United States of America
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Los Angeles District Office

Sarah Weimer, et. al.
           Complainant,

v.

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

EEOC Appeal No. 2023000892
EEOC NO. 550-2021-00060XAgency Case
No. 5P1C2000493CH20

COMPLAINANTS’ OPPOSITION TO
AGENCY APPEAL OF CLASS
CERTIFICATION

Date:   February 28, 2023
TABLE OF CONTENTS

Alphabetical Index of all Evidence Offered in Support of Complainant’s Renewed Motion for Class Certification ................................................................. VI

I. Introduction ......................................................................................................................... 1

II. Law Relevant to Class Claims ............................................................................................ 5

III. Statement of Facts .............................................................................................................. 9

A. Centralized Air Force policies and practices serve to discriminate against the Agency’s d/Deaf employees and applicants. ................................................................. 11

   1. The Air Force routinely denies necessary accommodations for lack of funds even though ample resources are available to the Agency as a whole, and the Agency has repeatedly failed to adopt a centralized process for funding accommodations or otherwise fix this issue.............................................................................................................. 11

   2. The Air Force has failed to provide reliable access to American Sign Language interpreters and other necessary accommodations, and in many instances has provided no access at all: according to its own records, it has only provided ASL 152 times since 2018, despite having over 700 d/Deaf employees. ........................................................................................................ 17

   3. The Air Force has a centralized discriminatory policy or practice that puts the onus of requesting necessary accommodations on d/Deaf employees every time, even when need for that accommodation is known to the Agency, and has not changed. .................. 24

   4. The Air Force has failed to implement a streamlined and standardized process for providing videophones and other necessary devices, connecting them to base networks, and ensuring their actual functioning, such that class members wait for years to have and be able to use these accommodations ................................................................................. 27

   5. The Air Force has failed to “whitelist” appropriate assistive technology, and failed to provide workable alternative accommodations (such as interpreters with security clearance) for d/Deaf employees working in secure areas.............................................................. 30

   6. The Air Force routinely fails to ensure that trainings, presentations, and videos for civilian employees are properly captioned or otherwise accessible............................................................................................................................. 33
7. The Air Force has failed to adequately staff its disability program, to the detriment of its d/Deaf employees, and everyone else who needs accommodations. ................................................................. 36

B. Complainants are civilian Air Force employees who are d/Deaf, and like every other member of the proposed class, they have been subjected to discriminatory Air Force policies and practices, and denied necessary accommodations. ............................................................................. 40

1. The Air Force has discriminated against class agent Sarah Weimer and repeatedly denied or delayed necessary accommodations, leading to her constructive termination..................................... 40

2. The Air Force has discriminated against class agent Hugo Perez, and repeatedly denied or delayed necessary accommodations. ................. 45

3. The Air Force has discriminated against class agent Sheila Burg, and repeatedly denied or delayed necessary accommodations. ................ 48

4. The Air Force has discriminated against class agent Matthew Wambold and repeatedly denied or delayed necessary accommodations—including during the Agency’s EEO process itself—leading to his constructive termination. ......................... 49

5. The Air Force has discriminated against class agent Mika Hongyu-Perez, and failed to provide her with necessary accommodations during the application process, as well as during employment. ........... 51

6. The Air Force has discriminated against class declarant Rachel McAnallen, and repeatedly denied or delayed necessary accommodations. ................................................................. 52

7. Claimants have satisfied all EEO procedural requirements................. 53

IV. Legal Standard Applicable to Class Certification......................................................... 54

V. Legal Standard Applicable to Review of Class Certification Decision..................... 55

VI. Argument ...................................................................................................................... 56

A. Administrative Judge Peterson’s decision on class certification should be affirmed................................................................. 56

1. Judge Peterson correctly found that Complainants’ claims and those of the class depend on common questions that are capable of classwide resolution. ................................................................. 58

2. Judge Peterson correctly found that Complainant’s claims are typical of the class................................................................. 65

3. Judge Peterson correctly found that the proposed class – which includes at least a thousand d/Deaf civilian employees throughout the Air Force – easily satisfies numerosity ........................................ 68
4. Judge Peterson correctly found that Complainants and their counsel will fairly and adequately protect the interests of the class. ....... 70

5. Certification of a class is appropriate, because a single injunction or declaratory judgment would provide relief to each member of the class. ................................................................. 72

6. The Commission routinely finds that claims under § 501 of the Rehabilitation Act are suitable for class treatment. ......................... 74

7. The Commission endorses the Teamsters method of proof for class claims under § 501 of the Rehabilitation Act ......................... 75

8. Damages for Complainant Weimer and the class can be determined at a later stage ................................................................. 79

B. The Agency repeatedly ignored Judge Peterson’s orders on pre-certification discovery and attempted to impede the development of an adequate record. ......................................................................... 79

1. Complainants diligently sought pre-certification discovery. ............ 79

2. The Agency violated or ignored every pre-certification discovery order in this case, including an order to show cause ..................... 80

C. Judge Peterson did not abuse his discretion in ordering production of a class list, but even if he had the error would be harmless, because he subsequently issued a protective order limiting its use, and the assertedly-confidential information from it formed no part of Complainants’ motion or the class certification decision ........................................... 85

D. Judge Peterson did not abuse his discretion in ordering the Agency to make its head Disability Program Manager available for deposition, and the Agency’s refusal to designate her as a “30(b)(6)” witness is irrelevant because the certification decision did not rely on any finding that her testimony “bound” the Agency ................................................................. 88

VII. Conclusion ............................................................................................... 92
**TABLE OF AUTHORITIES**

**Cases**

<table>
<thead>
<tr>
<th>Case</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abdullah v. U.S. Sec. Assocs., Inc., 731 F.3d 952 (9th Cir. 2013)</td>
<td>59, 60, 61, 62</td>
</tr>
<tr>
<td>Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997)</td>
<td>72</td>
</tr>
<tr>
<td>Aracely J., Complainant, EEOC DOC 2019003498, 2020 WL 6134366 (Sept. 21, 2020)</td>
<td>63</td>
</tr>
<tr>
<td>Armstrong v. Davis, 275 F.3d 849 (9th Cir. 2001)</td>
<td>64</td>
</tr>
<tr>
<td>Aurore C., et al., Complainant, EEOC DOC 0120150342, 2018 WL 2932869 (May 18, 2018)</td>
<td>55</td>
</tr>
<tr>
<td>Bates v. United Parcel Service, 204 F.R.D. 440 (N.D. Cal. 2001)</td>
<td>passim</td>
</tr>
<tr>
<td>Bedynek-Stumm v. Dep't. of the Interior, EEOC DOC 0520110587, 2011 WL 5894136 (Nov. 15, 2011)</td>
<td>89, 91</td>
</tr>
<tr>
<td>Burke-Thompson v. Attorney General, Appeal No. 05870473 (1988)</td>
<td>79</td>
</tr>
<tr>
<td>Californians for Disability Rts., Inc. v. California Dep't of Transp., 249 F.R.D. 334 (N.D. Cal. 2008)</td>
<td>71</td>
</tr>
<tr>
<td>Cf. Aracely J., Complainant, EEOC DOC 2019003498, 2020 WL 6134366 (Sept. 21, 2020)</td>
<td>69</td>
</tr>
<tr>
<td>Complainant v. Ashton B. Carter (Dep't of Def.), EEOC DOC 0120103592, 2015 WL 5530294, (Sept. 9, 2015)</td>
<td>63, 64</td>
</tr>
<tr>
<td>Complainant v. Dept. of Def., EEOC DOC 0120103592, 2015 WL 5530294, at *7 (Sept. 9, 2015)</td>
<td>74</td>
</tr>
<tr>
<td>Cyncar, EEOC Appeal No. 0720030111 (February 1, 2007)</td>
<td>78, 79</td>
</tr>
<tr>
<td>EEOC v. Bass Pro Outdoor World, LLC, 826 F.3d 791, 797 (5th Cir. 2016)</td>
<td>75</td>
</tr>
<tr>
<td>Ellis v. Costco Wholesale Corp., 657 F.3d 970 (9th Cir. 2011)</td>
<td>70</td>
</tr>
<tr>
<td>Felix Z. et al., Complainant, EEOC DOC 2020005328, 2021 WL 1928243 (Apr. 29, 2021)</td>
<td>64, 67</td>
</tr>
<tr>
<td>Glover v. United States Postal Serv., EEOC Appeal No. 01A04428 (April 23, 2001)</td>
<td>75</td>
</tr>
<tr>
<td>Hae T., Complainant, EEOC DOC 2019003385, 2020 WL 6134360 (Sept. 23, 2020)</td>
<td>6</td>
</tr>
<tr>
<td>Hanon v. Dataproducts Corp., 976 F.2d 497 (9th Cir. 1992)</td>
<td>66</td>
</tr>
</tbody>
</table>
1 Harris v. Pan American World Airways, 74 F.R.D. 25, 45 (N.D. Cal. 1977) ................................................................. 54
2 Haywood C. v. U.S. Postal Service. EEOC Appeal No. 0120132452 (Nov. 18, 2014) ...................................................... 78
3 Hines v. Dep’t of the Air Force, EEOC Appeal No. 01931776 (July 7, 1994) ................................................................. 54
4 Hohider v. United Parcel Serv., Inc., 574 F.3d 169 (3d Cir. 2009) ................................................................. 77
6 Huddleson v. U.S. Postal Service, EEOC Appeal No. 0720090005 n. 6 (Apr. 4, 2011) ...................................................... 78
7 Ignacio v. United States Postal Serv., EEOC Appeal No. 03840005 (September 4, 1984) ......................................... 6
8 In re Abbott Labs Norvir Anti-Trust Litig., 2007 WL 1689899 (N.D. Cal. Jun. 11, 2007) .................................................. 69
9 In re online DVD-Rental Antitrust Litig., 779 F.3d 934 (9th Cir. 2015) ................................................................. 70
12 Jay v. Internet Wagner, 233 F.3d 1014 (7th Cir. 2000) ................................................................. 8
13 Jeffries v. Secretary of Treasury, 01A02227 (2003) .................................................................................................... 66, 69
15 Johnson-Feldman v. Secretary of Veterans Affairs, 01953168 (1997) ................................................................. 68, 69
16 Just Film, Inc. v. Buono, 847 F.3d 1108 (9th Cir. 2017) ................................................................................................ 66
17 Kwok v. USPS, 01871083, 1721/E10 (1987) ........................................................................................................ 54
18 Lee v. Secretary of Army, 01990384 (2000) ........................................................................................................ 69
19 Lozano v. AT & T Wireless Servs., Inc., 504 F.3d 718 (9th Cir. 2007) ................................................................. 66
20 Mazza v. Am. Honda Motor Co., 666 F.3d 581 (9th Cir. 2012) ................................................................................ 60
22 McCray v. Wilkie, 966 F.3d 616 (7th Cir. 2020) ........................................................................................................ 8
23 McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973) ................................................................................ 75, 76
24 Melodee M. et al., Complainant, EEOC DOC 2020004194, 2020 WL 7243675 (Nov. 23, 2020) ........................................................................................................ 74
25 Meyer v. Kerry (State), EEOC Appeal No. 0720110007 (2014) ................................................................................ 75

Complainants’ Opposition to Agency Appeal of Class Certification
EEOC Appeal No. 2023000892, EEOC Case No. 550-2021-00060X  Page II
Complainants’ Opposition to Agency Appeal of Class Certification
EEOC Appeal No. 2023000892, EEOC Case No. 550-2021-00060X

Statutes

29 U.S.C. § 791(f) ............................................................................................................................. 6, 7, 71
29 U.S.C. § 794(b) ...................................................................................................................................... 7
29 U.S.C. § 794d(a)(1)(A) ........................................................................................................................ 34
42 U.S.C. § 12101(b)(1) ...................................................................................................................... 78
42 U.S.C. § 12111(9)(B) ........................................................................................................................ 8
42 U.S.C. § 12112(b)(5)(A) .................................................................................................................... 7
42 U.S.C. § 12112(b)(5)(B) .................................................................................................................... 9
42 U.S.C. § 12112(b)(7) ........................................................................................................................ 9
42 U.S.C. § 12112(d)(3)(B) .................................................................................................................... 86

Rules

Fed. R. Civ. P. 23(b)(2) ............................................................................................................................. 75

Treatises

William B. Rubenstein, 1 Newberg on Class Actions § 3:12 (5th ed. 2020) ........................................... 68, 69, 70
William B. Rubenstein, 1 Newberg on Class Actions § 3:20 (5th ed., 2020) ........................................... 64
William B. Rubenstein, 1 Newberg on Class Actions § 3:72 (5th ed. 2020) ........................................... 71
<table>
<thead>
<tr>
<th>Regulations</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>29 C.F.R. § 1614.109(f)(1)</td>
<td>88</td>
</tr>
<tr>
<td>29 C.F.R. § 1614.203(b)</td>
<td>6, 7, 71</td>
</tr>
<tr>
<td>29 C.F.R. § 1614.203(c)</td>
<td>6</td>
</tr>
<tr>
<td>29 C.F.R. § 1614.203(d)</td>
<td>7</td>
</tr>
<tr>
<td>29 C.F.R. § 1614.203(d)(3)(ii)</td>
<td>8, 11</td>
</tr>
<tr>
<td>29 C.F.R. § 1614.203(d)(3)(ii)(A)</td>
<td>8</td>
</tr>
<tr>
<td>29 C.F.R. § 1614.204</td>
<td>55</td>
</tr>
<tr>
<td>29 C.F.R. § 1614.204(a)(2)</td>
<td>54, 56</td>
</tr>
<tr>
<td>29 C.F.R. § 1614.204(a)(2)(i)</td>
<td>70</td>
</tr>
<tr>
<td>29 C.F.R. § 1614.204(iv)</td>
<td>70</td>
</tr>
<tr>
<td>29 C.F.R. § 1630.1</td>
<td>7</td>
</tr>
<tr>
<td>29 C.F.R. § 1630.14(c)</td>
<td>86</td>
</tr>
<tr>
<td>29 C.F.R. § 1630.14(c)(1)</td>
<td>86</td>
</tr>
<tr>
<td>29 C.F.R. § 1630.2(g)(1)</td>
<td>78, 79</td>
</tr>
<tr>
<td>29 C.F.R. § 1630.2(j)(ii)</td>
<td>79</td>
</tr>
<tr>
<td>29 C.F.R. § 1630.2(m)</td>
<td>79</td>
</tr>
<tr>
<td>36 C.F.R. Appendix D (Electronic and Information Technology Accessibility Standards) §§ D1194.24(c)(d)</td>
<td>34</td>
</tr>
</tbody>
</table>
## Alphabetical Index of all Evidence Offered in Support of Complainant’s Renewed Motion for Class Certification

