filed a response on May 16, 2022 (requesting sanctions related to interrogatory responses, requests for production, and class certification), followed by the Agency's response on May 19, 2022 (arguing the sought sanctions were not appropriate). On May 24, 2022, the Class Agent filed a further response, followed by another response by the Agency on May 25, 2022. In an order dated June 1, 2022, I recognized the Agency's May 19, 2022 filing to include "a request not to produce information regarding interrogatory nos. 1 and 3 based on the potential of

violating the Rehabilitation Act by disclosing medical information of Agency employees without their consent or authorization." I explained:

> While the Agency generally raised this issue during the February 4, 2022 videoconference with the parties, and I suggested the Agency propose a protective order (to which the Class Agent was inclined) or develop stipulations to address their concerns (to which the Agency was disinclined to do), this is the first instance of the Agency formally raising this objection, citing relevant authority. While it would have been more appropriate to raise this issue with this administrative judge in response to the Class Agent's discovery motions, I intend to ensure compliance with the Rehabilitation Act's disclosure requirements. I remind the parties that I informed them during the February 4th conference that while I did not see a privacy concern at that time, "But if there's a reason that the parties think – or if there is a way the parties think they can allay any concerns then I'm usually pretty receptive to that." Class Agent Response, dated May 24, 2022, Attachment A. That receptivity to ensuring privacy remains.

I notified the parties that I was considering the Agency's request and imposed a limited stay order on the Agency's production for the item nos. 1-3 and 5 in the Third Discovery Order. I also issued a limited protective order on already-produced information and imposed confidentiality requirements. I further provided "notice to the parties that I am considering 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; (c) entry of a protective order and removing the limited stay. I grant the parties leave to address these options in their amended certification filings (or sooner)." And I provided legal authority associated with the options I was considering. *See Nevarez v. Forty Niners Football Co. LLC*, 2018 WL 306681 (N.D. Cal. Jan. 5, 2018) (approving an opt-out procedure and protective order); *Cabral v. Supple, LLC*, 2012 WL 12895825 (C.D. Cal. Oct. 3, 2012) (disclosure of medical information was protected during pre-certification proceedings, noting that a failure to disclose the information did not hinder the ability to file class certification motion and that if certified this information would become available through post-certification notice procedures). Finally, I directed the parties to complete discovery by June 6, 2022, and to file amended certification filings on or before June 21, 2022, wherein they could also address outstanding sanctions issues.

On June 14, 2022, the Class Agent filed a motion to compel responsive documents Shock referenced during her deposition that the Agency had not yet produced. The Agency did not oppose the motion.

The Class Agent filed a renewed motion for class certification on June 21, 2022 (Motion), including exhibits. The Agency filed its amended opposition to class certification on June 21, 2022 (Opposition). The Agency also filed its response to the limited stay order and motion for sanctions decision on the same date.

In sum, the outstanding issues for consideration are a decision on the amended certification filings, imposition of sanctions (and related disclosure issues), and production of documents associated with Shock's deposition. To date, I have not imposed any sanctions.

For the reasons set forth below, I find that class certification should be granted. I decline to impose sanctions. I also order the Agency to produce the Shock documents.

1. Background and Class Agent's Definition of the Class

Class Agents are d/Deaf[1] employees, applicants, or former employees[2] of the United States Air Force. In their pleadings, they have identified centralized Agency policies and practices that they allege have resulted in the Agency's failure to accommodate themselves and others in their class. Specifically, they identify denied access to ASL interpreters, CART, and videophones and other accessibility technologies and services.

Failure to Ensure Resources as a Whole Are Considered; Failure to Provide a Common Fund for Accommodations; Access to ASL Interpreters. The Class Agents detail a process at the Agency that fails to consider the Agency's resources as a whole when determining whether to grant or deny requests for reasonable accommodation to deaf employees. Motion at 8-10, 26-30. In 2016, the Agency recognized that "[o]ften … managers do not budget for reasonable accommodations and funding this obligation becomes a unit-level challenge," despite a legal obligation to provide accommodations. Motion at 26-27. And since there was no formal process for funding reasonable accommodation funding requests it often occurred that requests had to "be elevated to the Major Command or higher headquarters, creating delays in providing the necessary accommodations." *Id.* The Agency created two special funding codes to address reimbursement of accommodations expenses. However, according to the Agency's Fiscal Year 2018 *Affirmative Action Plan for the Recruitment, Hiring, Advancement, and Retention of Persons with Disabilities*, which was approved by the Agency's Director of Equal Employment Opportunity, accommodations were still being "denied due to unit funding" and identified the "[l]ack of centralized funding for reasonable accommodations" as a barrier to granting accommodations to individuals with disabilities. Motion at 27. Again, in the Fiscal Year 2020 report, the Agency identified the following barriers: "Lack of execution of centralized funding for all RA's," "Lack of understanding the DAF process for funding RA," and "Accommodations denied due to unit funding." Motion at 27-28. As Disability Program Manager, Shock testified to her frustration at the lack of centralized funding. Motion at 28. Rather than a centralized fund, a unit-level employee forwards a RA request to a financial manager; if they believe they lack funds, they request up to the installation and up to the match com and up to headquarters.[3] Motion at 28. Shock testified that she has attempted to move toward a centralized process by

[1] As explained by the Class Agents, the terms "d/Deaf" and "deaf" should be read as synonymous with "deaf or serious difficulty hearing." Motion at 1, n.1. Additionally, the term d/Deaf is used to encompass both disabilities associated with deafness and language/culture. For purposes of this proceeding, I will use the term "deaf" to encompass all of these meanings.

[2] For purposes of this decision, I use the term "employee" to encompass applicants, employees, and former employees, unless otherwise indicated.

[3] The Agency argues that "Shock had not been appointed by the Agency to serve as a FRCP Rule 30(b)(6) witness and the Agency did not consider her as such." Opposition at 17-18. I need not address whether Shock "binds" the Agency with her testimony. Nevertheless, her role and experience as the central Disability Program Manager is illustrative. Her testimony has not been opposed by any witness the Agency has designated that would bind it. For example, the individuals at the local installations did not provide affidavits or other evidence that would contradict or contextualize Shock's testimony. I also note that the Agency refers to Shock as "former Air Force Disability Program Manager" but the Agency's website recently listed her as the current DPM. Opposition at 26; https://www.af.mil/Equal-Opportunity/.

raising centralization with "leadership frequently, multiple times, every year." Motion at 28. She opined that "our current process … actually increases the obstacles to funding reasonable accommodations," and that "I don't believe it's a practice that is currently effective." Motion at 28. According to Shock, the process financial managers use for funding RA requests has been withheld from her. Motion at 29. Indeed, base-level disability program managers raise lack of funding with Shock at least once a month since 2018. Motion at 29-30. Because she does not necessarily learn of every denial, Shock believes that this is "evidence of a larger problem" regarding Agency-wide denials based on costs. Motion at 30. Shock explained, "[A]nybody you can ask in Air Force will know that I am the No. 1 proponent for centralized funding for reasonable accommodations. I believe it's a best practice. I've tried to convince leadership of this organization that it's a best practice, and I just have been unable to convince them otherwise, even as late as last month. We're still having this conversation and they still believe this process is working…. This conversation has gone all the way to the undersecretary of the Air Force." Motion at 30.

The Class Agent also points to evidence from Wambold when he was informed by his local EEO Director that the EEO office did not have funding to provide an ASL interpreter and that Wambold needed to bring his own or rely on a friend, family members, or other individual for assistance. Motion at 9. For Burg, she was denied CART services because of a lack of unit level funds, "With much regret, I'm unable to obtain a CART interpreter due to the restrictions on my Micro Purchase Supply GPC Card. I also want you to know I did all I could. Motion at 9. For Perez, he was informed there were "no funds available to be allocated to the accommodations [he] requested." Motion at 10.

The Class Agent raised the resources issue previously in its February 11, 2021 motion for class certification. The Agency does not address the issue of resources.

Regarding access to ASL interpretation, the Class Agent points to record evidence that despite employing over 700 individuals who have identified as being deaf, it has provided ASL interpretation only 152 times since 2018. Motion at 11. The Agency does not provide any contrary evidence to demonstrate such services were provided on more occasions. The Class Agent identifies instances related to Weimer, Perez, Wambold, and Hongyu-Perez; for Burg, she requires CART services and was informed CART was not available in the EEO process. Motion at 13-15. Shock confirmed during her deposition that she was aware of a recent Commission decision requiring provision of interpretive services to an employee because the Agency had failed to do so. Motion at 15. Finally, the Class Agent explains that deaf employees were previously able to use the Federal Relay Service, which provided a service to relay oral communications to deaf individuals. Motion at 16. However, this service was terminated in February 2022. Motion at 16. The Class Agent presents evidence that the Agency has not provided another service as an alternative. Motion at 16-17.

Additionally, according to Shock, other organizations generally have established standing contracts for interpreters with secret or top-secret security clearance to assist deaf employees handling such information. Motion at 34-35. Shock is not aware of any efforts to obtain interpretive services for this type of work. Motion at 35.

Onus on Deaf Employee to Request Accommodations Every Time. The Agency's Reasonable Accommodation Training explains that employees are required to provide supervisors with "appropriate notice each time the accommodation is needed," regardless of whether the accommodation is obvious or recurring. Motion at 33. Shock testified that "the [a]ssistance of sign language interpreters" is "the most common example I can provide of a reasonable accommodation that's requested on a repeated basis." Motion at 33. The Class Agent provides examples where Weimer has been required to provide the same information each time she has required an accommodation, including each weekly staff meeting. Motion at 17-18. And for Wambold, multiple instances are identified where he was required to continue requesting accommodations despite the Agency's preexisting knowledge that he needed them. Motion at 18. Burg had similar instances to report. Motion at 18.