<table>
<thead>
<tr>
<th>Document</th>
<th>Original Location</th>
<th>Complainant’s Excerpt of Record (“ER”) Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>2016 Diversity and Inclusion Initiatives Implementation Guidance</td>
<td>Exhibit 7 to Deposition of Kendra Shock, attached as Exhibit E to Declaration of Sean Betouliere in Support of Complainants’ Renewed Motion for Class Certification.</td>
<td>ER 0452-477</td>
</tr>
<tr>
<td>AFI 36-2710 – Reasonable Accommodation Training</td>
<td>Exhibit 13 to Deposition of Kendra Shock, attached as Exhibit J to Declaration of Sean Betouliere in Support of Complainants’ Renewed Motion for Class Certification.</td>
<td>ER 0654-686</td>
</tr>
<tr>
<td>Combined Record of Investigation (“ROI”)</td>
<td>Filed by Agency on November 13, 2020</td>
<td>ER 2578-4193</td>
</tr>
<tr>
<td>Correspondence Involving CART for Ms. Burg</td>
<td>Exhibit N to Declaration of Sean Betouliere in Support of Complainants’ Renewed Motion for Class Certification.</td>
<td>ER 0839-853</td>
</tr>
<tr>
<td>DAF Deaf Accommodation (K. Shock) Excel Sheet</td>
<td>Exhibit 9 to Deposition of Kendra Shock, attached as Exhibit I to Declaration of Sean Betouliere in Support of Complainants’ Renewed Motion for Class Certification.</td>
<td>ER 0644-653</td>
</tr>
<tr>
<td>Declaration of Hugo Perez in Support of Complainants’ Motion for Class Certification (“Perez Decl.”)</td>
<td>Filed February 11, 2021</td>
<td>ER 2280-2288</td>
</tr>
<tr>
<td>Declaration of Matthew Wambold in Support of Complainants’ Motion for Class Certification (“Wambold Decl.”)</td>
<td>Filed February 11, 2021</td>
<td>ER 2446-2448</td>
</tr>
<tr>
<td>Declaration of Mika Hongyu-Perez in Support of Complainants’ Motion for Class Certification</td>
<td>Filed February 11, 2021</td>
<td>ER 2357-2366</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Declaration of Rachel McAnallen in Support of Complainants’ Motion for Class Certification</td>
<td>Filed February 11, 2021</td>
<td>ER 2449-2454</td>
</tr>
<tr>
<td>Declaration of Sarah Weimer in Support of Complainants’ Motion for Class Certification</td>
<td>Filed February 11, 2021</td>
<td>ER 1917-1940</td>
</tr>
<tr>
<td>Declaration of Sean Betouliere in Support of Complainants’ Renewed Motion for Class Certification</td>
<td>Filed June 21, 2022. Includes Exhibits A through N in Support of Complainant’s Renewed Motion for Class Certification.</td>
<td>ER 0308-1916</td>
</tr>
<tr>
<td>Declaration of Sheila Burg in Support of Complainants’ Motion for Class Certification</td>
<td>Filed February 11, 2021</td>
<td>ER 2327-2340</td>
</tr>
<tr>
<td>Fiscal Year 2018 Affirmative Action Plan report</td>
<td>Exhibit 10 to Deposition of Kendra Shock, attached as Exhibit F to Declaration of Sean Betouliere in Support of Complainants’ Renewed Motion for Class Certification.</td>
<td>ER 0478-500</td>
</tr>
<tr>
<td>Fiscal Year 2020 Affirmative Action Plan report</td>
<td>Exhibit 11 to Deposition of Kendra Shock, attached as Exhibit G to Declaration of Sean Betouliere in Support of Complainants’ Renewed Motion for Class Certification.</td>
<td>ER 0501-527</td>
</tr>
<tr>
<td>Fiscal Year 2020 MD-715 Workforce Tables</td>
<td>Exhibit 12 to Deposition of Kendra Shock, attached as Exhibit H to Declaration of Sean Betouliere in Support of Complainants’ Renewed Motion for Class Certification.</td>
<td>ER 0528-643</td>
</tr>
<tr>
<td>Number</td>
<td>Description</td>
<td>Exhibit/Document Information</td>
</tr>
<tr>
<td>--------</td>
<td>-----------------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>2</td>
<td>June 18, 2020 Air Force Instruction 36-2710 Policy Document</td>
<td>Exhibit K to Declaration of Sean Betouliere in Support of Complainants’ Renewed Motion for Class Certification.</td>
</tr>
<tr>
<td>3</td>
<td>Letter from Complainants’ Counsel Identifying Mr. Wambold as a class member and seeking to amend his individual EEO Complaint</td>
<td>Exhibit A to Declaration of Sean Betouliere in Support of Complainants’ Renewed Motion for Class Certification.</td>
</tr>
<tr>
<td>4</td>
<td>Opt-Out Notice Proposed and Adopted in Nevarez.</td>
<td>Exhibit M to Declaration of Sean Betouliere in Support of Complainants’ Renewed Motion for Class Certification.</td>
</tr>
<tr>
<td>5</td>
<td>Proposed Contact Information Opt-Out Notice to Class Members.</td>
<td>Exhibit L to Declaration of Sean Betouliere in Support of Complainants’ Renewed Motion for Class Certification.</td>
</tr>
<tr>
<td>6</td>
<td>Second Supplemental Declaration of Hugo Perez in Support of Complainants’ Motion for Class Certification (“Perez Second Supp. Decl.”)</td>
<td>Filed concurrently with the motion herein</td>
</tr>
<tr>
<td>7</td>
<td>Second Supplemental Declaration of Sarah Weimer in Support of Complainants’ Motion for Class Certification (“Weimer Second Supp. Decl.”)</td>
<td>Filed February 3, 2022</td>
</tr>
<tr>
<td>8</td>
<td>Supplemental Declaration of Hugo Perez in Support of Complainants’ Motion for Class Certification (“Perez Supp. Decl.”)</td>
<td>Filed April 28, 2021</td>
</tr>
<tr>
<td>9</td>
<td>Supplemental Declaration of Sarah Weimer in Support of Complainants’ Motion for Class Certification (“Weimer Supp. Decl.”)</td>
<td>Filed November 1, 2021</td>
</tr>
<tr>
<td>The January 11, 2021 Report of Investigation in the complaint of Sheila Burg, 9L4W2000671 (&quot;Burg ROI&quot;)</td>
<td>Exhibit B to Declaration of Sean Betouliere in Support of Complainants’ Renewed Motion for Class Certification.</td>
<td>ER 0854-1916</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Transcript excerpts from the June 1, 2022 (Volume One) and June 2, 2022 (Volume Two) depositions of head Air Force Disability Program Manager Kendra Shock (&quot;Shock Dep.&quot;)</td>
<td>Exhibit D to Declaration of Sean Betouliere in Support of Complainants’ Renewed Motion for Class Certification.</td>
<td>The full transcripts of the June 1, 2022 (Volume One) and June 2, 2022 (Volume Two) depositions of head Air Force Disability Program Manager Kendra Shock (collectively, “Shock Dep.”) were filed by the Agency in connection with its appeal on January 12, 2023. Citations to “Shock Dep.” in this brief are to those full transcripts, unless otherwise noted.</td>
</tr>
</tbody>
</table>
MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Complainant Weimer and other class agents—collectively, “Class Agents” or “Claimants”—and other class agents—all of whom are deaf or hearing impaired employees, applicants, or former employees of the United States Air Force (“Air Force” or the “Agency”)—have brought this case to challenge centralized Air Force policies, practices, and failures to act that result in widespread discrimination, including denial of consistent or reliable access to American Sign Language (ASL) interpreters, videophones, Communication Access Realtime Translation (CART) services, and other

1 Collectively, “Class Agents” or “Claimants.”

2 For the purposes of this case and brief, the terms “d/Deaf” or “deaf” should be read as synonymous with “deaf or serious difficulty hearing,” the first category of disability listed in Part A of question 5 of the Equal Employment Opportunity Commission's Demographic Information on Applicants form, located at https://www.eeoc.gov/sites/default/files/migrated_files/federal/2017-approved-Applicant-Form.pdf.

Similarly, the word “employee” should be read to include all members of the certified class, including current d/Deaf civilian employees, d/Deaf applicants, and former d/Deaf civilian employees.

The term d/Deaf is used in the d/Deaf community to encompass people who identify with Deaf culture and consider sign language to be their first and primary language (Deaf)—often, but not always, people who have been Deaf for their entire lives—as well as those who meet medical definitions of deafness but may not strongly identify with Deaf culture or communicate using sign language (deaf). As one source puts it: “We use the lowercase deaf when referring to the audiological condition of not hearing, and the uppercase Deaf when referring to a particular group of deaf people who share a language – American Sign Language (ASL) – and a culture.” See https://www.nad.org/resources/american-sign-language/community-and-culture-frequently-asked-questions/.

3 As the National Institute on Deafness and Other Communication Disorders (NIDCD) explains, American Sign Language, “is a language completely separate and distinct from English.” It “is a complete, natural language that has the same linguistic properties as spoken languages, with grammar that differs from English. ASL is expressed by movements of the hands and face. It is the primary language of many North Americans who are deaf.” See https://www.nidcd.nih.gov/health/american-sign-language.

4 Videophones allow people who are d/Deaf to place telephone calls with the assistance of an ASL interpreter. Through a high-speed internet connection, d/Deaf individuals using a videophone place calls to (or receive calls from) hearing people, who can use their standard phone. Calls are routed through an interpreting center, where an interpreter, fluent in ASL and spoken English (or other languages) appears on the device. The d/Deaf caller signs the message to the interpreter, and the interpreter relays the conversation between the two parties. As callers use their native language, communication is smooth and seamless. This same process can be completed using computers or mobile devices that are equipped with cameras, so long as proper software is installed and appropriate network access is provided.

5 CART is “the instant translation of the spoken word into English text using a stenotype machine, notebook computer and realtime software.” The text produced by the CART service can be displayed on a computer monitor, projected onto a screen, combined with a video presentation to appear as
necessary accommodations.

Administrative Judge Peterson’s order certifying a class in this case was based on voluminous
evidence—drawn largely from the Agency’s own documents and the uncontroverted testimony of its
own head Disability Program Manager, Ms. Kendra Shock—establishing that the Air Force’s denials of
necessary accommodations and other discriminatory actions or inactions were not attributable to the
discretionary decisions of isolated departments or supervisors, but to failings in systems, processes, and
trainings that come from the top down, and that affect over 700 d/Deaf employees throughout the Air
Force, regardless of the base at which they are stationed or the position in which they work.

This included uncontroverted evidence 1) that necessary accommodations are routinely delayed
or denied for supposed lack of funds (despite ample resources available to the Agency as a whole) and
that this is a direct result of the Agency’s byzantine and broken process for funding accommodations; 2)
that necessary accommodations like ASL interpreters are rarely granted;\(^6\) 3) that the Agency has failed
to hire or contract for interpreters with high levels of security clearance; 4) that the Agency requires
“appropriate notice” each time an employee with a disability requires a “repeat” accommodation—such
as ASL interpretation—even when their need for that accommodation is known and has not changed; 5)
that there are ongoing delays of months or even years with getting videophones and captioned
telephones working on base networks; 6) that training videos and presentations are consistently not
captioned; and 7) that the Air Force has completely failed to adequately staff its disability program, to
the detriment of every employee (including every d/Deaf employee) who needs accommodations. See
Order at 4-7 (ER 4-7);\(^7\) see also § III, below.

\(^6\) As discussed in § III(A)(2), below, while the Agency indisputably has over 700 deaf civilian
employees, its own tracking tools show that the accommodation of ASL interpretation has only been
approved 152 times since 2018. Even if this accommodation record is somewhat incomplete, it is also in
accord with Complainants’ own experiences, and the Agency’s repeated failures to provide them with
ASL interpretation or CART services. As Judge Peterson noted, the agency failed to “provide any
contrary evidence to demonstrate that such services were provided on more occasions.” Order at 5 (ER
5).

\(^7\) “ER” citations, here and throughout, are to page numbers in Complainants’ Excerpts of Record,
filed along with this opposition brief.
The Agency’s appeal largely ignores this evidence, and fails to grapple with Judge Peterson’s well-reasoned finding that Complainant Weimer and other class agents have satisfied every element of 29 C.F.R. § 1614.204(a)(2). See Order at 9-13 (ER 9-13). Instead, it devotes the majority of its brief to a profoundly inaccurate account of pre-certification discovery proceedings, and to two bizarre arguments for overturning the class certification decision: first, that the Administrative Judge “erred” by ordering the Agency to produce a class list,8 and second, that he similarly “erred” by ordering the Agency to produce its head Disability Program Manager to testify on certain topics when it had not chosen to designate her as a “person most knowledgeable.”

Both arguments are easily dispensed with. To begin, Administrative Judges have “broad discretion” over discovery matters, and their decisions regarding discovery are subject to the stringent “abuse of discretion” standard of review.9

Moreover, the supposed “errors” asserted by the Agency had no bearing on Judge Peterson’s class certification decision. Complainants’ Renewed Motion for Class Certification did not rely on supposedly-confidential information drawn from the class list in any way,10 and Judge Peterson’s

8 The Agency suggests that the Administrative Judge ordered this disclosure without regard to asserted privacy objections, but as Judge Peterson noted in his order, the Agency did not actually articulate any specific privacy objections until well after the fact. See Order at 15 (ER 15) (“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.”)

9 See Muller v. USDA, EEOC DOC 0120065071, 2008 WL 2484320, at *5 (June 12, 2008) (holding that “an AJ has broad discretion in the conduct of a hearing, including matters such as discovery orders,” and finding no abuse of discretion regarding discovery orders).

Beyond having broad discretion regarding pre-certification discovery, EEOC Administrative Judges are in fact “charged with the responsibility to assure full development of an adequate record.” Robinson v. Department of Navy, EEOC DOC 05810091, 1981 WL 382968, at *3 (1981). As Judge Peterson noted in his order “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.” Order at 16 (ER 16).

10 As Judge Peterson pointed out, “[t]he 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
finding on numerosity was based entirely on other evidence. See Order at 11-12 (ER 11-12) (finding numerosity on the basis of Ms. Shock’s testimony and the Agency’s 2020 “Total Workforce Distribution by Disability Status Report,” which identified over 700 Agency employees as being deaf or having serious difficulty hearing). In his order, Judge Peterson was also very clear that he did not consider Ms. Shock to be someone who “‘binds’ the Agency with her testimony” (as would be the case for a “person most knowledgeable” designee in federal court). Order at 4, fn. 3 (ER 4). At the same time, he noted that her role and experience as the central Disability Program Manager is illustrative,” and that 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.” Id. In other words, Judge Peterson gave Ms. Shock’s unrebutted testimony only the weight that it was naturally due, given her eight years of experience as head Disability Program Manager for the Air Force, and her first-hand knowledge of relevant policies and practices.

The Agency also asserts that Judge Peterson “erred” by ordering discovery regarding the lack of a “centralized funding structure to pay for reasonable accommodations,” arguing—without citation to anything—that “the establishment of such a structure is not a remedy the AJ could order or enforce.” Agency Appeal Brief at 24. This, of course, is wrong.

As Complainants noted in their Renewed Motion for Class Certification, the claim that the Agency’s existing process for funding accommodations is fundamentally broken, and that that necessary accommodations are routinely delayed or denied for supposed lack of funds—despite ample resources available to the Agency as a whole—is very similar to the one asserted in Tessa L., Complainant, EEOC DOC 0720170021, 2017 WL 5564438 (Nov. 9, 2017). There, complainants filed a class case alleging that when “the [a]gency transitioned funding for sign language interpreting services from the 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.” Order at 15 (ER 15); see also Renewed Motion for Class Certification at 77-78 (ER 306-07) (noting compliance with Judge Peterson’s “Limited Stay and Protective Order” regarding class list).
Department level to the sub-agency level without using the appropriate process and without providing adequate time and training,” this “resulted in denial and delay of interpreting services and inhibited Class Agent from performing her job duties.” Tessa L. v Perdue (USDA), 2017 WL 5564438, at *4-5.

Upon review, the Commission affirmed the AJ’s decision to certify the class, holding that “[t]he basic premise underlying Class Agent's claim and the class members' claim is the same - the very same act of dismantling the centralized fund caused everyone to suffer lack of reasonable accommodations in the form of consistent, qualified interpreting services for essential functions of their respective employment and Department-wide functions.”11 Id. at *5. Where, as here, an agency’s process for funding accommodations causes necessary accommodations to be discriminatorily delayed or denied, changes to that funding process are absolutely something the EEOC can order. See id.12

Though the Agency may prefer to pretend otherwise, the extensive evidence offered in support of Complainant’ Renewed Motion for Class Certification showed that d/Deaf employees throughout the Air Force are subjected to the same broken systems, and consequently experience the same discriminatory exclusion, the same denials of reasonable and necessary accommodations, and the same inexcusable delays. On the basis of this evidence, Judge Peterson correctly found that Complainants had satisfied every element of 29 C.F.R. § 1614.204(a)(2), and his order granting class certification in this case should be affirmed.

II. Law Relevant to Class Claims

Under the Rehabilitation Act of 1973 (the “Act”) and its implementing regulations, Federal agencies must “not discriminate on the basis of disability in regard to the hiring, advancement or

11 This case ultimately resolved through settlement, with the agency agreeing—among other things—to “centralize the provision of sign language interpreter services in the National Capital Region” and to fund interpreter services in the region through a “Shared Cost Program.” See USDA Notice of Resolution of Class Action, at https://www.nad.org/usda/.

12 See also MD-110 at Chapter 8, Section X (noting that if there is a finding of discrimination in the context of a class complaint, “the decision shall include systemic relief for the class”); Miles v USPS, EEOC DOC 05860013 (Oct. 20, 1986) (describing Commission policy that in “issuing federal sector Commission decisions or orders, obtaining full remedial, corrective and preventive relief is the standard by which the agency is to be guided,” and that this relief “is to be tailored to cure or correct the particular source of the identified discrimination and to minimize the chance of its recurrence.”)
discharge of employees, employee compensation, job training, or other terms, conditions, and privileges of employment.” 29 C.F.R. § 1614.203(b); see also 29 U.S.C. § 791(f). In 1978, Congress amended the Rehabilitation Act to explicitly provide a private right of action under § 501 that allows federal employees to pursue claims of discrimination. See Prewitt v. United States Postal Serv., 662 F.2d 292 at 302 (5th Cir. 1981); Shirley v. Devine, 670 F.2d 1188, 1194-96 (D.C. Cir. 1982).

Congress passed the Rehabilitation Act with the express purpose of “promot(ing) and expand(ing) employment opportunities in the public and private sectors for handicapped individuals.” Prewitt, 662 F.2d 292, 301 (quoting 29 U.S.C § 710(8)). In passing the Act, Congress specifically intended that the Federal Government would be a “model employer” of people with disabilities; to this end, the Act imposes considerable affirmative obligations on federal employers, beyond the mandate not to discriminate against people with disabilities.13, 14 29 C.F.R. § 1614.203(c) (emphasis added); see also Prewitt, 662 F.2d at 301-306 and Shirley, 670 F.2d. at 1193-97 (discussing legislative history); Ignacio v. United States Postal Serv., EEOC Appeal No. 03840005 (September 4, 1984) (“Congress expected and fully intended that the [f]ederal government was to be a model employer of the handicapped, taking affirmative action to hire and promote the disabled”). To this end, the Act requires that federal agency...
employers develop an “affirmative action program plan for the hiring, placement and advancement of
handicapped individuals.” 29 U.S.C. § 794(b); see also 29 C.F.R. § 1614.203(d) (detailing various
requirements of “affirmative action plan” for the employment of people with disabilities).

The Rehabilitation Act makes clear that “[t]he standards used to determine whether Section 501
has been violated in a complaint alleging employment discrimination under this part shall be the
standards applied under the [Americans with Disabilities Act, also known as the] ADA.”15 29 C.F.R. §
1614.203(b); 29 U.S.C. § 791(f); see also Velva B., Class Agent, EEOC DOC 0720160006, 2017 WL
4466898, at *11 (Sept. 25, 2017).