Failure in Process for Connecting Videophones and Assistive Devices for Deaf Employees & Failure to Whitelist Assistive Technology for Deaf Employees. The Agency has been aware of complications in the process for connecting videophones and captioned telephones to base networks since at least 2018. Yet those complications persist through the date of Shock's testimony this year. Motion at 33-34. Rather than addressing these complications in a unified way, they have been handled on a case-by-case basis, and the Class Agent reports multiple instances where the complications have never been resolved. Motion at 34. Wambold requested a videophone in 2006; he did not receive one prior to his departure in 2020. Motion at 19. In Weimer's case, she brought a videophone with her from when she worked at the Department of the Army. Motion at 19. It took the Agency 11 months to connect it to the network after her efforts to get it connected. Motion at 19. For Burg, it took over a year to get the phone working. Motion at 19-20. For Perez, he requested a videophone in November 2018, received it in May 2020, and was never able to consistently use it due to server issues. Motion at 20. Perez also reports that he requested to install video relay software to his work computer in January 2019, but he was not permitted to download the software. Motion at 21. Weimer also reports that permitted software has been blocked so that it cannot be used. Motion at 21. And the Agency would not allow her to use a disabled feature of Automated Speech Recognition in software that is approved, Microsoft Teams, until mid-2021. Motion at 21. Burg reports that her Bluetooth hearing aids were disallowed inside Sensitive Compartmentalize Information Facility (SCIF) such that reassignment would be necessary, and the Agency did not work with her to determine alternative accommodations for working in the SCIF. Motion at 21.

Failure to Ensure Accessibility for Deaf Employees to Trainings, Presentations, and Videos. The Agency is aware of consistent complaints from deaf employees that videos for training are not captioned where "mandatory training's been required, videotapes have been used and they've not been captioned." Motion at 35. Shock explains that it is "a systemic problem with the [Agency] that persists to today." Motion at 35-36. But there is no plan to ensure such videos are consistently captioned. Motion at 36. The Agency's collateral-duty Section 508 coordinator takes the view that such materials must be requested as an individual accommodation on a case-by-case basis. Motion at 36. Because of this policy, Shock only learns of materials without captions after the fact. Motion at 37. And she views the failures as a violation of law. Motion at 23. Burg reports that online seminars are not reliably captioned. Motion at 23. Weimer reports consistent struggles with completing required video trainings because they are not captioned. Motion at 23-

24. McAnallen reports mandatory trainings were consistently provided without captioning. Motion at 24.

Failure to Adequately Staff and Train Disability Program Managers. According to the Agency, it did not designate sufficient qualified personnel to implement its disability program during the reporting period of Fiscal Year 2018. Motion at 37. And that collateral-duty Disability Program Managers (DPMs) had a primary challenge of effectively executing DPM duties because of their full-time position. Motion at 37. Despite guidance from its EEO officials to designate full-time DPMs at installations, the Agency has a total of three full-time employees responsible for processing reasonable accommodation requests and 85 collateral-duty DPMs. Motion at 37-38. Similarly, for Fiscal Year 2020, the Agency reported that it did not have sufficient qualified personnel to implement its disability program during the reporting period, with no change to personnel numbers. Motion at 38. According to Shock, "at most installations" in the Agency, DPMs "should be full-time jobs. It's full-time work," explaining that the "role of the [DPM] is vast. It's not just related to ensuring the reasonable accommodation process. It also … involves training managers and supervisors addressing accessibility issues." Motion at 38. Shock also explains that a quarter of the Agency's installations do not even have a designated DPM. Motion at 39. Shock has briefed Agency leadership about this issue every year since 2012. Motion at 40. Weimer reports that the DPM for Nellis AFB is a Dental Assistant, but there appears to be confusion here as EEO counselor interviews reported, that Lucianna Wais (Human Resources Specialist) was the DPM. CF at 38; *see also* at 288 (email from Shock identifying Champion as DPM and Wais as Affirmative Employment Program Manager for Nellis AFB); at 530 (Champion corresponding re accommodation issue).

Definition of the Class. Based on the foregoing, the Class Agent defines the proposed class as follows, which I modify to address a general class and specific sub-issues:

> All deaf civilians who are currently employed by the Agency, as well as all 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 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 deaf employees are denied because of cost;
> c. Failed to ensure that deaf employees have access to American Sign Language services;
> d. A centralized discriminatory policy or practice that puts the onus of requesting accommodations on 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 deaf employees to base networks and ensuring that they function;
> f. Failed to whitelist assistive technology for deaf employees working in secure areas;

g. Failed to ensure that trainings, presentations, and videos are accessible for 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 deaf employees.

2. Legal Standards

The underlying purpose of a class complaint is to economically address claims "common to [the] class as a whole [that] turn on questions of law applicable in the same manner to each member of the class." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982); *Mitchell, et al. v. Dep't of the Air Force*, EEOC Appeal No. 01A42828 (Sept. 1, 2005). Before a class complaint is considered on the merits, it must be certified in accordance with the requirements of 29 C.F.R. § 1614.204. Specifically, the class agent must satisfy each of the following prerequisites: (i) the class is so numerous that a consolidated complaint of the members of the class is impractical (numerosity); (ii) there are questions of fact common to the class (commonality); (iii) the claims of the agent of the class are typical of the claims of the class (typicality); and (iv) the agent of the class or, if represented, the representative will fairly and adequately protect the interests of the class (adequacy of representation). 29 C.F.R. § 1614.204(a)(2).

The failure of a class agent to meet any one of these four criteria precludes certification. 29 C.F.R. § 1614.204(d)(2); *Mastren v. U.S. Postal Serv.*, EEOC Request No. 05930253 (Oct. 27, 1993). The class agent, as the party seeking certification of the class, carries the burden of proof, and it is their obligation to submit sufficient probative evidence to demonstrate satisfaction of the four regulatory criteria. *Anderson, et al. v. Dep't of Defense*, EEOC Appeal No. 01A41492 (Oct. 18, 2005); *Mastren*, EEOC Request No. 05930253.

3. Analysis

3.1. Preliminary Matters

The Commission has explained that reasonable accommodation complaints under the Rehabilitation Act are not barred from class consideration. *Complainant v. Dep't of State*, EEOC Appeal No. 0720110007 (June 6, 2014), *request for reconsideration denied*, EEOC Request No. 0520140506 (Feb. 19, 2015). Similarly, federal district courts interpreting the ADA will certify class actions under similar conditions. *See, e.g., Bates v. United Parcel Serv.,* 204 F.R.D. 440 (N.D. Cal. 2001) (certifying class of plaintiffs with hearing disabilities); *Wilson v. Pa. State Police Dep't,* No. Civ. A. 94–cv–6547, 1995 WL 422750 (E.D. Pa. July 17, 1995) (certifying class of candidates for police officer denied employment due to their vision problems). The court in *Perdue v. Murphy*, 915 N.E.2d 498 (Ind. Ct. App. 2009) noted, in these cases, "there appear to be some unifying criteria, such as a common disability or requested accommodation." *Id.* at 510; *see also Hohider v. United Parcel Service*, 574 F.3d 169, 189 (suggesting that unifying criteria might include common conditions suffered or accommodations sought); *Walters v. Reno,* 145 F.3d 1032, 1046 (9th Cir.1998) (explaining that a common allegation of illegal procedures is sufficient to find commonality, even when subsequent complex individualized proceedings will be necessary to resolve individual class members' claims). The Commission has

also supported use of the *Teamsters* process of bifurcating common questions from individualized inquiries such that class issues may be addressed efficiently. *Velva B. v. U.S. Postal Serv.*, EEOC Appeal No. 0720160006 (Sept. 25, 2017). Specifically, the Commission approves of addressing individualized inquiries during the remedies phase once the liability stage is complete. The court in *Bates v. United Parcel Service*, 204 F.R.D. 440 (N.D. Cal. 2001), reasoned that a disability case could proceed first with a liability phase addressing what equitable relief would be appropriate in the event of liability, followed by a remedies phase regarding appropriate level of relief based on individualized questions for each class member. Therefore, I find that certification of the class complaint is not barred from prosecution by the Rehabilitation Act. Issues of commonality and typicality are addressed below.

3.2. Commonality and Typicality

In addressing whether a class complaint warrants certification, it is important first to resolve the requirements of commonality and typicality to "determine the appropriate parameters and size of the membership of the resulting class." *Fusilier v. Dep't of the Treasury*, EEOC Appeal No. 01A14312 (Feb. 22, 2002); *Moten v. Fed. Energy Regulatory Comm.*, EEOC Request No. 05910504 (Dec. 30, 1991). Demonstrating commonality and typicality ensures that the putative class agent possesses the same interests and suffered the same injuries as the members of the proposed class. *Falcon*, 457 U.S. at 156 (1982).

Commonality requires that there be questions of fact common to the class. The class agent must, therefore, establish some evidentiary basis from which one could reasonably infer the operation of an overriding policy or practice of discrimination through allegations of specific incidents of discrimination, supporting affidavits containing anecdotal testimony from other employees against whom an employer allegedly discriminated against in the same manner as the putative class agent, and evidence of specific adverse actions taken against members of the purported class. *Hopkins v. U.S. Postal Serv.*, EEOC Appeal No. 01A02840 (July 22, 2002); *Mastren*, EEOC Request No. 05930253. Mere conclusory allegations, standing alone, do not show commonality. *Id.*

Typicality exists where the class agent demonstrates some nexus with the claims of the class, such as similarity in the condition of employment and similarity in the alleged EEO violation affecting the agent and the class. *Thompson v. U.S. Postal Serv.*, EEOC Appeal No. 01A03195 (Mar. 22, 2001). Typicality requires that the claims or bases alleged by the class agent be typical of the claims of the class, such that the interests of the putative class members are encompassed with the class agent's claim. *Falcon*, 457 U.S. at 156. A class agent must be part of the class theh seek to represent, and must "possess the same interest and suffer the same injury" as class members. *Id.* A class agent need not demonstrate the total absence of factual variation among class members to satisfy these requirements. *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 561 (8th Cir. 1981), *cert. denied*, 460 U.S. 1085 (1982); *Donald v. Pillsbury Co.*, 554 F.2d 825, 831 (8th Cir. 1976), *cert. denied*, 434 U.S. 856 (1977). Although 29 C.F.R. § l614.204(a)(2) identifies commonality and typicality as two individual requirements for certification, they are generally analyzed together, because in application they tend to merge and are often indistinguishable. *Falcon*, 547 U.S. at 157, n.13; *Carter v. U.S. Postal Serv.*, EEOC Appeal No. 01A24926 (Nov. 14, 2003).