Chief among the mandates of both the Americans with Disabilities Act (ADA) and the
Rehabilitation Act is the requirement to make “reasonable accommodations to the known physical or
mental limitations” of applicants and employees, so that they have the same access to hiring,
advancement, compensation, job training, and other terms, conditions, and privileges of employment as
their nondisabled peers. See 42 U.S.C. § 12112(b)(5)(A); see also 29 C.F.R. § 1614.203(b). “[O]nce an
employee requests an accommodation ..., the employer must engage in an interactive process with the
employee to determine the appropriate reasonable accommodation.” Zivkovic v. S. Cal. Edison Co., 302
F.3d 1080, 1089 (9th Cir. 2002). Complying with this interactive process “requires: (1) direct
communication between the employer and employee to explore in good faith the possible
accommodations; (2) consideration of the employee's request; and (3) offering an accommodation that is
reasonable and effective.” Id.

Further, the Commission has held that excessive delays in providing necessary reasonable
accommodation are just as discriminatory as denials. See, e.g., Shealey v. E.E.O.C., 111 LRP 30774
(April 18, 2011) (delay of nine months to provide reasonable accommodations was an unnecessary delay
in violation of the Rehabilitation Act, where procedures required a request for reasonable

15 Congress’s incorporation of ADA standards for the purposes of determining whether §501 has
been violated in a complaint alleging nonaffirmative action employment discrimination does not
diminish the agency’s affirmative obligations. 29 C.F.R. § 1630.1 (“Except as otherwise provided in
this part, this part does not apply a lesser standard than the standards applied under Title V of the
Rehabilitation Act of 1973.”).
accommodation decision within 20 business days). Federal courts are in accord and have consistently
held that “[a]n unreasonable delay in providing an accommodation for an employee’s known disability
can amount to a failure to accommodate his disability that violates the Rehabilitation Act.” McCray v.
Wilkie, 966 F.3d 616, 621 (7th Cir. 2020); see also Jay v. Internet Wagner, 233 F.3d 1014, 1017
(7th Cir. 2000) (“unreasonable delay in providing an accommodation can provide evidence of
discrimination”); Valle-Arce v. Puerto Rico Ports Auth., 651 F.3d 190, 200-01 (1st Cir. 2011)
(same); Mogenhan v. Napolitano, 613 F.3d 1162, 1168 (D.C. Cir. 2010) (same); Selenke v. Med.
Imaging of Colo., 248 F.3d 1249, 1262 (10th Cir. 2001) (same).

Under regulations implementing § 501 of the Act, federal agencies must also “take specific steps
to ensure that requests for reasonable accommodation are not denied for reasons of cost, and that
individuals with disabilities are not excluded from employment due to the anticipated cost of a
reasonable accommodation, if the resources available to the agency as a whole, excluding those
designated by statute for a specific purpose that does not include reasonable accommodation, would
enable it to provide an effective reasonable accommodation without undue hardship.” 29 C.F.R.
§ 1614.203(d)(3)(ii) (emphasis added). In addition, federal agencies must “[e]nsure 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 […] are considered when determining
whether a denial of reasonable accommodation based on cost is lawful.” 29 C.F.R.

In defining “reasonable accommodation,” Congress expressly included “the provision of
qualified readers or interpreters” as an illustration of proper accommodations in a workplace setting. 42
U.S.C. § 12111(9)(B). Further, in considering the claims of a deaf employee whose employer denied
repeated accommodation requests for ASL interpreters during routine meetings, instead only providing a
coworker to take notes in written English, the Ninth Circuit found “a genuine issue of material fact
regarding whether these modifications, viewed as a whole, would allow a deaf employee, even one who
was fluent in written English, to enjoy the benefits and privileges of attending and participating in the
departmental meetings [especially where the employee only has] limited proficiency in written English.”

_U.S. E.E.O.C. v. UPS Supply Chain Sols.,_ 620 F.3d 1103, 1112 (9th Cir. 2010) (noting that agendas,

contemporaneous notes, and written summaries alone did not necessarily enable d/Deaf employees to
enjoy the same benefits and privileges of meeting participation as their nondisabled peers).

In addition to requiring reasonable accommodations, § 501 of the Act and the ADA prohibit

federal employers from “denying employment opportunities to a job applicant or employee,” if such a
denial is based on their need for accommodation—as happens when qualified ASL interpreters or

similar necessary accommodations are not provided for applicant interviews, employee trainings, and

other work-related opportunities. See 42 U.S.C. § 12112(b)(5)(B). Similarly, under both § 501 and the

ADA, it is discriminatory to fail “to select and administer tests concerning employment in the most
effective manner to ensure that, when such test is administered to a job applicant or employee who has a
disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills,

aptitude, or whatever other factor of such applicant or employee that such test purports to measure,

rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant.”

_See_ 42 U.S.C. § 12112(b)(7). When a federal entity fails to provide ASL interpreters and similar

accommodations to d/Deaf employees and applicants who need them, this is precisely the sort of

discrimination that occurs.

III. **Statement of Facts.**

As the underlying record in this case plainly shows, the Agency attempted to frustrate the pre-
certification discovery process at every turn—repeatedly disregarding the Administrative Judge’s orders
to produce relevant designees, documents, and information, and offering discovery responses that were

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To aid the Commission in locating documents cited in this section and throughout this brief,

Complainants have included an “Alphabetical Index of all Evidence Offered in Support of

Complainant’s Renewed Motion for Class Certification,” which is located at page VI of this document
(immediately after the Table of Authorities).

Additionally, Complainants have included all filed documents cited herein in their “Excerpts of
Record” filed in connection with this motion, and have added citation to specific Excerpt of Record
(“ER”) page numbers throughout.
plainly evasive and incomplete.\textsuperscript{17} Indeed, during the deposition of Air Force Disability Program Manager Kendra Shock (“Shock Dep.”),\textsuperscript{18} Complainants learned that the Agency had indisputably withheld large numbers of relevant and responsive documents, including its 2019 MD-715 Part J report to the EEOC regarding barriers facing employees with disabilities; as well as multiple emails between Ms. Shock and the undersecretary of the Air Force regarding reasonable accommodation requests being unlawfully denied because of a lack of unit-level funding, and the need to establish a central Agency accommodations fund to address this issue. Shock Dep. at 212:11-213:12 (ER 419-420) (2019 MD-715 report); \textit{id.} at 174:23-179:10 (ER 406-411) (emails with Agency leadership regarding need for centralized funding); \textit{see also} Complainants Motion to Compel Responsive Documents (June 14, 2022) (ER 8051-8077).

Despite the Agency’s efforts to avoid producing responsive documents—and to prevent its head Disability Program Manager, Ms. Shock, from testifying at all—the pre-certification discovery process established beyond doubt that centralized Air Force policies, practices, and procedures serve to discriminate against its deaf employees, and that certification is appropriate in this case.

To aid the Commission in locating documents cited in this section and throughout this brief, Complainants have included an “Alphabetical Index of all Evidence Offered in Support of Complainant’s Renewed Motion for Class Certification,” which is located at page VI of this document (immediately after the Table of Authorities). Additionally, Complainants have included all filed documents cited herein in their “Excerpts of Record” filed in connection with this motion, and have

\textsuperscript{17} See, e.g., Complainants’ May 16, 2022 Response to Sanctions Notice (summarizing history of noncompliance) (ER 7941 – 7959); \textit{see also} February 25, 2022 Motion to Compel and related filings (ER 4510 – 4539); March 07, 2022 Second Pre-Certification Discovery Order (ER 4550-4551); March 23, 2022 Motion to Compel and related filings (ER 4552 – 7886); April 12, 2022 Third Pre-Certification Discovery Order (ER 8107 – 8108); April 20 2022 Motion to Compel and Related filings (ER 8109 – 8183); May 2, 2022 Order to Show Cause (ER 7895 – 7897). May 9, 2022 Motions to Compel Compliance and related filings (ER 7898 – 7939).

\textsuperscript{18} The full transcripts of the June 1, 2022 (Volume One) and June 2, 2022 (Volume Two) depositions of head Air Force Disability Program Manager Kendra Shock (collectively, “Shock Dep.”) were filed by the Agency in connection with its appeal on January 12, 2023. Citations to “Shock Dep.” are to those full transcripts, unless otherwise noted.
A. **Centralized Air Force policies and practices serve to discriminate against the Agency’s d/Deaf employees and applicants.**

1. **The Air Force routinely denies necessary accommodations for lack of funds even though ample resources are available to the Agency as a whole, and the Agency has repeatedly failed to adopt a centralized process for funding accommodations or otherwise fix this issue.**

   *Q. Do you believe there is a straight line to be drawn between lack of centralized funding and denial of reasonable accommodations to employees that are deaf or hard of hearing based on lack of funding?*

   *A. Yes.*

   —Exchange Between Air Force Disability Program Manager Ms. Shock and Agency Counsel Mr. Wells (Shock Dep. at 340:8-13).

Under 29 C.F.R. § 1614.203(d)(3)(ii), the Air Force must 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 is lawful.” 29 C.F.R. § 1614.203(d)(3)(ii). The record in this case makes clear that the Air Force has failed to abide by this basic obligation.

Agency documents and the testimony of head Disability Program Manager Ms. Shock confirm the Air Force has failed to abide by this clear statutory requirement, that the byzantine process for reimbursement of reasonable accommodations that the Air Force created in 2016 has been an unmitigated failure, and that accommodations are still routinely denied for lack of unit-level funds.

According to Air Force documents and the testimony of Ms. Shock, the Air Force has consistently spent something in the range of $1 million per year to accommodate its employees with disabilities—roughly .000005% of a budget that, in recent years, has exceeded $190 billion. Shock Dep. at 160:16-161:20; see also Betouliere Decl., Exhibit E (2016 Diversity and Inclusion Initiatives Implementation Guidance) at 19 (ER 471) (noting projected FY 2017 cost of accommodations).

In a 2016 guidance document regarding the Air Force’s initiative to “Reduce Bureaucratic Obstacles to Providing Reasonable Accommodations for Individuals with Disabilities,” the Agency noted that it “has a legal obligation to provide reasonable accommodations to employees with
disabilities,” but that “[o]ften [. . .] managers do not budget for reasonable accommodations and funding this obligation becomes a unit-level challenge.” Betouliere Decl., Exhibit E (2016 Diversity and Inclusion Initiatives Implementation Guidance) at 18 (ER 470).

This guidance document went on to say “Currently, there is no formal process through which reasonable accommodation funding requests are made. It is the responsibility of the individual to request special accommodations from his or her manager, who can then seek to pay for the accommodation out of unit funds. Often, however, these accommodations are not budgeted by the unit and the request must be elevated to the Major Command or higher headquarters, creating delays in providing the necessary accommodations.” Id.

In an effort to address this issue, the Air Force created two special funding codes, which would supposedly allow “units to request reimbursement of expenses associated with providing reasonable accommodations, so that funding shortfalls at the unit-level no longer prevent [employees] from receiving the accommodations they need.” Id.; see also Shock Dep. at 159:18-160:15 (no other changes made to funding process to address accommodation delays and denials for lack of funds).

Unfortunately – as subsequent documents and the testimony of Disability Program Manager Ms. Shock make clear – the byzantine process for reimbursement that the Air Force created in 2016 has been an unmitigated failure, and accommodations are still routinely denied for lack of unit-level funds, despite the billions of dollars available to the Agency as a whole.

In the Agency’s Fiscal Year 2018 “Affirmative Action Plan for the Recruitment, Hiring, Advancement, and Retention of Persons with Disabilities” report—authored approximately three years after the guidance document discussed above, and approved by the Agency’s Director of Equal Employment Opportunity— it notes that accommodations are still “denied due to unit funding,” and cites “[l]ack of centralized funding for reasonable accommodations” as a barrier affecting all employees with disabilities. Betouliere Decl., Exhibit F (Fiscal Year 2018 Affirmative Action Plan report) at 19 (ER 497) (emphasis added).

Shock Dep at 225:21-226:1 (ER 70-71) (all such reports reviewed and approved by agency EEO director).
Similarly, the Fiscal Year 2020 version of the same document—authored roughly five years after the agency rolled out its new funding codes—continued to cite “Lack of execution of centralized funding for all RA’s,” “Lack of understanding of the DAF process for funding RA,” and “Accommodations denied due to unit funding,” as major barriers affecting employees with disabilities. Betouliere Decl., Exhibit G (Fiscal Year 2020 Affirmative Action Plan report) at 21 (ER 522) (emphasis added).

During her deposition testimony, Ms. Shock spoke at length about the delay and confusion caused by the Agency’s current process for funding accommodations—and the Agency’s persistent unwillingness to implement a streamlined and centralized funding process, to prevent accommodations from being delayed or denied due to a lack of unit-level funds. As she put it at one point: “I can’t tell you how many times I have beat my head against this rock in the last eight years.” Shock Dep. at 168.

As Ms. Shock explained during her deposition, the Agency’s current system for funding and reimbursing reasonable accommodations is essentially as follows: “the unit would make a request [for funding] through their financial manager. If the financial manager doesn’t have the funding, they would make a request to the installation. The installation would make the request to the match com, and the match com would make the request to headquarters until someone was able to fund the reasonable accommodation request.” Shock Dep. at 163:24 – 164:8.

Each step in this process is, of course, one more opportunity for unnecessary delay. See Shock Dep. at 167:9-20. When asked if anything had been done to ensure that accommodations are funded through some other source, to “stop these delays” and this “step by step by step” process, Ms. Shock responded: “Yes [...] I have this conversation with leadership frequently, multiple times, every year.” Shock Dep. at 167:21 – 168:6.

Ms. Shock then described her repeated efforts “explain that our current process does not, in my opinion, reduce bureaucratic obstacles; that it actually increases the obstacles to funding reasonable accommodations; that the financial management folks have not done a good job of explaining this process to their financial management and resource advisors. So, the answer is still often ‘we don't have
the money for that.’ And I don't believe it's a practice that is currently effective.” Shock Dep. at 168:10-
19.

As Ms. Shock explained, even the people responsible for implementing the Air Force’s
current process for funding accommodations do not know how it works. When asked how an
“unfunded request” was supposed to be “submitted through the organization’s established corporate
process,” as Agency documents describe, Ms. Shock responded as follows:

A. I wish I knew. You know, that -- that's the best-kept secret in the Air Force. Every time
I would ask for specific information on -- on how that process worked so that I could
provide that information to the disability program managers, I was told that our financial
resource managers know what it is and that's all -- that's all I need to know. So there are a
lot of things I don't know about how it works in the Air Force, but that's -- that's definitely
one of them.

Q. But weren't those same folks who were supposed to know asking you this question?
A. Yes.

Q. So it was clear that they didn't know, correct?
A. Yes, which is why I was asking for the information so I could provide it to them.

Q. Okay. And this was supposed to stop shortfalls at the unit level on being used as a basis
for denial of reasonable accommodation, right?
A. Right.

Q. But since the process to get unfunded requests did not occur or was a mystery, that still
occurred, right?
A. Yes.

Q. Meaning that reasonable accommodations were still being denied because of a
purported funding shortfall, and that included for employees who were deaf or hard of
hearing?

Q. Additionally for applicants who were deaf or hard of hearing, that was still occurring?
A. I assume it was, yeah.

Q. And that continues up until today, as you've testified to, correct?
A. Same process.

Shock Dep at 174:23 – 177 (ER 406 – 409); see also id. at 343:12 – 21 (ER 188).

When questioned further on this subject by the Agency’s own counsel, Ms. Shock noted that she
has had conversations about accommodations being denied due to lack of funding with employees,
managers, and supervisors at least 2 or 3 times a year, and that base-level disability program managers
have brought this issue to her attention “at least once a month” since 2018 – in other words, roughly 60
times. Shock Dep. at 334:6 – 335:7 (ER 179 – 180) (supervisors, managers, and employees); id. at 340:8 – 341:21 (ER 446 – 447) (hears about this from disability program managers roughly once per month); see also id. at 343:5 – 11 (ER 188) (hearing from different disability program managers each time). In each instance when Ms. Shock has been told that an accommodation was denied on the basis of cost, she found the report was true, and that the requested accommodation has indeed been denied on account of cost – despite the Air Force having billions of dollars at its disposal. Shock Dep. at 336:7-23 (ER 181)

As Ms. Shock sensibly notes, the instances of improperly-denied accommodations that happen to filter their way up to her are likely only the tip of the iceberg: “evidence of a larger problem” and of “Air Force wide denials of reasonable accommodations based on costs.” Shock Dep. at 339:3-17 (ER 184).

Despite being told by their own Disability Program Manager that the Air Force’s current process for funding accommodations was not working, the Agency’s response has repeatedly been that business-as-usual is good enough.20 Shock Dep. at 169:1-170:2. As she 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.

Q. Even though you've informed them unequivocally it is not?

A. In my opinion, I believe it is not.

Q. And when you say them, who are you referring to?

A. This conversation has **gone all the way to the undersecretary of the Air Force.**


20 Over the years, d/Deaf employees at the Air Force have also repeatedly raised the need to reform the way accommodations are funded, so as to avoid the frequent delays and denials associated with the current process. McAnallen Decl. ¶ 12 (ER 2451 – 2452). However, there has been no change in the byzantine and inefficient way by which ASL interpreters, CART translators, and other necessary accommodations are funded and procured. McAnallen Decl. ¶ 15 (ER 2452). As a result, necessary accommodations are still routinely delayed or denied because of a lack of unit-level funding, or the lengthy process required to get it.