Here, I find that the requisite nexus exists to establish common questions of fact and law between the Class Agent and the putative class members. First, Weimer was a deaf civilian employee for the relevant period, as were other Class Agents. As addressed in the background section above, each of the Class Agents has reported instances where they were discriminated against (that is, because the policy or practice itself is discriminatory) or denied reasonable accommodations (that is, because the reason for denying accommodation was based on a policy or practice that is not allowed under the Rehabilitation Act) under one or all of the alleged policies or practices identified in the sub-issues (a)-(h). Each sub-issue addresses a specific policy or practice that will be common to some or all of the general class. *See Tessa L.*, EEOC Appeal No. 0720170021 (certifying a class based on challenged policy); *Bates*, 204 F.R.D. at 445 (class based on process for addressing barriers). In other words, the class is focused on the policies and practices of the Agency, not lower-level discretionary decisions. Indeed, the experiences of the putative class members provided in the existing record demonstrate that the sub-issues potentially affect most or all of the Agency's installations and offices. *Mitchell v. U.S. Postal Serv.*, EEOC Appeal No. 01A20442 (July 29, 2003) (allegations and affidavits used to establish an agency policy or practice for commonality question). The Class Agents have identified policies and practices that purport to discriminate against the putative class members or deny them of reasonable accommodations.

The background section above similarly addresses how the Class Agents' sub-issues are typical of putative class members. While it is true that there is factual variation as to how the policies and practices affected each individual (based their anecdotal evidence at this stage), the interests of the class members will be appropriately encompassed within the sub-issues. For example, to the extent relief is ultimately granted to the class, the type of equitable or injunctive relief addressed to each sub-issue would have the same result for each class member, even if their particular alleged harms are different. Ultimately, the Class Agents identify centralized policies and practices that affect all other putative class members. *See Tessa L.*, EEOC Appeal No. 0720170021 (change in police "caused everyone to suffer lack of reasonable accommodation" regardless of location or functions); *see also,* EEOC Appeal No. 0120103592 (Sept. 9, 2015) ("the CA has identified a policy or practice of the Agency which affects all employees seeking a reasonable accommodation" and claims were typical because the complainant was subjected to the relevant policy or practice).

The Agency argues that the Motion relies on conclusory statements and lacks specificity. Opposition at 15-16. The Agency does not address each of the sub-issues the Class Agent has identified throughout the pendency of this class complaint. The Agency argues that "it appears that most of the allegations are applicable to some individual complainants at certain Air Force bases due to local decision making, but there certainly is no showing that all of the allegations occurred across the Air Force due to some overarching personnel policy or practice." Opposition at 16. The Agency does not grapple with the policies and practices identified throughout this decision. For example, it does not produce any evidence demonstrating that the allegations are one-off instances at dispersed installations. It does not grapple with the testimony of Shock that there are persistent issues across virtually all installations.

Regarding the common fund sub-issue, the Agency argues, "Complainant has not identified an Agency-wide policy for handling individual reasonable accommodation requests." Opposition at 16. Yet here is an obvious candidate for commonality. The *Bates* court explained that the failure to have a common fund was a common question for employees at UPS. And, on the other hand, the Commission found in *Tessa L.* that the decision to move from a common fund to dispersed funds established commonality. Here, the Agency has been aware of issues stemming from the failure to have a common fund for years. The Class Agents have put forward evidence that the Agency has not addressed the issue. The Agency does not put forward any evidence that it has addressed it, or that it does not affect how accommodation requests are handled for deaf employees. The Class Agents have brought forward evidence that the lack of a common fund is the type of response given at local levels for not accommodating them.

The Agency takes issue with the Class Agent's decision not to depose the five DPMs offered by the Agency. Opposition at 17. On the other hand, the Agency does not produce any testimony from these individuals to undercut any evidence offered by the Class Agent, including the expansive testimony offered by Shock. The Agency argues that Shock does not manage individual reasonable accommodation requests. Opposition at 18. Indeed, she manages the centralized reasonable accommodation process, such as it is, and has seen the policies and practices that the Class Agent has alleged results in failing to accommodate deaf employees. At issue are the policies and practices adhered to, or not, by those authorized to make decisions on reasonable accommodations.

Regarding captioning, the Agency argues that Shock does not have firsthand knowledge of training materials lacking captions. Opposition at 19. However, the Agency does not address the testimony of the Class Agents addressing this sub-issue. Moreover, the Agency does not produce evidence demonstrating that all, or any, of its training materials are appropriately captioned. Rather, Shock's testimony confirmed the case-by-case nature alleged by the Class Agents.

Regarding typicality, the Agency argues that "there is absolutely no evidence that others have experienced the same problems for the same reasons or due to the same policy." Opposition at 19. This argument is addressed above.

In sum, the elements of commonality and typicality are met.

3.3. Numerosity

Numerosity requires that the putative class be sufficiently numerous such that a consolidated complaint by the members of the class or individual, separate complaints are impractical. *See* 29 C.F.R. §1614.204(a)(2)(i). Relevant factors to consider include the number of putative class members, geographic dispersion, the ease with which the class be identified, the nature of the action, and the size of each claim alleged. *See Wood v. Dep't of Energy*, EEOC Request No. 05950985 (Oct. 5, 1998). There is no specific numerical cut off point, though a gray area generally hovers around 30 class members as a lower threshold. *See Anderson*, EEOC Appeal No. 01A41492 (Oct. 18, 2005) (citing *Harris v. Pan Am. World Airways*, 74 F.R.D. 24, at *45 (N.D. Cal. 1977).

Here, I find that the numerosity requirement has been satisfied. According to the Agency's 2020 Total Workforce Distribution by Disability Status Report for the period October 1, 2019-September 30, 2020, more than 700 Agency employees identified as being deaf or having serious difficulty hearing. Motion at 68. And Shock testified that she believed there were more than a thousand such individuals. Motion at 68. These individuals are geographically dispersed and easily identified. Motion at 69.

The Agency argues that Complainant can only meet numerosity based on evidence ill-gotten during the pre-certification discovery process. Opposition at 20. The Agency admits 2589 self-identified deaf or hard of hearing individuals. Opposition at 20. It also argues that numerosity stands on the "hope that the Administrative Judge will sanction the Agency and find certain matters, such as numerosity, commonality, and/or typicality to be established." Opposition at 20.[4] Notably, the Agency does not address the number of putative class members, geographic dispersion, ease of identifying the class, the nature of the action, or the size of each claim alleged. Rather, the Agency argues "not all deaf or hard of hearing employees have sought or believe they need a reasonable accommodation." Opposition at 20-21. To this point, the Agency produces no evidence how some, most, or all of the identified individuals are subject to the Agency's policies and practices affecting those with a hearing disability. At any rate, it is reasonable to conclude that there are at least 40 such individuals (though likely several multiples more) such that certification of the class is appropriate.

3.4. Adequacy of Representation

The adequacy of representation criterion requires that the representative(s) of the class fairly and adequately protect the interests of the class. To satisfy this element, "[t]he class representative should have no conflicts with the class and should either have sufficient legal training and experience to pursue the claim or designate an attorney with the requisite skills and experience." *Sedillo v. Dep't of Agriculture*, EEOC Appeal No. 07A20071 (Aug. 7, 2002); *Goldin v. Nat'l Aeronautics & Space Admin.*, EEOC Appeal No. 01993626 (Apr. 26, 2001). The following factors are considered: the representative's prior experience handling class complaints; the representative's level of professional competence; and the representative's access to the resources necessary to prosecute the class complaint. *See Hight v. Dep't of Agriculture*, EEOC Appeal No. 01942377 (Feb. 13, 1995) (citing *Johnson v. Shreveport Garment Co.*, 422 F. Supp. 526, 534-541 (W.D. La. 1976), *aff'd* 577 F.2d 1132 (5th Cir. 1978)).

Here, I find that adequacy of representation has been satisfied. First, as to the Class Agents, I find that Weimer, Perez, Hongyu-Perez, Burg, and Wambold do not have any conflicts of interest with other class members in prosecuting the class complaint. Moreover, their declarations and filings to date demonstrate that they are committed to vigorously prosecuting the complaint on behalf of the class. To the extent a conflict arises, a Class Agent may seek to withdraw from that role and, where appropriate, a class member may be named as Class Agent after certification processing is complete. Similarly, the attorneys currently representing the putative class have satisfied the adequacy requirement. There is no conflict of interest. They are qualified and have committed to prosecuting this complaint vigorously. Significant resources have already been marshaled in this regard as evidenced by the filings in this matter. They also declare that they are

[4] Whether to impose sanctions is addressed below.

prepared with the necessary resources to continue prosecuting the complaint. Moreover, Disability Rights Advocates have specialized in disability law and class action litigation for approximately 30 years, serving as class counsel in dozens of disability rights class actions. And the Law Offices of Wendy Musell has decades of experience in representing federal employees, including in class action cases.

The Agency does not argue adequacy of counsel. The Agency argues, "There is no showing that Ms. Weimer's complaints are typical of all class members or factually similar to the other complainants' claims," and "there is no showing that there are any common factual circumstances or that all ten allegations are or will be applicable to all class members." Opposition at 21. This argument has been addressed above. The Agency does not provide further explanation or evidence to address its argument.

4. Additional Matters

As addressed in the introductory section of this decision, I decline to impose sanctions against the Agency at this time. The Class Agent also requests a class list and removal of the limited stay, which I decline at this time. I also order the Agency to produce the Shock documents at this time. I explain my reasoning below.

Sanctions. As I have granted certification to the putative class based on the existing evidence in the record, the contemplated sanctions of adverse inferences and considering matters established are mooted, and I decline to impose sanctions at this time. Nevertheless, I remind the Agency that past noncompliance may be considered where there are new instances of noncompliance.

Class List & Stay. I determine that a class list should not be produced at this time, and I extend the limited stay and protective order indefinitely. Before addressing the parties' arguments, I note that if the certification decision is accepted or survives challenge after its issuance, the parties' arguments are mostly mooted. A notice procedure and class list would be addressed during post-certification processing and production of further information would be required as the Class Agent would be representing class members.