Furthermore, when supervisors have attempted to use certain base- or unit- level funds to cover the cost of accommodating their d/Deaf employees (because of the lack of a central source from which funds could be drawn), they were actually disciplined for doing so. See McAnallen Decl. at ¶¶ 10, 13 (ER 2451 – 2452).
This information obtained during the pre-certification discovery process comports with Claimants’ own experiences. For example, when Class Agent Wambold (whose first language is ASL, and who has significant difficulty communicating in written English) requested accommodations in the Air Force EEO process, Mr. Randy White, Director of the Equal Opportunity Office at Offutt Air Force Base, informed Mr. Wambold that “he needed to work with his organization to secure the services of [an ASL interpreter] or bring his own as the EO Office does not have that sort of funding nor the responsibility.” See 20.11.13 Complaint File (“Record of Investigation”) at 41 (ER 2618) (emphasis added). Indeed, rather than provide Mr. Wambold with this reasonable and necessary accommodation, Mr. White admits that “many times over the years, he personally explained to Mr. WAMBOLD the Intake and other documents could be taken home and completed,” and that Mr. Wambold could “have a friend, family member or other individual to assist him and return the signed and dated documents for Pre-Complaint or Formal Complaint processing.” Record of Investigation at 42 (ER 2619) (emphasis added).

Class Agent Sheila Burg has similarly been denied necessary accommodations due to an alleged lack of funding. For example, in late September of 2017 Ms. Burg requested CART services for an upcoming Air Force workshop. After a lengthy email exchange which involved Kendra Duckworth Shock, the Disability Program Manager for the central Air Force Equal Opportunity Office, she was told that this accommodation would be denied because of a lack of unit level funds. See Declaration of Sean Betouliere in Support of Complainants’ Renewed Motion for Certification (“Betouliere Decl.”) Ex. C (Burg Record of Investigation at Addendum) at 48-58 (ER 375 – 384). Specifically, on October 16, 2017, Kim Vu wrote to Ms. Burg: “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.” Id. at 49 (ER 376); see also Betouliere Decl. Ex. B at 299-375 (ER 1153 – 1229) (Air Force GPC Policy). Ultimately, Ms. Burg was forced to rely on coworkers to help fill in the pieces of the training that she could not understand, because this basic and necessary accommodation was not provided. See id.

21 Unless otherwise indicated, all subsequent cites to the Record of Investigation refer to the 20.11.13 Complaint File uploaded by the Air Force to the EEOC docket of this case.
Class Agent Hugo Perez has similarly repeatedly been told that there were “no funds available to
be allocated to the accommodations I requested”—without any indication that all resources available to
the Air Force as a whole were considered, as the law requires. See Declaration of Hugo Perez, filed
February 11, 2021 ("Perez Decl.") at ¶ 16 (ER 2284).

2. The Air Force has failed to provide reliable access to American Sign
Language interpreters and other necessary accommodations, and in many instances
has provided no access at all: according to its own records, it has only provided ASL
152 times since 2018, despite having over 700 d/Deaf employees.

The Air Force has failed to ensure that d/Deaf employees and applicants have consistent, reliable
access to ASL interpreter services and other necessary accommodations, and in many instances has
provided no access at all.

During her deposition, Ms. Shock estimated that as of 2022, the Air Force has “over a thousand
deaf employees” in its civilian workforce. Shock Dep. at 71:2-10. The Agency’s MD-715 “Workforce
Tables” for Fiscal Year 2020 bear out this estimate: as of that year, the Air Force had 773 civilian
employees who self-identified as “deaf or serious difficulty hearing,” and in the previous year, it had
591. Shock Dep. at 300:19-301:14 (ER 145); see also Betouliere Decl., Exhibit H (Fiscal Year 2020
MD-715 Workforce Tables) at 50 (ER 581).

Unfortunately, the Air Force’s own internal tracking documents suggest that these deaf civilian
employees are accommodated at an alarmingly low rate – which is in accordance with the experiences of
class agents and declarants. As discussed below, Agency records indicate that despite having over 700
employees who identify as being deaf or having serious difficulty hearing, the Air Force only approved

According to head Air Force Disability Program Manager Ms. Shock, base-level disability
program managers Disability Program Managers are “required to complete a spreadsheet for tracking
purposes that [. . .] captures all of the required information regarding reasonable accommodation.”
Shock Dep. at 120:20-25 (ER 8063). This spreadsheet is supposed to be provided to Ms. Shock on a
quarterly basis, and if one is not provided, she will follow up to ask about it; in each instance where no
spreadsheet has been provided, Ms. Shock testified that it was because disability program managers
stated “they didn’t provide any reasonable accommodations,” and thus “they didn’t have a spreadsheet to submit.” Shock Dep. at 120:20-124:2 (ER 8063 – 8067).

In response to a request to “provide information on the number and types of accommodations that we’ve provided for individuals that are deaf and hard of hearing,” Ms. Shock produced a spreadsheet based on this quarterly data. Shock Dep. at 186:5-20; see also Betouliere Decl., Exhibit I (ER 644 – 653) (“DAF Deaf Accommodation (K. Shock)” Excel Sheet). Though it was created several months into 2022, this spreadsheet does not indicate even a single approved request for interpreters, Agency-wide for that year, and shows only 3 such requests in 2021, 3 in 2020, and 4 in 2019. Betouliere Decl., Exhibit I (ER 651 – 652). In fiscal year 2018 – the only year with more than a handful of approved requests – there were 142. Id. Even this, however, suggests serious problems, because all 142 approved requests come from three bases: Sheppard, Tinker, and Wright Patterson. Id.

Aside from these 152 approved requests (nearly all of which came from only three Air Force bases), there is no indication that the Air Force provided ASL interpretation or CART to any of its hundreds of deaf civilian employees over the past five years—which, given the Agency’s repeated refusal or inability to provide Class Agents and declarants with ASL interpretation or CART services for meetings, trainings, interviews, and other work-related events, rings true.22 For an Agency with as many deaf employees as the Air Force, this is a shockingly small number of requests to have approved over the past five years—particularly because, as Ms. Shock acknowledged, ASL interpretation is among the most commonly-needed accommodations for deaf employees. Shock Dep. at 62:25-63:9 (discussing common accommodations).

The Agency’s apparently extremely low rate of approving ASL interpretation may have much to do with the fact that only three Air Force bases – Tinker, Wright-Patterson, and Eielson – have standing

22 During her deposition, Ms. Shock expressed her belief that the spreadsheet data she provided regarding accommodations for deaf employees was incomplete and inaccurate – however, she also acknowledged that she had no way of knowing what the true data was. Shock Dep. at 198:3-12 (ER 412).
contracts for the provision of interpreters.\footnote{ Apparently, in order to set up a contract, the Air Force requires quotes from “at least three authorized businesses.” Betouliere Decl., Ex. N at 803 (ER 845) (September 27, 2017 email from Veda Crawley, asking for a list of at least three “authorized businesses” that offer CART service, before she could procure CART for Ms. Burg – an accommodation that was, in fact, never provided). Incredibly, complainant Mr. Perez has been \textit{asked to obtain three such quotes himself, before a contract can be set up to provide him with ASL, Video Remote Interpreting, or other necessary accommodations.} In the meantime, he has been forced to do without. Second Supplemental Declaration of Hugo Perez (“Perez Second Supp. Decl.”) at ¶ 17 (ER 2557-2558).} Shock Dep. at 67:17-68:3 (ER 395 – 396); \textit{see also id.} at 73:13-21 (explaining why standing contract would expedite the process of procuring interpreters); \textit{id.} at 74:24-75:8 (agreeing that a standing contract would expedite the process of getting ASL or CART interpretation for someone with a higher security clearance).

Notably, of the 152 interpreter requests that Agency records show having been approved since 2018, 130 (or over 85%) were at Tinker or Wright-Patterson – places where standing contracts exist, and which also happen to be among the three bases that have full time disability program managers.

\begin{itemize}
  \item Betouliere Decl., Exhibit I (ER 644 – 653) (“DAF Deaf Accommodation (K. Shock)” Excel Sheet). As Ms. Shock observed wryly during her deposition, “Yeah, kind of a coincidence, isn’t it?” Shock Dep. at 248:17-249:2 (ER 430 – 431) (“Funny how that works out. Yeah, when you have somebody who can devote their time to addressing reasonable accommodation issues for that organization, yes, then you are more likely to have the programs in place that you need to support those individuals.”).
  \item This extremely low rate of approval is in accord with Complainants’ own experiences, and the Agency’s repeated failures to provide them with ASL interpretation or CART services.
  \item For example, the Air Force has repeatedly refused or failed to provide Complainant Weimer with ASL interpreters, CART and similar accommodations. \textit{See} February 11, 2021 Declaration of Sarah Weimer in Support of Class Certification (“Weimer Decl.”) at ¶ 5 (ER 1919). She was repeatedly denied accommodations for Judge Advocate symposiums, including for a February 2020 symposium at which—ironically—she was slated make a presentation about the Agency’s Equal Opportunity obligations. \textit{Id.} at ¶¶ 13-14 (ER 1922-1924). As a consequence of the Air Force’s utter failure to accommodate her, Ms. Weimer was effectively excluded from the symposium, and a co-worker gave Ms. Weimer’s prepared presentation in her stead. \textit{Id.} at ¶ 14 (ER 1923 – 1924). In October 2020, she
was once again not provided for accommodations for a Judge Advocate symposium, and thus was once again excluded from this valuable opportunity for training and career development. *Id.* Shockingly, **by the Air Force’s own admission, Ms. Weimer only received ASL interpreter services three times** between the start of her employment in January 2018, and February of 2021. *See* Record of Investigation at 284 (ER 2861) (“We have provided an interpreter on 3 occasions: an office off-site in May 19, DJAG visit in Nov 19, and the off-site in Jan 20.”); Supplemental Declaration of Sarah Weimer, filed November 1, 2021, (hereinafter “Weimer Supp. Decl.”) at ¶ 9 (ER 2467).

After returning to in-person meetings in July 2021, Ms. Weimer was effectively excluded from these recurring team meetings because of the Agency’s failure to provide her ASL interpreters, despite her repeated requests for this accommodation. *Id.* at ¶¶ 12-14 (ER 2470 – 2471) (noting that this “demonstrates that the Air Force’s systemic failure to ensure that d/Deaf and hard of hearing employees and applicants have consistent, reliable access to ASL interpreters.”).

Class agents and other class members have had similar issues getting consistent, reliable, or any access to interpreters and other basic accommodations. For example, despite knowing that class agent Hugo Perez was Deaf and needed an ASL interpreter for his new-employee orientation, and despite having **months** to procure one, the Air Force only gave him an interpreter for half of his orientation, meaning that he “had no accommodations for the rest of [his] orientation and was therefore, unable to access most of the information provided.” Perez Decl. at ¶ 6 (ER 2281 – 2282). The Air Force also repeatedly failed to provide him with requested interpreters for his first six months on the job—a crucial adjustment period for any new employee—thus depriving him of the opportunity to communicate with co-workers, learn, and progress. *Id.* at ¶ 7 (ER 2282). This pattern of denying Mr. Perez’s necessary accommodations has continued throughout his employment, and through to the present. *Id.* at ¶¶ 10, 15, 16, 19 (ER 2282 – 2285). Indeed, Mr. Perez was informed in October 2020 that a contract to provide interpreter services had expired, and that the Agency would not provide to him accommodations of an interpreter until a later date when a new contract was secured. Perez Decl. at ¶¶ 21-23 (ER 2286). As of this writing, such a contract has **still** not been established – and indeed, **Mr. Perez has been made to**
search for and obtain quotes from possible ASL and Video Remote Interpreting providers himself, before anyone at the Agency will finalize a contract and provide him with the accommodations he needs. See June 21, 2022 Second Supplemental Declaration of Hugo Perez ("Perez Second Supp. Decl.") at ¶ 17 (ER 2557 – 2558).

By the Air Force’s own admission, Mr. Perez has been denied “the same, equal access to training, work or advancement opportunities since he was hearing impaired.” See Perez Decl., Ex. D (ER 2311) (Kimberlei Calhoun Decl.). As another example, Mr. Perez was explicitly told via email that the Air Force would not provide ASL interpreters for a March 31, 2021 mandatory “Extremism Stand Down Training,” which was meant to include open dialogue and conversation with colleagues and base leaders. See April 28, 2021 Supplemental Declaration of Hugo Perez (Perez Supp. Decl.) at ¶¶ 4-7 (ER 2456). Mr. Perez’s supervisor himself acknowledged that this was not ideal but “we are stuck having to do it this way” because his base still had no active contract to bring in outside ASL interpreters, despite his own supervisor advocating for this for many months. Id. at ¶¶ 7-8 (ER 2456). As a result of the Agency’s inability to accommodate him effectively, Mr. Perez instead reviewed a 71-page booklet, rather than effectively participate in an interactive program on a topic he was particularly interested in communicating about. Id. at ¶¶ 11-12 (ER 2457 – 2458).

Class agent Sheila Burg is not fluent in ASL and thus requires CART services rather than ASL interpretation, but again, the Air Force has failed to consistently provide her with CART and other necessary accommodations. See February 11, 2021 Declaration of Sheila Burg (“Burg Decl.”) at ¶¶ 9, 10, 11 (ER 2329 – 2331). Indeed, the Air Force even failed to accommodate Ms. Burg during the EEO process that she initiated about the Agency’s persistent failure to accommodate her.24 Burg Decl. ¶ 32 (ER 2338). See also Betouliere Decl. Exhibit B at 983-984 (ER 1839 - 1840) (email from Diversity Management Operations Center Investigations and Resolutions Directorate Investigator Leslie M. Walter to Ms. Burg indicating that her interview options were by telephone with Federal Relay, the

24 This failure to accommodate d/Deaf employees during their EEO processes is a common and pervasive problem at the Air Force, as Mr. Wambold had the same experience with a different EEO counselor at a different base. See ROI at 41-42 (ER 2618-2619) (no interpreter for EEO process).
cost for which “would be absorbed by” the EEO office, or by written interrogatory, which “might be the easiest way to go.”).

While Ms. Burg has received many promotions and accolades from the Air Force during her three-decade career with the Agency, this consistent denial of necessary reasonable accommodations over the past many years has negatively impacted her ability to do her job, caused her extreme stress, and taken a severe toll on her mental health and general well-being. Burg Decl. at ¶¶ 6, 26, 38 (ER 2328, 2336-37, 2339-40); see also Betouliere Decl. Ex. B at 968-969 (ER 1824-1825) (declaration by Air Force Personal Property Activity Headquarters Operations Chief Rodney Phillips that he “witnessed Ms. Burg attempting to perform her duties without accommodations and afterwards expressing no support offered by Agency to assist;” that Ms. Burg “missed several projected, planned, and ad hoc meetings due to her inability to participate due to lack of accommodations;” and he “felt Ms. Burg was almost apologetic for not being able to participate at the level she could due to lack of medical accommodations.”).

In his 18 years as an Air Force employee, class agent Wambold’s needs for reasonable accommodation were ignored again and again: he was never provided with a videophone, despite requesting one in 2006, and his requests for ASL interpretation and other basic accommodations were habitually refused, including during the Air Force EEO process itself. Wambold Decl. at ¶¶ 5-7, 10-12, 13-14 (ER 2437 – 2441); see also Record of Investigation at 41-42 (ER 2617-2618) (no interpreter for EEO process). Despite repeatedly requesting interpreters for trainings and other work-related events, he was only provided with “an interpreter twice from 2014 to 2019.” Id. at ¶ 9 (ER 2439). Ultimately, Mr. Wambold was constructively terminated from his position, as a result of the Air Force’s utter failure to accommodate him. Id. at ¶ 16 (ER 2442).

The Air Force also repeatedly failed to accommodate class declarant Rachel McAnallen during her five years at the Agency, and this discrimination occurred in a variety of positions, across a variety of bases. See February 11, 2021 Declaration of Rachel McAnallen (“McAnallen Decl.”) at ¶¶ 4-9, 16-17 (ER 2450-2451, 2453). Ms. McAnallen too was ultimately constructively terminated as a result, and
made it a point to note in her exit paperwork that the Air Force’s failure to accommodate her was one of
the main reasons she was leaving the position. McAnallen Decl. at ¶ 18 (ER 2453).

The Air Force’s failure to accommodate people who are d/Deaf extends to the application
process as well: despite over a month of advance notice and the knowledge that class agent Mika
Hongyu-Perez was Deaf and needed an ASL interpreter for her job interview, the Air Force failed to
provide one. See February 11, 2021 Declaration of Mika Hongyu-Perez, (“Hongyu-Perez Decl.”) ¶¶ 9-
10 (ER 2359 – 2360). The Agency has also withdrawn an internship offer from Ms. Hongyu-Perez
rather than provide her with the accommodation of an interpreter, and has provided her with an
interpreter for only one-half day out of a three-day new employee orientation. Id. at ¶¶ 11-12, 13-15 (ER
2361 – 2364).

Nor was the Air Force’s failure to provide ASL Interpretation for applicant Ms. Hongyu-Perez
an isolated occurrence. During Ms. Shock’s deposition, she discussed yet another incident of the Air
Force denying or failing to provide ASL interpretation during the application process, despite being
well-aware of the applicants’ disability and disability-related need. Shock Dep. at 30:17-32:4 (discussing
case of Mr. Brown); id. at 38:20 – 40:6 (Agency aware of Mr. Brown’s needs but failed to locate an
interpreter); id. at 40:18 – 42:22 (discussing July 2019 EEOC finding of discriminatory failure to
provide reasonable accommodations and violation of the Rehabilitation Act as it pertained to Mr.
Brown; order that Agency be trained in providing reasonable accommodations); id. at 43:18-44:6
(Agency ordered to provide two full-time interpreters for Mr. Brown).