The Class Agents argue that they are entitled to a class list and removal of the limited stay, noting that courts addressing disclosure of medical information to militate in favor of disclosure in the context of litigation regarding protecting the rights of individuals with disabilities. *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 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."); *McDonald v. Holder*, No. 09-CV-0573-CVE-TLW, 2010 WL 4362821, at *5 (N.D. Okla. Oct. 26, 2010) (allowing discovery notwithstanding § 12112(d)(3), and noting that "defendant cites no cases adopting his argument that this statute creates a privilege preventing discovery of employee medical examinations in civil ligation. The Court has independently researched this issue and has found no cases supporting defendant's argument that this statute creates a discovery privilege."); *In re Nat'l Hockey League Players' Concussion Inj. Litig.*, 120 F. Supp. 3d 942, 949–52 (D. Minn. 2015) (allowing production of de-identified information regarding hockey players' head trauma and brain disease, and holding that "the ADA does not

create a privilege that wholesale bars the discovery of the requested information."); *Tjernagel v. Gates Corp.*, No. 4-06-CV-362-TJS, 2007 WL 9761305, at 2-*5 (S.D. Iowa May 24, 2007) (discussing cases, and ordering discovery regarding the identities and contact information of other employees with disabilities, subject to protective restrictions). The Class Agents further argue that because this is a class complaint, disclosure of the relevant information advances the duty of class representatives to protect class interests, and that the duty to advance these interests began with filing of a class complaint (not after certification). Motion at 75. The Class Agent's argument is well-founded and the Agency has not independently identified legal authorities prohibiting disclosure. However, as addressed above, further production at this stage is unnecessary and should be limited until post-certification.[5]

The Class Agents argue that they have not opposed entry of an appropriate protective order, and that the Agency has never responded to the invitation, despite the Agency being the party asserting an interest in protecting the information. Motion at 76. The Class Agents argue that if putative class members must have an opportunity to avoid disclosure of their information, it should be via an "opt out" provision like the one used in *Nevarez v. Forty Niners Football Co., LLC*, No. 16CV07013LHKSVK, 2018 WL 306681, at *3 (N.D. Cal. Jan. 5, 2018). The Class Agents propose such an opt out. The Class Agents also argue that they should not be penalized for not providing additional evidence in support of class certification as they have sought to comply with the limited stay order. They note that efforts were undertaken to obtain further declarations but they were not completed so that they would be in compliance with the order. The Class Agent is correct that the Agency should be the party bearing the burden of proposing solutions as it has asserted an interest in protecting information, but I do not need to address the type of disclosure of protection required at this stage as I extend the order. As I have decided to certify the class, I need not address whether the Class Agent is penalized by not providing additional evidence.

The Agency complains that it should not have been required to disclose the identity of individuals that identified their hearing disability to the Agency. It argues that it is inappropriate

[5] The Agency asks in its June 21, 2022 filing regarding the limited stay and protective order, that I state whether I believe "the ordered release of the employees' information during the pre-certification stage constituted a violation of the Rehabilitation Act." As demonstrated by the cited authorities herein, I do not discern such a violation. In the same filing, the Agency asks for a determination on its request not to give any consideration to the Class Agent's May 24, 2022 filing because it "contains no new information or anything that could not have been raised" in the May 16th filing. This is incorrect. The Class Agent's May 24th filing attaches an extremely useful document that addresses the Agency's arguments in its May 19th filing. The Agency's May 19th filing attaches two declarations, one from each Agency Representative, presenting their recollections of a video conference I held with the parties on February 4, 2022. For that conference, I had required the Agency to provide Communication Access Realtime Translation (CART) services as an accommodation for putative class agents. During the conference, interpreters provided real-time transcription of the words spoken. While imperfect, the transcription is the best evidence of what was said during that conference, not the declarations provided by the Agency Representatives. We need not attempt to recall what was said when there is a transcription, which the Agency has now used in its more recent filings as well. Rather than produce this transcription with its May 19th filing, the Agency opted to produce declarations. Therefore, it was appropriate for the Class Agent to submit a filing responding to the Agency's assertions and to attach the transcription. Perhaps the better course would have been for the Class Agent to seek leave to file a copy of the transcription before filing. But that is of little moment here where I would have granted that leave. The Class Agent had no reason to produce the transcription in its May 16th filing because there was no reason to conceive that the Agency would argue sanctions were not appropriate based on statements made during the February 4th conference.

to address the stay and protective order in the context of the amended certification filings. Opposition at 21-22. First, I do not discern any prejudice to the Agency in considering how to address the limited stay and protective order at the same time as the certification filings. Nor is the Agency prejudiced in fact, as I decline to impose sanctions and determine to extend the stay and protective order. Second, as addressed by the legal authorities cited above, there was no inappropriate disclosure during the pre-certification discovery period. The medical disclosure regulations do not bar production of information under their ambit in the context of individuals pursuing their rights on behalf of a class.

The Agency argues that it did not request not to produce information regarding interrogatory nos. 1 and 3; rather, it argued that the sanctions sought were "unwarranted, inappropriate, and unsupported." Opposition at 22. Later, the Agency argues that it should not have been required to produce the subject information. Opposition at 22-23. I have addressed the appropriate production above, and I have declined to impose sanctions.