Finally, in its June 1, 2022 Limited Stay Order, the Administrative Judge took judicial notice of
what may be yet another example of the Air Force’s failure to accommodate deaf employees:25 “I note
that the Commission recently issued a decision in Alvaro P. v. Dep’t of the Air Force, EEOC Appeal No.
2021004984 (Mar. 14, 2022), which was an appeal of the same case. I take administrative notice of the

25 In his order, the Administrative Judge suggested that this case involved Mr. Brown, the same
individual named in the “Notice of Intent to Issue a Decision” filed by the Agency on May 20, 2022.
Order at fn. 1 (ER 8049). However, because the individual identified in the caption for this case is not
Mr. Brown and Complainants do not have access to the filings, they are unsure of whether it in fact
concerns the same employee referenced above, or yet another employee that the Air Force failed to
accommodate.
administrative judge’s further findings that the Agency failed to accommodate the complainant and otherwise discriminated against the complainant based on his disability (deaf). Further, the administrative judge found that the individual assigned to engage the complainant in the reasonable accommodation process had no relevant experience or training. In reviewing the administrative judge’s decision, which was fully implemented by the Agency, I recognize similarities between the allegations raised by the Class Agent.” June 1, 2022 Limited Stay and Protective Order at 2, fn. 1 (ER 8049).

This, of course, is only a partial account of the myriad ways in which the Air Force fails to provide its d/Deaf employees and applicants with consistent and reliable access to the accommodations they need.

Moreover, even the limited workarounds that many deaf employees had relied on to make up for the Air Force’s failures to accommodate are now no longer available. For years, Class Agent Weimer was forced to rely on the Federal Relay Service to make up for the Agency’s lack of any central process, fund, or contract for providing ASL interpreters or CART services. See February 3, 2022 Second Supplemental Declaration of Sarah Weimer (“Weimer Second Supp. Decl.”) at ¶ 12-15 (ER 2503 – 2504). When Ms. Weimer learned that the Federal Government planned to terminate this service in February 2022, she immediately contacted Ms. Shock because she was concerned that the Air Force would not establish an appropriate replacement in time. Id. at ¶ 15 (ER 2504). Indeed, as class Agent Hugo Perez confirms, the Air Force has failed to establish its own alternative to the Federal Relay Service, despite him also making this request to multiple supervisors. See June 21, 2022 Second Supplemental Declaration of Hugo Perez (“Perez Second Supp. Decl.”) at ¶ 15 (ER 2557). Because the stopgap services provided by Federal Relay are now no longer available – and the Air Force has consistently failed and refused to provide ASL, CART, or Video Remote Interpreting itself – Mr. Perez now struggles even more to communicate at work, and to perform his job without these basic and necessary reasonable accommodations. Id. at ¶¶ 15-18 (ER 2557 – 2558).

3. The Air Force has a centralized discriminatory policy or practice that puts the onus of requesting necessary accommodations on d/Deaf employees every time,
even when need for that accommodation is known to the Agency, and has not changed.

Agency training documents produced during pre-certification discovery process confirm that while employees who need the same obvious accommodation again and again are not necessarily required to submit a new written request, they are expected to provide supervisors with “appropriate notice each time the accommodation is needed.” Betouliere Decl., Exhibit J (ER 669) (AFI 36-2710 – Reasonable Accommodation Training). In other words, the onus of requesting necessary accommodations is placed on employees with disabilities every time, even when need for that accommodation is or should be known to the Agency, and has not changed—just as Complainants have alleged.

This requirement has a particular discriminatory impact on the Agency’s deaf employees, as “the assistance of sign language interpreters” is among the “most common example[s . . .] of a reasonable accommodation that’s requested on a repeated basis.” Shock Dep. 303:5-11 (ER 148).

During her deposition, Ms. Shock clarified that managers were not in fact supposed to be making employees request the same accommodations over and over again, where their accommodation needs are known. Shock Dep. at 304:8-305:9 (ER 149 – 150). Unfortunately, Claimants’ experiences suggest that managers have not gotten the message on this point – and understandably not, since the training they are given expressly says otherwise, and instructs them to require “appropriate notice” from employees with disabilities “each time the accommodation is needed.” Betouliere Decl., Exhibit J at 15 (ER 669).

For example, Ms. Weimer has been required to provide the same information regarding her disability and need for reasonable accommodations over and over, despite the fact that her disability is permanent and her need for accommodations does not change. Weimer Decl. ¶ 5 (ER 1919). She has had to request the same reasonable accommodations for trainings and work meetings that are scheduled on repeated basis. Weimer Decl. at ¶¶ 5, 8, 13-15, 16-17, 41-49 (ER 1919 – 1925, 1933 – 1937); see also Record of Investigation at 128-29 (ER 2705 – 2706) (“I see an email where you say that […] the symposium is an example of something for which you would need an accommodation, but I do not see a
request for an accommodation - to whom was that request sent?” Ms. Weimer responded, “I did request accommodations for future events such as that symposium in the email – it wasn’t rhetorical example - and brought it up in our meeting.”). Record of Investigation at 129 (ER 2706).

The Agency has admitted in writing that Ms. Weimer is responsible for requesting CART services for each staff meeting (that occurs weekly), and if she does not do so, no accommodations of CART services will be provided. Record of Investigation at 111 (ER 2688) (email from Col. Debra Luker acknowledging, at top of page, that Col. Luker needed to authorize a court reporter to caption a meeting for Ms. Weimer during the one instance that Ms. Weimer forgot to request one—thus affirming that Ms. Weimer is responsible for requesting her own CART services for each staff meeting, and that if she forgets, there is no CART). As noted above, Ms. Weimer has almost never been provided ASL interpreters despite her numerous requests, and when she requests an ASL interpreter she is routinely still questioned as to why she needs this accommodation, despite the Air Force being on notice that she is Deaf and communicates using ASL. Weimer Supp. Decl. at ¶ 6 (ER 2467 – 2468).

Similarly, accommodations for a DOD Security Certification exam were not offered until Mr. Wambold’s sixth attempt, despite the Agency knowing of his disability and need for accommodations—a need that did not change. See Record of Investigation at 43, 999 (ER 2620, 3576); Wambold Decl. at ¶¶ 9 (ER 2439) (not provided accommodations for Cybersecurity Liaison training), 11 (ER 2439 – 2440) (no accommodations for Kiosk Training), 12 (ER 2440) (no accommodations for security plus certificate training). Ms. Burg was likewise required to provide the same information regarding her disability and need for accommodations over and over during the past 5 years, with little help or guidance from the Agency. Burg Decl. at ¶¶ 10, 15, 29, 34 (ER 2330, 2332, 2337 – 2339). For example, when Ms. Burg asked for assistance obtaining CART services for a 3-day teleconference in May 2020, after having consistently sought CART services since 2015, the Air Force’s central Disability Program Manager Ms. Shock only responded with a list of local CART providers, and left the burden and responsibility of obtaining the accommodation on Ms. Burg. Betouliere Decl., Exhibit B at 293-296 (ER 1147 – 1150). Ms. Burg even tried to ask whose responsibility it was to assist her, but the only response she received
was that “No one person is responsible for implementing reasonable accommodations.” Id. at 293-4 (ER 1147 – 1148); Burg Decl. at ¶ 34 (ER 2338 – 2339).

Like Ms. Burg, Ms. Weimer, and Mr. Wambold, Hugo Perez has had to repeatedly request ASL interpretation, even though his need for that accommodation was known, and had not changed. Perez Decl. at ¶ 7 (ER 2282) (“For over six (6) months from the time I was hired, I was forced to chase people to get an interpreter.”).

4. **The Air Force has failed to implement a streamlined and standardized process for providing videophones and other necessary devices, connecting them to base networks, and ensuring their actual functioning, such that class members wait for years to have and be able to use these accommodations**

Because of the Air Force’s lack of standardized process, class members are forced to wait for years to receive or be able to use assistive communications devices.

   During her deposition, Ms. Shock confirmed Complainants’ allegation that the Air Force has failed to implement a streamlined and standardized process for connecting videophones and captioned telephones to base networks and ensuring that they actually work, such that class members must wait for months or years before being able to do something as basic as making a phone call. Ms. Shock’s testimony on this point is as follows:

   Q. Are you aware of consistent delays with ensuring that videophones and/or captioned telephones work on base networks?
   A. Yes.
   [. . .]
   Q. And what is your understanding of those consistent delays?
   A. It's a complicated process due to Air Force security and firewalls.
   Q. And has -- have those consistent delays been in place at least from 2018 to the present?
   A. Yes.
   [. . .]
   Q. And do those consistent delays ensuring videophones and captioned telephones work on base networks continue into the future, as far as you're aware?
   [. . . A.]: They continue at present, is all I can predict.


Ms. Shock also confirmed that, **unlike Complainants and other members of the proposed class, hearing employees receive working phones their first day on the job.** Shock Dep at 134:4-6
According to Ms. Shock, the Agency has not done anything to expedite the process of ensuring that videophones or captioned telephones can actually be used by its deaf employees, such as training “IT staff so that they understand the particular requirements of videophones or captioned telephones” and how to get them working on each base network. Shock Dep. at 136:7-12 (ER 401). Instead, the Agency has chosen to address these issues on a “case by case” basis – presumably in the same unacceptably slow and incompetent way experienced by Complainants Weimer, Burg, and Perez, each of whom had to wait months or years before they had a functioning videophone or captioned telephone. See Shock Dep. at 135:7-136:12 (ER 400 – 401); see also § III(A)(5), above (describing excessive delays in getting Complainants’ essential communication devices working on base networks).

In many cases, these delays are truly egregious. For example, Mr. Wambold requested a videophone when he began employment at Offutt AFB in 2006, but had still not received one by the time of his constructive discharge in 2020. His supervisor Heidi Snyder suggested getting an iPad for him to use to communicate, but was unable to procure one because of unspecified “government restrictions.” Record of Investigation at 1020 (ER 3597). Similarly, class members Mr. Arthur Garcia and Mr. Rex Nelson worked as Wood Workers at the 99th Logistics Readiness Squadron at Nellis AFB for ten years without receiving videophones, even though Mr. Garcia requested one when he first began the job. Record of Investigation at 39 (ER 2616).

In addition, after waiting long periods of time to obtain hardware or equipment that they needed as a reasonable accommodation, many of the complainants have had to wait for many additional months (or longer) for their equipment to be installed and connected as needed in order to function. The Air Force’s failure to implement a standardized process to connect these essential devices, along with its failure to have any trained or designated staff to coordinate such processes, has created a classwide barrier for d/Deaf employees to receiving the accommodations they need.

Class Agent Weimer brought her videophone with her from her job at the Army. Weimer Decl. at ¶¶ 7-8 (ER 1920 – 1921). Although she had not experienced any difficulty or delay in getting the
phone connected to the network at Joint Base Elmendorf–Richardson when she worked for the U.S. Army, her experience working for the Air Force was vastly different and worse-- it took 11 months for her to connect the phone to the Nellis AFB network. *Id.* During that time, she was forced to take it upon herself to find a fix, and contacted multiple people, units, and bases. *Id.* Eventually, a separate internet line was installed in her office to connect to her video phone. *Id.*; see also Record of Investigation at 36 (ER 2613) (Kathy Wiltse stating that attempts made to install video phones for d/Deaf Nellis AFB employees in warehouse took “**several years**” because of network and firewall issues; installation of Class Agent Weimer’s videophone took **at least 8 months**); Record of Investigation at 37 (ER 2614)(Colonel Luker stating that “Firewalls often a problem for some of the software or devices.”); Record of Investigation at 358-362 (ER 2935 – 2939) (correspondence regarding connecting Ms. Weimer’s videophone).

Similarly, after Ms. Burg received the captioned telephone she requested at the Pentagon, it took her over a year of attempting to coordinate between the Communications Squadron and IT to get the phone working. Burg Decl. at ¶ 17 (ER 2333); see also Betouliere Decl. Ex. B at 464 (ER 1318) (Ms. Mahoney stated in August 2019, “We have been working on the CAPTEL request…CAPTEC was very supportive, however, we are still working the many challenges in getting the CAPTEL phone connected. Five months in for reconsideration…Ms. Burg has been more than patient.”). The same failure of process for installation and original connection of assistive equipment extends to its continued maintenance and troubleshooting. Again, there is no centralized and streamlined process or designated staff to assist class members in resolving technical problems with their equipment. This results in class members effectively and functionally having no accommodations for long stretches of time, even if they ultimately receive the necessary equipment after a long delay.

Mr. Perez, who received his videophone at Fort Sam Houston in May 2020 after requesting it since November 2018, was **still** not able to use his phone consistently as of February 2021. Perez Decl. at ¶ 12 (ER 2283 – 2284). Between May 2020 and at least February of 2021, his videophone only worked for a day or two at a time. *Id.* Then it would display an error message like “waiting for server
issue.” *Id.* at Ex. A (ER 2289 – 2292). Mr. Perez and Mr. Morgan submitted numerous tickets to the Network Enterprise Center (NetOps), but each ticket would be treated as a separate issue and closed out when the phone worked temporarily. *Id.* For a time, Mr. Perez would daily restart the phone, restart the networking setting, log in to the server with username and password, and wait for the connection. Even when it seemed to connect, the screen was often black and Mr. Perez was unable to see the interpreters. *Id.* Ms. Burg’s captioned telephone also stopped working at one point and there was no standardized process she could use to ensure that it would be fixed within a reasonable time period. Burg Decl. at ¶ 17 (ER 2333).

5. The Air Force has failed to “whitelist” appropriate assistive technology, and failed to provide workable alternative accommodations (such as interpreters with security clearance) for d/Deaf employees working in secure areas.

The Air Force’s Network Enterprise Center is responsible for providing approval for software, including assistive technology applications, but lacks policies to ensure that software that class members require as reasonable accommodations is approved.

Mr. Perez requested around January 2019 to be able to install video relay service software on his government computer, including Convo Communications, Sorensen video relay service, and ZVRS. He was never permitted to download the software. Perez Decl. at ¶ 14 (ER 2284); *see also* Record of Investigation at 1320, 1469 (ER 3897, 4046) (discussing issue with software not being allowed on network, failure to fix).

Even some software that is “whitelisted” is blocked. Video relay service software for the government’s Federal Relay service remote interpreting, for example, is already whitelisted. The 99th Communications Squadron installed it on Ms. Weimer’s government laptop at her request. However, even once installed, the software was blocked, and she could not actually use it. She notified the Communications Squadron about this problem repeatedly, but it was never fixed. Weimer Decl. at ¶ 8 (ER 1920 – 1921); *see also* Record of Investigation at 111 (ER 2688) (Colonel Luker acknowledging that government On Demand Video Relay software on Ms. Weimer’s computer was still being worked on in April 2020, from months prior). Ms. Weimer repeatedly asked to be permitted to use the
Automated Speech Recognition (ASR) feature in Microsoft Teams, the Agency had disabled this feature, thereby making Teams inaccessible to her and other deaf employees. See Weimer Supp Decl. at ¶ 15 (ER 2471 – 2472).\(^{26}\)

Similarly, a new policy was instituted in May 2018 that prohibited Ms. Burg from using her Bluetooth hearing aids upon which she previous relied, which enable her to adequately hear a conversation taking place around her. See Record of Investigation at 38 (ER 2615) (investigatory summary stating that, according to Ms. Shock, Ms. Burg’s request for Bluetooth hearing aids was denied, and CART services for meetings somehow “not possible”; only option was reassignment outside of Sensitive Compartmentalize Information Facility (SCIF)). Ms. Burg’s supervisor, Personnel and Training Division Chief of Budget Operations and Personnel Heidi Mahoney, wrote to Ms. Shock the following about the change in policy:

> Although I understand the “national security” policy I do believe that further AF guidance/policy is required to address those individuals that were hired into positions/locations that can no longer provide specific accommodations based on these security policy changes/updates. To say that we are limited in choices to address Sheila’s situation, such as providing accommodations at a certain level based on the security requirement and not on the individual’s disability seems misplaced. I would think there would be an Air Force policy that outlines next steps such as an alternate work location or reassignment as a priority action since the restriction of accommodations, as in Sheila’s case, were levied after accepting her current position as Schedule A employee.

Betouliere Decl. Ex. B at 463 (ER 1317) (emphasis added). Ms. Shock responded that “AF/A1Q is currently updating AFI 36-205 which contains AF reasonable accommodation policy and procedures and we are developing a handbook to accompany the instructions. We can certainly address this issue in both of these documents.” Id. at 507 (ER 1361). To date, it does not appear that this has happened, and there does not appear to be a version of AFI 36-205 more recent than 2016. See https://www.af.mil/Portals/1/documents/eeo/AFI%2036-205%2015%20Dec%202016.pdf?ver=2017-09-

\(^{26}\) While Teams’ Automated Speech Recognition feature was eventually enabled in mid-2021—after Ms. Weimer and other deaf employees had been made to do without this essential feature for over half a year—Ms. Weimer’s understanding is that this resulted from a general, Air Force wide software update and not in response to her November 2020 accommodations request. Weimer Supp. Decl. at ¶ 16 (ER 2472).
Even if security concerns genuinely prevent the use of some Bluetooth-enabled assistive devices or other accommodations, and exceptions to this policy cannot be made (which Complainant and class agents do not concede), the Air Force has an obligation to conscientiously explore other possible devices and accommodations that would enable d/Deaf employees to work in secure environments. For example, the Air Force could make recordings using a non-Bluetooth device that were later transcribed, or provide d/Deaf employees in secure areas with regular access to a qualified CART provider or ASL interpreter with appropriate clearances.

The Air Force seems to have made little if any effort to do this – as Ms. Shock noted at her deposition, the Air Force has largely failed to hire or contract for interpreters with high levels of security clearance, severely impacting deaf employees who must work with secure information as part of their jobs.

According to Ms. Shock, when other organizations have needed to obtain ASL or CART interpreters with secret or top-secret security clearance to assist deaf employees who work with that level of information, they have either established standing contracts for such interpreters, or hired them as employees. Shock Dep. at 369:25 – 371:12 (ER 447 – 448). Based on her conversation with staff at other agencies, “most often they [. . .] have both staff interpreters that are employees of the agency and they supplement that with contract employees” Id. at 370:16-19 (ER 447). The Air Force, by contrast, has largely failed to do either thing.

To the best of Ms. Shock’s knowledge, the Air Force has “one or two” staff interpreters (at Wright-Patterson and Tinker, two of the same bases that have standing interpreter contracts and full-time disability program managers) but it has largely failed to procure the services of interpreters with high levels of security clearance—to the detriment of deaf employees like Ms. Burg, who must regularly work with secure information. Shock Dep. at 370:20-371:12 (ER 447 – 448); see also Burg Decl. at ¶ 9 (ER 2329 – 2330) (“My understanding is that the Air Force has, or can get, CART translators with appropriate security clearances to work in a Sensitive Compartmentalized Information Facility (SCIF),
but as far as I am aware there has been no effort to do this on my behalf, whether for meetings, trainings, or any other occasion in which the reasonable accommodation of CART translation would help me perform the essential functions of my job.”).

6. **The Air Force routinely fails to ensure that trainings, presentations, and videos for civilian employees are properly captioned or otherwise accessible.**

The Air Force routinely fails to provide captions and similar accommodations for necessary trainings, presentations, and videos, thereby denying class members the accommodations they need to benefit from this programming. During her deposition, Ms. Shock confirmed that she was well-aware of this problem, that it was ongoing, that complaints about lack of captioning were well-founded, and that Agency leadership had done essentially nothing to address the issue. Shock Dep. at 138:13-24 (ER 402)(aware of problem); Shock Dep. at 138:25-139:15 (ER 402 – 403) (complaints well-founded, deaf employees denied equal access to training); Shock Dep. at 139:16-141:7 (ER 403 – 405) (systemic and ongoing problem, no agency action).

When asked whether she was “aware of complaints by deaf and hard of hearing employees that there’s a persistent problem that videos for training and other purposes are not captioned,” Ms. Shock responded that she was, and stated “I’m aware that we’ve had multiple issues where [. . .] mandatory training[ has] been required, videotapes have been used, and they’ve not been captioned.” Shock Dep. at 138:13-24 (ER 402). Ms. Shock also confirmed that the complaints of these employees were well-founded, that the mandatory training was in fact not captioned, and that this meant there was “no way for the employee to have equal access to that training.” Shock Dep. at 139:25-139:15 (ER 402 – 403).

Despite affirming that this was a “systemic problem with the Air Force that persists to today,” and that she had had multiple conversations about the need for captions with the people “responsible for providing such training videos,” Ms. Shock stated that she was not aware of any Air Force policy requiring that training videos be captioned. Shock Dep. at 139:16-141:7 (ER 403 – 405). This was reaffirmed during Ms. Shock’s second day of deposition, during which the following exchange occurred:

**Q.** [. . .] is there a plan that the Air Force has to ensure its videos are consistently captioned?

**A.** Not that I’m aware of.
Q. Given that it’s a requirement of the law, do you think that would be a good idea for the Air Force to do that?

[. . .A.]. I would recommend that for the updating policy that we’re crafting, that [. . .] they include a section on accessible media and what the requirements there would be.


The Air Force’s consistent failure to caption its training videos may have something to do with the fact that the Agency’s sole employee responsible for ensuring compliance with Section 508 of the Rehabilitation Act\(^\text{27}\) – who, shockingly, performs this task as a “collateral duty,” meaning that it may take up no more than 20% of her total work time\(^\text{28}\)—apparently does not believe that ensuring the accessibility of electronic training materials is her responsibility, and that making such materials accessible should be handled case-by-case, as an accommodation. Shock Dep. at 251:21-254:4 (ER 433 - 436) (noting that Agency’s section 508 office views the accessibility of electronic content as something that should be handled as an individual reasonable accommodation).

As Ms. Shock explained, in addition to being illegal, this individualized accommodation approach is fraught with problems, because she is not involved in the creation of training videos and has no way of knowing “whether a video exists and whether or not its captioned until someone informs me

\(^\text{27}\) Section 508 requires federal departments and agencies “developing, procuring, maintaining, or using electronic and information technology” to ensure that the electronic and information technology allows “individuals with disabilities who are Federal employees to have access to and use of information and data that is comparable to the access to and use of the information and data by Federal employees who are not individuals with disabilities.” 29 U.S.C. § 794d(a)(1)(A).

\(^\text{28}\) Shock Dep. at 293:15-22 (ER 439) (noting that Section 508 coordinator performs that job as a “collateral” duty); \textit{id.} at 241:13-242:8 (ER 425 - 426) (explaining that employees are “only allowed to spend 20% of their time” on an assigned collateral duty).
that it’s not” – that is, not until “after the fact when the individual has not been provided [. . .] access.”

The systemic lack of legally-required captioning for Air Force trainings and presentations is also confirmed by Complainants and class declarant McAnallen.

For example, in order to maintain her Financial Management certificate, which was necessary for her position, Ms. Burg was required to participate in periodic trainings. Burg Decl. at ¶ 20 (ER 2334). These trainings often consisted of online seminars that were not reliably captioned. Id. Captioning of these videos is particularly important for Ms. Burg, because Bluetooth streaming between the video and her hearing aids is not allowed in the “open space vaults” where she works, which means that, without captions, she has no way of accessing their content at all. Id.

Similarly, Ms. Weimer has consistently struggled to complete required video trainings because she could not access them without captioning. As just one example, Ms. Weimer has requested that the Mandatory Annual Legal Assistance Refresher Training be provided with captions since she began working for the Air Force in 2018, but this has not happened. Weimer Decl. at ¶¶ 19-26 (ER 1926 – 1928). While Ms. Weimer was told that the Air Force was in the middle of an upgrade would enable them to caption the Annual training as well as other webcasts and videos- to date captioning has still not been provided. Id. Ms. Weimer has been denied access to multiple other mandatory trainings, as videos are consistently provided without captions, despite repeated efforts on her part to advocate for herself and other d/Deaf employees who require captioning. Weimer Decl. at ¶¶ 16-40 (ER 1924 – 1933) (detailing failure to provide captions or other accommodations for a variety of required trainings). More recently, upon returning to work after several months of leave under the Family and Medical Leave Act, Ms. Weimer was informed that she needed to complete multiple video or audio trainings, all but one of which lacked captions and thus were entirely inaccessible to her. Weimer Second Supp. Decl. at ¶¶ 4-8 (ER 2500 – 2502). While Ms. Weimer immediately requested captions so that she could access these trainings, only one was subsequently captioned, meaning Ms. Weimer has been unable to complete the vast majority of these trainings. Id. at ¶¶ 8-11 (ER 2501 – 2503).
Ms. McAnallen experienced the same harm when videos at mandatory Wing trainings were consistently provided without captioning. McAnallen Decl. at ¶ 17 (ER 2453). By neglecting to ensure that all trainings, videos, and presentations are provided with captioning, the Air Force discriminates against d/Deaf employees who are denied the ability to benefit from this material in the same manner as their coworkers without disabilities.

7. The Air Force has failed to adequately staff its disability program, to the detriment of its d/Deaf employees, and everyone else who needs accommodations.

The Air Force has completely failed to adequately staff its disability program, to the detriment of every employee who needs accommodations: despite an Air Force Instruction that “highly recommend[s]” appointment of full-time Disability Program Managers, only 3 bases have full-time people in this position, and roughly a quarter have no Disability Program Managers at all. The remainder perform their disability-related work as a “collateral duty,” meaning that they must somehow accomplish all of it – or not – in only 20% of their work time.


The answer, unsurprisingly, is “No.” Id.

In elaboration, the report explains that “Air Force Instruction (AFI) 36-2710 encourages installations to establish full-time DPMs [(Disability Program Managers)], but still the majority of

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29 AFI 36-2710 is the Agency’s Equal Opportunity Program Guidance. Section 11.4.6 of this document states “It is **highly recommended** that installations designate a full-time Disability Program Manager.” AFI 36-2710 at 101 (emphasis added). Betouliere Decl., Exhibit K (AFI 36-2710) at 101, § 11.4.6 (ER 791).

Similarly, section 3.5.3 of an earlier Air Force Instruction 36-205, titled “Affirmative Employment Program (AEP), Special Emphasis Programs (SEPS) and Reasonable Accommodation Policy” states: “Installations are encouraged to establish a full-time Disability Program Manager (DPM) position due to the lack of representation of individuals with disabilities, in particular, individuals with targeted disabilities, in the federal workforce.” AFI 36-205 at 19 (available at https://www.af.mil/Portals/1/documents/eeo/AFI%2036-205%2015%20Dec%2016.pdf?ver=2017-09-15-170350-580).
DPMs in FY20 were assigned as collateral duty.” Id. It then goes on to note that one of the “primary challenges with collateral duty DPMS” is an “inability to effectively execute DPM duties due to performing full-time jobs.” Id. (emphasis added).

A table immediately below this explanation shows that the Air Force has only 3 full time employees responsible for “processing reasonable accommodation requests from applicants and employees,” and 85 employees who perform this task as a “collateral duty” – meaning that they cannot devote more than 20% of their time to it. Id. at 3; see also Shock Dep. at 241:13-242:8 (ER 425 – 426) (explaining that employees are “only allowed to spend 20% of their time” on an assigned collateral duty).

The Fiscal Year 2020 “Affirmative Action Plan” report comes to the same conclusion about whether the Agency has “designated sufficient qualified personnel to implement its disability program during the reporting period” – “No” – and shows that the number of full-time employees responsible for processing reasonable accommodation requests remains unchanged. Betouliere Decl., Exhibit G at 2-3 (ER 503 – 504).

When Agency counsel asked Ms. Shock why she believed collateral duty Disability Program Managers could not accomplish “the proper processing [. . .] of reasonable accommodation requests,” she responded that in reports and during trainings, “usually the first question [her disability program managers] ask is, [‘]how do I do all of this with only 20 percent of my time[?]’” Shock Dep. at 328:10-329:14 (ER 444 – 445) (stating that she is asked this approximately five or six times every year, and that she also knows disability program managers cannot properly process accommodation requests because the Agency is not meeting its policy of processing such requests within 30 days).

As Ms. Shock explained, “at most installations in this organization,” the Disability Program Manager positions “should be full-time jobs. It’s full-time work.” Shock Dep. at 291:6-13 (ER 438). In response to questioning from Agency counsel, she elaborated: the “role of the disability program manager is vast. It’s not just related to ensuring the reasonable accommodation process. It also [. . .] involves training managers and supervisors [and] addressing accessibility issues. Shock Dep. at 327:19-
When asked “so how is it that a person is supposed to get a full-time job done in 20 percent of
their time,” she responded: “That’s a great question. I don’t have an answer for that.” Shock Dep. at
242:5-8 (ER 426).

At multiple points during her deposition, Ms. Shock eloquently explained why having so few
full-time Disability Program Managers—as the Agency’s own Air Force Instruction (AFI) 36-2710
document encourages – is a problem. For example, when asked how more full-time DPMs would make
her own job easier, she replied:

A. Well, then I would have a point of contact at that organization when there was a
question about how do we install a video phone or is there a contract for interpreters or
where do I locate some piece of equipment. Without a point of contact at those locations,
then it's -- it's on -- falls to me to figure that out and, again, I'm one person and there are a
hundred bases across the world.

Q. And 174,000 employees?
A. Yes. In -- in 2018 we had about -- just a little over 19,000 individuals with disabilities.
Q. Who had identified?
A. Who identified as being individuals with disabilities, yes.

In addition to the fact that all but three of the Air Force’s Disability Program Managers perform
that role as a “collateral duty,” roughly 25% of the Agency’s bases do not have designated Disability
Program Managers at all. Shock Dep. at 237:8-22 (ER 422). As Ms. Shock confessed, it is “difficult to
have a disability program if you don’t have anyone managing the reasonable accommodation program
for that organization [. . . because] there wouldn’t be anyone identified [. . .] to facilitate that process for

In the absence of qualified full-time Disability Program Managers at most bases, it seems that
the burden of researching, locating, and coordinating necessary accommodations like ASL and
Video Remote Interpreting—and doing the requisite work to set up contracts—has fallen on the
Agency’s deaf employees themselves. See Second Supplemental Declaration of Hugo Perez (“Perez Second Supp. Decl.”) ¶ 17 (ER 2557 – 2558) (describing being told that he would need to personally provide his supervisor with quotes from various agencies providing ASL interpretation and video remote interpreting services, before his supervisor could take any further steps to set up a contract or provide him with those accommodations).

Not coincidentally, the bases with full-time Disability Program Managers are also the ones that have standing contracts for ASL or CART interpretation, and that appear to have approved requests for ASL Interpretation in the greatest numbers. Shock Dep. at 67:17-68 (ER 395 – 396) (bases with standing contracts); id. at 248:17-249:2 (ER 430 – 431) (bases with full-time disability program managers); Betouliere Decl., Exhibit I (ER 644 – 653) (“DAF Deaf Accommodation (K. Shock)” Excel Sheet) (showing that, of the 152 interpreter requests that Agency records indicate have been approved since 2018, 130 (or over 85%) were at Tinker or Wright-Patterson – places where standing contracts exist, and which also happen to be among the three bases that have full time disability program managers). There is thus every indication that the Agency’s systemic failure to adequately staff its disability program directly impacts Complainants and other deaf employees across the Air Force.

Despite this, Air Force leadership has done nothing to ensure that the Agency’s disability program is adequately staffed, in accordance with its own guidance. As Ms. Shock explained, “on an annual basis my office would meet with our leadership to brief this report and the results of this report, and every year from the day I started in 2012 until last year, I have said that this is a recommendation and that it’s very difficult to have a competent disability program when you have people who are only devoting 20 percent of their time to that work” – and yet, for whatever reason, she has been “unable to convince leadership that [...] full-time DPMs are required at most bases.” Shock Dep. at 247:2-22 (ER 429).

In addition to inadequately staffing its Disability Program, the Air Force has failed to properly train supervisors and others with the power to approve or deny accommodations,30 and has appointed

30 For example, Mr. Perez’s supervisors have admitted that they have received little training and guidance regarding providing reasonable accommodations. Perez Decl. ¶ 25 (ER 2286 - 2287).
base-level “Disability Program Managers” who are profoundly unqualified for the job—something its own policy documents prohibit. Under the Air Force’s own written policies, Disability Program Managers must:

“3.9.1. Be familiar with federal laws, regulations, and policies that protect individuals with disabilities from discrimination in all employment practices and procedures.

3.9.2. Be familiar with special appointing authorities available to hire individuals with disabilities (including Schedule A, 5 CFR 213.3102(u))

3.9.3. Be familiar with reasonable accommodation obligations and procedures.

3.9.4. Be able to, assist as necessary, candidates or employees, and advise managers regarding reasonable accommodations.”

See AFI 36-205 at ¶ 3.9.31

As just one example of the Air Force’s failure to follow its own stated policies in this regard, the Disability Program Manager at Nellis Air Force base was for some time apparently a GS-05 Dental Assistant, who served as a Disability Program Manager as a “collateral duty”—a distressing indication of the low priority the Agency has given to this essential role. There is no indication that this person had any specialized training in or knowledge of disability laws, reasonable accommodation obligations, or disability-related needs and how to meet them. Weimer Decl. at ¶¶ 50-53 (ER 1937 - 1938); see also Record of Investigation at 38 (ER 2587) (acknowledging that Lydia Champion, GS-5 Dental Assistant/Nellis AFB “Collateral Duty” Disability Program Manager was overseeing Ms. Weimer’s requests for ASL interpreter services and videophone line).

B. Complainants are civilian Air Force employees who are d/Deaf, and like every other member of the proposed class, they have been subjected to discriminatory Air Force policies and practices, and denied necessary accommodations.

1. The Air Force has discriminated against class agent Sarah Weimer and repeatedly denied or delayed necessary accommodations, leading to her constructive termination.

Ms. Weimer is a Class Agent and the named Complainant in this matter. Weimer Decl. at ¶ 1 (ER 1917). She is Deaf and uses bi-lateral cochlear implants. Id. at ¶ 4 (ER 1918). She was a civilian attorney with the U.S. Air Force Warfare Center, Office of the Staff Judge Advocate where she advised

commanders, managers and supervisors, military organizations, human resources personnel, equal
opportunity personnel, investigators, and other personnel on administrative law, ethics, labor and
employment law, contract law, environmental law, military law, and other areas of law as needed. Id. at ¶ 3 (ER 1917 – 1918). She was the primary ethics and labor and employment law attorney for Nellis
AFB and the Nevada Test and Training Range (NTTR). Id. Ms. Weimer has been awarded two Civilian
of the Quarter awards during her time with the Air Force, and she was nominated for a Civilian of the
Year award. Id. at ¶ 4 (ER 1918 - 1919).