The Agency argues that the Class Agent intended to use the contact information for the listed individuals "to bolster its push for class certification." Opposition at 25. This is precisely the purpose of pre-certification discovery: to allow a party to obtain information to support its case beyond the allegations in the class complaint, if possible. The Agency would argue on one hand that the Class Agent has produced insufficient information and on the other withhold the relevant information. I add that the Agency declined to identify stipulations to obviate the subject production.

Regarding production of information, the Agency takes issue with the limited stay and protective order, arguing that this tribunal was "clearly on notice of the Agency's effort to avoid violating employees' privacy rights." Opposition at 26. I reiterate that the Agency made no effort to advise this tribunal of any legal objections it had until its May 19, 2022 filing. As explained in the Initial Processing Order, dated January 20, 2022, "[R]equests to me shall be submitted as a motion." The Agency did not file such a motion. It did not oppose the Class Agent's discovery motions. It did not respond to a show-cause order. Only after the Sanctions Notice did the Agency seek to formally raise privacy concerns, which was followed by the complained-of order that limited further production and implemented additional protections. I note that while the Agency references Shock's opinion regarding the production (Opposition at 26-27), it does not appear that either party explained to Shock the relevant procedural history outlined in this decision.

The Agency argues that the Class Agent should not be allowed to rely on information received as a result of obtaining the employee's disability status. As addressed above, the Class Agent ceased such efforts upon receipt of the order and further production was not required during the pre-certification discovery period. I note that the Agency does not now oppose the numerical facts of over 2500 individuals self-identifying as deaf or hard of hearing, or the information in its Total Workforce Distribution by Disability Status Report that identifies over 700 employees as deaf or having serious difficulty hearing.

Finally, I note that in the Agency's June 21, 2022 filing regarding the limited stay and protective order, it argues that I have prejudged this case prior to the parties' conducting any discovery, citing the CART transcript. I wish to clarify one of the statements: "And my expectation is that

this information will bear that out, in essentially the format the class agent has requested." The intention of this statement, as stated elsewhere, is to follow the evidence wherever it goes; that is, whichever way it *bears*. Information can bear out a defense or a claim. I did not intend to express a prejudgment that the evidence would bear out a particular end. Indeed, in the statements just before the one I've quoted here, I said:

> "[M]y expectation is to allow a broader amount of discovery to determine *whether* those kinds of decision are the effect of a policy or procedure at a higher level. And so by allowing this discovery, it's a way to determine *whether* this is a, you know, *whether* this numerosity component can be met and *whether* the class agents have met the requirements of typicality and commonality." (Emphasis added.)

That is, my expectation was that allowing further discovery would assist the parties in developing evidence on whether the class should be certified. As has been demonstrated in this decision, clearly, additional discovery (including discovery to which the Agency has not objected) has aided in determining whether the class should be certified. As I further explained in the February 4, 2022 conference:

> "It may be to the agency's benefit to produce this discovery as well, right? It could be that, in fact, every component in the agency is doing the thing it ought to, except for in four, five, or six places. In that case, you know, numerosity wouldn't be met or the agency would be able to put up its defenses against class certification. And so by looking into that information, you know, more deeply yourselves, you might find that you have a better defense than you thought you had. And so that's the reasoning there."

Shock Documents. As the Agency did not oppose the Class Agent's motion, and for the reasons stated in the motion, I grant the motion. **On or before October 28, 2022**, I order the Agency produce the documents and categories of documents identified as item nos. 1-4 at pages 3-5 of the Class Agent's motion. In view of the limited stay and protective order, the Agency is granted leave to redact confidential medical information at this time. After disclosure, the Class Agent is granted leave to file a motion regarding the appropriateness of the Agency's redactions, if any, and the Agency may respond. Failure to produce the information by the deadline may result in sanctions.

5. Conclusion

For the foregoing reasons, I find that the class complaint meets the criteria of 29 C.F.R. § 1614.204. Accordingly, I accept the captioned class complaint. The captioned class is therefore certified to consist of the following general class and specific sub-issues:

> All deaf civilians who are currently employed by the Agency, as well as all 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 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 deaf employees are denied because of cost;
c. Failed to ensure that deaf employees have access to American Sign Language services;
d. A centralized discriminatory policy or practice that puts the onus of requesting accommodations on 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 deaf employees to base networks and ensuring that they function;
f. Failed to whitelist assistive technology for deaf employees working in secure areas;
g. Failed to ensure that trainings, presentations, and videos are accessible for 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 deaf employees.

6. Further Processing

Upon issuance of its final action (either accepting or appealing this decision), the Agency shall upload a copy to the electronic docket and email a copy to me. If the Agency appeals this certification decision, the hearings process will cease until further instructions from the Commission's Office of Federal Operations.

If the Agency implements the certification decision, within 15 days of receipt of the Agency's action, the Class Agent must upload a notice to the electronic docket and email a copy to me indicating the Class Agent's intention whether to appeal the Agency's final action. If the Class Agent does not intend to file an appeal, I will issue an order with instructions for notifying all class members of the acceptance of the class complaint. I will also set a conference to address processing matters (for example, discovery, bifurcation, settlement).

The applicable time limits and procedures for appealing this order and issuing a final action appear in the attached notice.

It is so ordered. I certify this document was served to the parties and representative(s) via the electronic docket.

For the Commission: RICHARD PETERSON

Digitally signed by RICHARD PETERSON
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