Ms. Weimer’s work at the Air Force is incredibly important to her. As Ms. Weimer states in her
declaration, “the U.S. Air Force has been part of my life since birth. I am the daughter of a U.S. Air
Force Academy graduate and retired Air Force pilot, and I grew up on Air Force bases around the
United States and in the Philippines. As a child, I wanted to become an Air Force pilot like my father but
my deafness medically disqualified me from joining the Air Force as a military member.” Id.

Unfortunately, the Air Force has repeatedly failed to provide Ms. Weimer with reasonable
accommodations since she began working there in January 2018, including but not limited to
videophone/video relay services, ASL interpreters, CART services, and meeting/event/training
accommodations. Id. at ¶ 5 (ER 1919).

Ms. Weimer previously worked for the U.S. Army, where there was no difficulty or delay in
connecting her videophone that she required to perform her job duties. Id. at ¶¶ 6-7 (ER 1919 – 1920).
When she left her employment at the U.S. Army to work for the U.S. Air Force, she brought her Z70
videophone with her, so the Air Force needed only to connect the videophone to the network. Id. By
contrast to the immediate installation of the videophone by the Army, it took the Air Force over eleven
(11) months to get the videophone connected to the network. Id. This was the case even though there
had been approval to connect videophones to the Air Force network prior to her working at the Air
Force. Id. While she waited for her videophone to get connected to the network, Ms. Weimer requested
that a video relay service software be installed on her government laptop computer so that she could
have a way to make and receive phone calls and in order to access the federal government’s on-demand
The Air Force has failed to provide reasonable accommodations of captioning, transcripts and live interpreter at trainings and other work-related events. In February 2020, Ms. Weimer was asked to give a presentation at the Judge Advocate Symposium, which is an Agency-wide training for Staff Judge Advocates and a prestigious honor to be selected to present. Id. at ¶ 13 (ER 1922 – 1923). Ms. Weimer requested accommodations of a speakerphone and an ethernet connection so that she could access the federal government’s relay conference captioning (RCC) service and have the captioner call into the speakerphone so he or she could transcribe what was being said for her. Id. This request was denied, and she was not provided reasonable accommodations. Id. As a result, she was excluded from giving the presentation and a co-worker gave Ms. Weimer’s presentation instead. Id.

Similarly, for the same Judge Advocate Symposium that occurred in October 2020, she requested accommodations in the form of CART services. This was denied and Ms. Weimer was not able to attend the Symposium as a result. Id. at ¶ 14 (ER 1923 - 1924). Ms. Weimer is required to attend a mandatory annual legal assistance refresher training. However, the training is not captioned so that d/Deaf employees may have equal access to the training. Weimer Decl. at ¶¶ 19-26 (ER 1926-1928). Ms. Weimer requested CART services so that she may access the content of the trainings but has not received it. Id. at ¶ 19 (ER 1926). While the Air Force has promised since 2018 to “upgrade” the training to provide for captioning, to date, this has not occurred. Id. at ¶¶ 19-26 (ER 1926-1928).

On June 16, 2020, Ms. Weimer received a directive informing her that she is required to attend a monthly Bridge Chat training, a directive that she is informed came from General David Goldfein, Chief of Staff of the Air Force and is a requirement for her office. Weimer Decl. at ¶¶ 27-29 (ER 1929 – 1930). There were instructions to view a video before the Bridge Chat. The video was not captioned. Id. Ms. Weimer informed the Air Force that because the video did not have captions, she could not watch it, even though the Air Force is required by Section 508 of the Rehabilitation Act of 1973 to make their video relay sign interpreter (VRI) service (www.federalrelay.us). Id. at ¶ 8 (ER 1920 – 1921). While this software is approved for installation of government computers, three years later, Ms. Weimer has still not been provided with this accommodation. Id.
In response, Ms. Weimer was informed that her team facilitator would try to reach out to whoever was in charge of the Bridge Chat training to “see if we can get this rectified for future trainings.” \textit{Id.} at ¶¶ 27-28 (ER 1929 – 1930). It took more than six months and extensive advocacy on Ms. Weimer’s part for the Bridge Chat videos to be captioned, and she was never offered any means of accessing the content that she missed during that time. \textit{Id.} at ¶ 29 (ER 1930).

On July 20, 2020, the Secretary of Defense Mark Esper, issued a memorandum requiring all U.S. Department of Defense personnel, including military members, civilian employees, and on-site contractors, to complete the following OPSEC trainings: (1) Center for the Development of Security Excellence OPSEC Awareness; (2) Unauthorized Disclosure of Classified Information for DoD and Industry; (3) Insider Threat Awareness; and (4) Introduction to Information Security. \textit{Id.} at ¶¶ 30-31 (ER 1930). All four videos for this training were not captioned. \textit{Id.} at ¶ 32 (ER 1930-1931). While Ms. Weimer repeatedly requested accommodation that the videos be captioned, the Air Force failed to do so. \textit{Id.} at ¶¶ 33-40 (ER 1931-1933). Ms. Weimer was precluded from accessing the entirety of the mandatory training and could only access portions of the training through reading slides and slide notes and partial transcripts that were later made available to her. \textit{Id.} She requested that all future Air Force trainings and video fully accessible to d/Deaf Air Force personnel, to include captions. \textit{Id.} at ¶ 40 (ER 1933). To date, the Air Force has not responded. \textit{Id.}

Ms. Weimer was on leave under the Family and Medical Leave Act from September 2021 until January 2022; during that time and upon her return she was informed she needed to complete several trainings. \textit{See} Second Supplemental Declaration of Sarah Weimer in Support of Claimants’ Motion for Class Certification (hereinafter “Weimer Second Supp. Decl.”) at ¶¶ 4-6, 8 (ER 2500-2502). Ms. Weimer attempted to complete the trainings but discovered that all but one of the trainings were completely inaccessible to her as they lacked transcripts or captions. \textit{Id.} at ¶¶ 6, 8 (ER 2500-2502). Ms. Weimer sent multiple emails requesting accommodations so that she could access these training videos, 

\textsuperscript{32} The only accessible training was a DOD training which had captions available.
as of the date of her supplemental declaration only one of those trainings was captioned, such that Ms. Weimer was unable to complete the rest. Id. at ¶¶ 9-11 (ER 2502-2503).

Even in the rare instances that Ms. Weimer’s necessary accommodations for trainings are ultimately granted, such as for a 40-hour Federal Employment Labor Law training in October 2020, it is only after a long and frustrating back and forth. Weimer Decl. at ¶ 17 (ER 1925).

Despite her need for disability-related accommodations being known and unchanging, Ms. Weimer was required to repeatedly request accommodations for meetings that occurred on a set, reoccurring basis, such as weekly staff meetings and a weekly Civil Law section meeting. Id. at ¶ 41 (ER 1933). Ms. Weimer was required to put in multiple requests a week in order to have accommodations in order to participate in these reoccurring meetings, and the agency has generally failed to provide her with consistent and reliable accommodations in connection with meetings, as the law requires. Id. at ¶¶ 42-49 (ER 1934-1937). When Ms. Weimer’s recurring meetings became virtual from March 2020 to June 2021, Ms. Weimer was able to rely on the Federal Relay Service, which provided her some access to these meetings.33 Weimer Supp. Decl. at ¶ 11 (ER 2470). When Ms. Weimer was instructed that she was again expected to attend these meetings in-person starting in July 2021, she again requested ASL interpreters, but she received no response; she discovered at the meeting that no interpreter had been arranged, meaning she was forced to return to her office to read the federal relay service transcript while her coworkers remained in the conference room. Id. at ¶ 14 (ER 2471) (noting also that she experienced nights of insomnia and anxiety due to her worries that the Agency would not provide effective communication accommodations for this meeting).

As mentioned above, Ms. Weimer took a brief leave under the FMLA and when she returned, encountered the same repeated, systemic barriers regarding the Air Force’s inability to accommodate her in violation of Federal Law. Weimer Second Supp. Decl. at ¶ 18 (ER 2473).

33 As Ms. Weimer later noted in her second supplemental declaration, the Federal Relay Service has subsequently been discontinued, leading Ms. Weimer to fear that “it will be impossible for myself, as well as many other deaf and hard of hearing Air Force employees, to do our jobs.” Weimer Second Supp. Decl. at ¶¶ 15-16 (ER 2504); see also § III(C)(2) (further details regarding discontinuation of Federal Relay Service accommodations, lack of replacement).
As a result of more than four years of the Air Force’s failure to provide effective accommodations, combined with frequent accessibility barriers such as the inaccessible mandatory trainings, the upcoming termination of the RCC and VRI services she relied on, and the profound impact of this constant discrimination (and the ensuing stress of attempting to work without accommodations) on Ms. Weimer’s health, she felt that she had no choice but to resign from her job. See Weimer Second Supp. Decl. at ¶ 19 (ER 2473-2474). Had Ms. Weimer been effectively accommodated, she would not have been forced to resign. Id. Despite her resignation, Ms. Weimer is still committed to ending the Air Force’s discrimination against deaf employees, and she “would be willing to return to work for the Air Force [again] if there were adequate policies and procedures in place ensuring effective accommodations for deaf and hard of hearing employees.” Id.

2. The Air Force has discriminated against class agent Hugo Perez, and repeatedly denied or delayed necessary accommodations.

Mr. Perez is a Class Agent. He has been Deaf Since birth. See Perez Decl. at ¶ 3 (ER 2280). He is employed as an Engineering Technician (Drafting) at 502nd Air Base Wing, 802nd Civil Engineering Squadron at Fort Sam Houston, Texas since November 2018. Id. As soon as his employment started with the Air Force, Mr. Perez encountered substantial barriers to equal opportunity in employment and a failure to provide reasonable accommodations. For example, in November 2018, Mr. Perez requested an ASL interpreter during his orientation. Id. at ¶ 6 (ER 2281-2282). Despite nearly a month of lead time, the Air Force only provided Mr. Perez with an interpreter for half of the first day of his new hire orientation, and therefore, he was unable to access much of the information provided. Id. at ¶ 8 (ER 2282). In October 2020, Mr. Perez was informed that the contract for ASL has expired, and therefore interpreter accommodations would not be provided until it is renewed. Id. at ¶ 23 (ER 2286).

As of the filing of Complainants’ Renewed Motion for Class Certification in June 2022, there was still no active contract in place, for these crucial accommodations. Incredibly, on May 23, 2022 – nearly two years later – Mr. Perez was informed that if he wanted ASL interpretation of Video Remote Interpreting Services, he would need to personally provide his supervisor with quotes from various interpreting agencies, before his supervisor could take any further steps to set up a contract or provide
Second Supplemental Declaration of Hugo Perez (“Perez Second Supp. Decl.”) at ¶ 17 (ER 2557). In other words, the Agency has placed the burden of researching, locating, and coordinating Mr. Perez’s accommodations on him, rather than assigning that work to a competent Disability Program Manager or some similar official. Id.

For the first six months of his hiring, he requested an interpreter and was not provided interpreter services. Perez Decl. at ¶ 7 (ER 2282). Mr. Perez did not receive reasonable accommodations and the Air Force did not provide him work to perform because management did not know what to do. Id. at ¶¶ 7, 24-25 (ER 2282, 2286-87). Mr. Perez has repeatedly requested a sign language interpreter and other accommodations, but the Air Force has consistently failed to properly and fully provide reasonable and timely accommodations on a consistent basis. See id. at ¶¶ 10-11, 15-16, 18-19, 21-23 (ER 2282 – 2286).

Mr. Perez was told at times there were no funds available to be allocated to the accommodations he requested. See Perez Decl. at ¶ 16 (ER 2284). This is the case even though the Air Force budget at the time was approximately $165.6 billion dollars.34 This has caused disruptions and barriers for Mr. Perez to fully perform his job duties. Mr. Perez has also not been fully included in trainings, where no interpreter or other effective accommodation was provided. Id. at ¶¶ 6, 16, 19 (ER 2281-2285).

Mr. Perez requested an audio video device for his desk for phone calls soon after he became employed by the Air Force. Perez Decl. at ¶ 11 (ER 2283). As set forth in Mr. Perez and his supervisor Mr. Morgan’s declarations, a video phone was not provided for over a year. Id. at ¶¶ 11-12 (ER 2283-84); id. Ex. C (ER 2299 – 2306) (Morgan Decl.). Once the phone was provided, it was not installed correctly, and was generally not operational. Id. Supervisor Morgan aptly described the Air Force’s inexcusable failure to provide Mr. Perez with a working videophone in an email dated September 29, 2020, which states that Mr. Perez’s videophone:

is still not operational and has never worked more than a day or so since it's connection in Jul/Aug.

As this phone is a Reasonable Accommodation Solution, I find it difficult to believe that after almost TWO YEARS of this issue that a permanent solution has yet to be found.

I am requesting that your office take action to fix this issue – he has already submitted several tickets and the original goes back to Jan 2019. At this point I see no reason for this individual to have to submit any further requests, etc. Your organization needs to step up to the plate and do what is necessary to get this equipment functioning properly – if a ticket needs to go in, just find a closed one and re-open it – it should not have been closed in the first place. Once it’s operational – and stays operational for 30 days I think you could say at that point the issue has been solved. Until then – it’s just sweeping it under the carpet.

I think we’ve been more than patient in this exercise and I request that action be taken to get this problem solved. As this email is elevating to the highest possible levels, the only way forward from here, if there is no action, is through the IG office. Not something I’d want to do, or desire to do, but if that’s what it takes to get this issue addressed, I’m without other recourse. Please – assign someone to this issue, get it fixed, and follow up with it to make sure it stays fixed.

Perez Decl. at ¶ 12 (ER 2283-84), Exhibit A. To date, the video phone is still not consistently operational more than two years after the initial request for accommodation was made. Id. at ¶¶ 12-13 (ER 2283-2284). Mr. Perez has also been denied assistive technology. Perez Decl. at ¶ 14 (ER 2284).

Mr. Perez’s supervisors have admitted that they have received little training and guidance regarding providing reasonable accommodations. Id. at ¶¶ 25-26 (ER 2286-2287). Ms. Calhoun, Mr. Perez’s prior supervisor, admitted in her declaration that Mr. Perez “could not have the same, equal access to training, work or advancement opportunities since he was hearing impaired.” See Perez Decl., Ex. D (ER 2331) (Calhoun Decl.); Perez Decl. at ¶ 20 (ER 2286). Supervisor Morgan admitted the “problem has been the lack of authority to get things done” in order to reasonably and timely accommodate Mr. Perez. See Morgan Decl. Ex. C (ER 2304); Perez Decl. at ¶ 26 (ER 2287).

Supervisor Morgan stated, “there should be standard accommodation vehicle in place for employees who may need these types of services that should be able to be implemented quickly – not after 2 years of red tape.” Id. at ¶ 26 (ER 2287) (emphasis added); id. at Exhibit C (ER 2306).

The one tool that had been available to Mr. Perez to facilitate effective communication was the Federal Relay Service (“FRS”), which was provided not by the Air Force, but by the federal
government. See Perez Second Supp. Decl. at ¶ 4 (ER 2554-2555). FRS used Video Remote Interpreting ("VRI") to enable all Federal employees to communicate via videoconferencing by connecting federal employees free of charge and on-demand to ASL interpreters and vice-versa. Id. While VRI is not an appropriate substitute for ASL interpretation in many situations, particularly large group settings, for Mr. Perez it was better than the minimal to no accommodations the Agency had provided him and kept him from being completely excluded from communicating with his coworkers. Id. at ¶¶ 5-6 (ER 2555).

However, in late 2021 Mr. Perez received notice that the FRS would been decommissioned. In November 2021, he notified his supervisors about the impending termination of FRS and the resulting communication barriers that would ensue. Id. at ¶ 8 (ER 2555). On February 15, 2022, Mr. Perez again contacted his supervisor, noting that FRS had officially been decommissioned. Id. at ¶ 11 (ER 2556). Given the lack of FRS, Mr. Perez again requested ASL interpreters but was told by a Program Manager that to her knowledge Joint Base Saint Andrews did not have a contract with an interpreting agency. Id. at ¶ 14 (ER 2556-2557). Without FRS, Mr. Perez is even more isolated at work. See id. at ¶¶ 19-20 (ER 2558) (noting isolation, including incident where Mr. Perez was totally excluded from work-related celebration of “staff resiliency” due to lack of interpreter).

3. **The Air Force has discriminated against class agent Sheila Burg, and repeatedly denied or delayed necessary accommodations.**

Ms. Sheila Burg is a Class Agent. She has had a hearing disability since birth and diagnosed as Deaf, with progressive (that is, worsening) hearing loss. Burg Decl. at ¶ 4 (ER 2328). She is an oral communicator and uses Bluetooth hearing aids. Id. Ms. Burg also reads lips to assist with her understanding of what is being stated. Id. Ms. Burg has been employed with the Air Force since 1986 and has received awards and promotions throughout her three-decade long career. Id. at ¶¶ 3, 6 (ER 2328). Since 2015, Ms. Burg has held a GS-13 position in SAF/FMBOP as an OCO Budget Analyst at the Pentagon. Id. at ¶ 8 (ER 2329). She was hired under the Schedule A hiring program, which is described by the Office of Personnel Management as a non-competitive hiring process to increase the
hiring and retention of employees with disabilities.\textsuperscript{35} \textit{Id.}

The Air Force continues to fail to provide the accommodations that Ms. Burg needs to perform her job. This includes a working captioned telephone, CART services, notetaker services, and written notes/instructions/information necessary for her job. The lack of timely, consistent reasonable accommodations has lasted for over five (5) years. \textit{Id.} at ¶ 9-15, 19-20 (ER 2329 – 2334). Despite the fact that Ms. Burg’s disability is permanent and her need for accommodations is ongoing and unchanging, she has been required to provide documentation and share information to justify the need for accommodation, due to poorly trained staff and supervisors. Burg Decl. at ¶¶ 14-15 (ER 2332). Ms. Burg has teleworked since September 2019 so that she could self-accommodate at her home. \textit{Id.} at ¶¶ 21-22 (ER 2334-2335). However, in January 2020 Ms. Burg was informed that she would be reassigned to Andrews Air Force Base rather than the Pentagon, because “currently there are no restrictions on the use of cell phones or other Bluetooth devices in the building.” \textit{Id.} at ¶ 23 (ER 2335-2336). The “Bluetooth devices” in question are Ms. Burg’s hearing aids. \textit{See id.} Ms. Burg was informed the move would be “an interim accommodation until [the Air Force] determined if there are other available locations closer to the Pentagon” or if she will be “reassigned to another position” within the Air Force. \textit{Id.} For now, she continues to telework due to COVID, but she does not know when her permission to do this will be revoked, or whether she will be able to return to her former workplace at the Pentagon. \textit{Id.} at ¶¶ 23, 27 (ER 2335-2337).

Ms. Burg has not been consistently provided accommodations for trainings and teleconferences. Burg Decl. at ¶¶ 9, 19, 20 (ER 2329-2330, 2334). She also has not received reasonable accommodations of CART services she requested in the EEO process. Burg Decl. at ¶ 32 (ER 2338).

\textbf{4. The Air Force has discriminated against class agent Matthew Wambold and repeatedly denied or delayed necessary accommodations—including during the Agency’s EEO process itself—leading to his constructive termination.}

Mr. Matthew Wambold is class agent and former employee of the Air Force. He is Deaf and has been since birth, and like many d/Deaf people, English is not his first language, and he struggles to

understand or use written English. See February 11, 2021 Declaration of Matthew Wambold ("Wambold Decl.") at ¶ 3 (ER 2436-2437). Mr. Wambold communicates primarily through ASL. Id. As the National Institute on Deafness has noted, “ASL is a language completely separate and distinct from English.” Id.

Mr. Wambold was hired in 2002 as a WG-05 Electronic Worker at the Offutt Air Force Base in Nebraska. Id. at ¶ 4 (ER 2437). Mr. Wambold requested a video phone in approximately 2006 but his request was denied, and he was never provided an accessible phone that would enable him to communicate via ASL. Id. at ¶ 5 (ER 2437). Co-workers who were hired at approximately the same time as Ms. Wambold at the WG-05 level like Mr. Wambold were promoted to a WG-10. Id. Mr. Wambold’s supervisor responded that the reason Mr. Wambold was not similarly promoted was because he can’t use the phone, despite the fact that the reason he could not use the phone was that the accessible one he requested was never provided to him. Id.

Mr. Wambold has been denied ASL interpreter accommodation for trainings, as well as opportunities for Temporary Duty Travel (offsite) training opportunities—even when he asked for such accommodations weeks in advance. Id. at ¶¶ 6-7 (ER 2438). When trainings occurred, “[a]ll my co-workers were provided the training but me. I sat in the office and did nothing.” Id. at ¶ 6 (ER 2438). Furthermore, Mr. Wambold was not even informed of what happened at the trainings after the fact or provided with training information, despite asking that he be allowed to “make up what [he] missed.” Id. at ¶¶ 6-7 (ER 2438).

In 2011, Mr. Wambold requested a transfer to a GS-05 Computer Assistant position in order to attempt to obtain reasonable accommodations and have equal opportunity to training and promotional opportunities. Id. at ¶¶ 8-12 (ER 2438 – 2440). Nothing changed in the new position, Mr. Wambold continued to not be provided accommodations for work related meetings and for trainings. Id. For example, despite his need for accommodations being well known by the Agency, Mr. Wambold was not offered accommodations for DOD Security certification examinations until his sixth attempt to take the test. Id. at ¶ 10 (ER 2439). Despite many requests, Mr. Wambold only received an ASL interpreter on two occasions between 2014 and 2019. Id. at ¶ 9 (ER 2439).
Mr. Wambold was not provided reasonable accommodations for the EEO process. He requested an interpreter for communications and to ask questions related to the EEO process. \textit{Id.} at ¶ 13-14 (ER 2440 – 2441); \textit{see also} ROI at 41-42 (ER 2617-2618). When denying the requested accommodations, Mr. Wambold was informed the “EO Office does not have that sort of funding nor the responsibility,” and “the Intake and other documents could be taken home and completed, have a friend, family member or other individual to assist him and return the signed and dated documents for PRE Complaint or Formal Complaint processing.” \textit{See} Report of Investigation p. 41-42 (ER 2617-2618); Wambold Decl. at ¶ 13-14 (ER 2440-2441). Two weeks after Mr. Wambold filed an EEO complaint, he received a memorandum of instruction stating that if he did not pass the Security Plus test by January 31, 2020, he would be reassigned, have a reduction in grade or pay or removed from federal service. \textit{Id.} at ¶ 15 (ER 2441-2442). He requested an interpreter for the test, but none was provided, resulting in Mr. Wambold not passing the test. \textit{Id.} at ¶ 15 (ER 2441 – 2442). Mr. Wambold was constructively discharged in January 2020. \textit{Id.} at ¶ 13-16 (ER 2440 – ER 2442). Mr. Wambold has applied for many positions with the Air Force, without being hired, even for positions he was well qualified for. \textit{Id.} at ¶ 17 (ER 2442).

5. \textbf{The Air Force has discriminated against class agent Mika Hongyu-Perez, and failed to provide her with necessary accommodations during the application process, as well as during employment.}

Ms. Mika Hongyu-Perez is a Class Agent. She is Deaf. \textit{See} Hongyu-Perez Decl. at ¶ 3 (ER 2358). She is both a former employee and an applicant, having applied for and not been selected for a position on the basis of her disability within forty-five days of filing her declaration in support of Complainants’ Motion for Class Certification. \textit{Id.} at ¶ 1-7, 17-18 (ER 2357-2359, 2365). Ms. Hongyu-Perez has applied for more than 150 positions in the Air Force at the Lackland Air Force Base, Texas, including seven jobs in January and February of 2021. \textit{Id.} at ¶ 6-7, 17-18 (ER 2358-2359, 2365-2366).

Though Ms. Hongyu-Perez consistently applied to civilian Air Force jobs through the Agency’s Schedule A noncompetitive hiring process (for which her deafness makes her eligible), she has seldom been selected for interviews, including for positions for which she was very well qualified. \textit{Id.} at ¶ 6-7, 17-18 (ER 2358-2359, 2365-2366). In the few instances where she has gotten past the initial application
stage, she has not been properly accommodated throughout the application process, despite the Air
Force knowing that she is Deaf and needed such accommodations. *Id.* at ¶¶ 8-10 (ER 2359 – 2360).

In fact, in one instance the Air Force canceled a paid internship position that they had offered
her, rather than simply providing her with the reasonable accommodations she required to perform the
essential functions of the job. *Id.* at ¶¶ 11-12 (ER 2361-2362).

For one position that Ms. Hongyu-Perez was able to secure employment as a GS-1702-6, Step 1
in January 2020, no accommodations were provided to her. *Id.* at ¶¶ 13-16 (ER 2362-2364). Despite
making her need for an ASL interpreter known well in advance, she was only provided an interpreter for
part of the first day of her weeklong new-hire orientation. *Id.* at ¶ 15 (ER 2363-2364). Her supervisor
was not informed she is Deaf. Ms. Hongyu-Perez realized that the primary duty of the position was
Charge of Quarters, supervising a dormitory, and required extensive oral communication as well as
listening to announcements over an intercom. *Id.* at ¶¶ 15-16 (ER 2363-2364). Her supervisor said the
position was almost 100% focused on communication; in person and via phone and intercom. *Id.*
However, none of these forms of communication were accessible to her as a Deaf employee, and no
accommodations were provided to her, despite the Air Force knowing that she was Deaf and would need
such accommodations. *Id.* As a result of the Air Force’s failure to accommodate her and her inability to
perform the essential functions of the position without such accommodations, she resigned. *Id.*

6. **The Air Force has discriminated against class declarant Rachel McAnallen, and repeatedly denied or delayed necessary accommodations.**

Ms. McAnallen is a class declarant and former employee of the Air Force. Ms. McAnallen has
been Deaf since birth and communicates primarily through spoken language and cued speech, which is a
way for people who are d/Deaf to “see” spoken English (or any other language). McAnallen Decl. at ¶ 2
(ER 2449-2450). Ms. McAnallen worked for the Air Force for five years, initially as part of the Palace
Acquire Program, a two-year, full-time paid training program designed for both professional and
personal growth, and then as an Environmental Program Manager and Environmental Engineer. *Id.* at ¶ 3 (ER 2450).

Throughout her five-year career at the Air Force, Ms. McAnallen was repeatedly denied a variety
of reasonable accommodations that were necessary for her to do her job and receive effective training. *Id.* at ¶ 5 (ER 2450). The Air Force routinely denied Ms. McAnallen’s requests for interpreters or cued language services at trainings, meetings, and other functions—making it very difficult for her to perform essential job duties. *Id.* at ¶ 10 (ER 2451). Many of the difficulties Ms. McAnallen faced in receiving necessary accommodations stemmed from the Air Force’s lack of centralized funding for interpreting, captioning, and cued language transliteration services, meaning the financial burden of providing accommodations was entirely on individual squadrons. *Id.* Ms. McAnallen continually advocated for the Air Force to establish centralized accommodations funding and contracts for interpretation and other services but faced numerous barriers while doing so. *Id.* at ¶¶ 11–12, 15 (ER 2451-2452). When Ms. McAnallen left the Air Force in 2018 she cited its continual failure to effectively accommodate her as one of the main reasons for leaving her post. *Id.* at ¶ 18 (ER 2453).

7. **Claimants have satisfied all EEO procedural requirements.**

Claimant Weimer and the other Class Agents have properly exhausted their administrative remedies and identified the EEO complaints as class complaints. Ms. Weimer identified her complaint as a class complaint in the EEO process and identified the scope of the class and the policies and practices at issue. See Record of Investigation at 454-56 (ER 3031 – 3033) (January 24, 2020 Class Complaint); see also Weimer Decl. ¶¶ 55-64 (ER 1938-1940); see also Weimer Decl., Ex. A-J (ER 1941-2279). Similarly, Mr. Perez, and Ms. Hongyu-Perez also identified that they were class agents and members of the same class. Perez Decl. at ¶ 30 (ER 2287-2288); Hongyu-Decl. at ¶ 19 (ER 2366). Class agent Ms. Burg was also identified as a class member; her materials were a part of the class complaint, and her investigative report was included in the Report of Investigation provided by the Agency to the Commission. See Burg Decl. at ¶¶ 28-38 (ER 2377 – 2340). As it relates to Mr. Wambold, he identified himself as part of the class, and sought to amend his complaint to add a claim that he was not accommodated in the EEO process. Wambold Decl. at ¶¶ 13-14, 18 (ER 2440-2441); Musell Decl. at ¶ 36, Ex. A (ER 8196, 8196-8203); Betouliere Decl. Ex. A (ER 320-325). The Agency improperly dismissed Mr. Wambold’s claims in part without referring them to the EEOC for assignment of an
administrative judge. Such a decision is not within the Agency’s jurisdiction. Kwok v. USPS, 01871083, 1721/E10 (1987); see also Penk v. Oregon State Bd. of Higher Educ., 93 F.R.D. 45, 53 (D. Or. 1981) (individuals who have not complied with administrative filing requirements can serve as class agents for a subclass).

Complainant is not aware of any other complaints pending before the agency that assert the claims pled on behalf of the class in this motion. Based on the history recited above, Complainant Weimer and the other Class Agents have met all regulatory deadlines and fulfilled all administrative requirements to permit this case to proceed as a class action.36

IV. Legal Standard Applicable to Class Certification

Under EEOC regulations, a class complaint must allege that: (1) the class is so numerous that a consolidated complaint concerning the individual claims of its members is impractical; (2) there are questions of fact common to the class; (3) the class agent's claims are typical of the claims of the class; and (4) the agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class.37 29 C.F.R. § 1614.204(a)(2). These requirements are an adaptation of Rule 23(a) of the Federal Rules of Civil Procedure. See Hines v. Dep’t of the Air Force, EEOC Appeal No. 01931776 (July 7, 1994). Decisions interpreting Rule 23 are thus relevant, and routinely considered in EEOC decisions on class certification. See, e.g., Jantz, et al. v. Astrue, EEOC Appeal No. 0720090019 (Aug. 25, 2010) at *5 (looking to federal court decisions on numerosity under Rule 23).

At the same time, complainants engaged in the EEOC administrative process are not held to the

36 As noted by Mr. Perez and Ms. Burg, the ROI submitted by the Agency to the EEOC improperly omitted evidence obtained in the formal complaint stage, including affidavits of supervisors and rebuttal evidence, and the Agency has refused to cure or explain this deficient and cherry-picked record. See Perez ¶ 30 (ER 2287); Burg Decl. ¶ 37 (ER 2339).

A copy of Ms. Burg’s more complete ROI (inexplicably not submitted by the Agency to the EEOC) was included as Exhibit B to the Declaration of Sean Betouliere in Support of Complainants’ Renewed Motion Class Certification (“Burg ROI”), and is located at ER 854-1916. (Because of file size limitations, this Exhibit in split into four parts, and appears across multiple ER volumes).

37 The EEOC has explained that when addressing a class complaint, it is important to resolve the requirements of commonality and typicality prior to addressing numerosity in order to “determine the appropriate parameters and the size of the membership of the resulting class.” Moten, EEOC Request No. 05960233 (April 8, 1997) (citing Harris v. Pan American World Airways, 74 F.R.D. 25, 45 (N.D. Cal. 1977).
same standard of proof as a Rule 23 plaintiff due to the limited availability of discovery prior to
certification of the complaint as a class complaint. See Aurore C., et.al., Complainant, EEOC DOC
0120150342, 2018 WL 2932869, at *5 (May 18, 2018) (“We note that, although the Commission’s
requirements for an administrative class complaint are patterned on the Rule 23 requirements,
Commission decisions in administrative class certification cases should be guided by the fact that an
administrative complainant has not had access to pre-certification discovery in the same manner and to
the same extent as a Rule 23 plaintiff.”). EEOC regulations provide for development of the evidence by
the parties once a class complaint has been accepted. As a case progresses, the Administrative Judge
may take appropriate action if the evidence reveals that the class should be redefined, subdivided, or
otherwise changed. See 29 C.F.R. § 1614.204.

Under both EEOC regulations and Rule 23, courts have “no license to engage in free-ranging
merits inquiries at the certification stage,” and merits questions can only be considered to the extent
“that they are relevant to determining whether the Rule 23 prerequisites . . . are satisfied.” Amgen Inc. v.
Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 466 (2013). In other words, “[n]either the possibility that
a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit
might unforeseeably prove the original decision to certify the class wrong, is a basis for declining to
certify a class which apparently satisfies’ Rule 23.” Sali v. Corona Reg’l Med. Ctr., 909 F.3d 996, 1004–
05 (9th Cir. 2018), cert. dismissed, 139 S. Ct. 1651 (2019) (citation omitted). Similarly, evidence offered
in support of class certification does not need to be admissible at trial, and rejection of such evidence on
the basis admissibility is an abuse of discretion. See id. at 1004-06.

V. **Legal Standard Applicable to Review of Class Certification Decision**

Where, as here, an Administrative Judge has entered a certification decision without a hearing,
the Commission applies a *de novo* standard of review, and bases its decision on a preponderance of the
evidence. Sedillo v. USDA, EEOC DOC 07A20071, 2002 WL 1841018, at *3 (Aug. 7, 2002). In so
doing, the Commission may affirm the decision to grant class certification on any grounds supported the
record, including on the basis of evidence that was not specifically cited in the challenged order. See
Meza v. Renaud, 9 F.4th 930, 933 (D.C. Cir. 2021) (“On de novo review, we generally may affirm on any ground supported by the record.”).

To the extent the Agency is attempting to challenge the Administrative Judge’s underlying decisions regarding pre-certification discovery, it must establish an abuse of discretion. See Muller v. USDA, EEOC DOC 0120065071, 2008 WL 2484320, at *5 (June 12, 2008) (holding that “an AJ has broad discretion in the conduct of a hearing, including matters such as discovery orders,” and finding no abuse of discretion).

VI. Argument

A. Administrative Judge Peterson’s decision on class certification should be affirmed.

Complainants’ June 21, 2022 Renewed Motion for Class Certification asked Judge Peterson to certify a class of “all d/Deaf38 civilians who are currently employed by the United States Air Force, as well as all d/Deaf civilians who either applied for civilian employment with the Air Force or were so employed at any time between January 1, 2018 and the present.” See Renewed Motion for Class Certification at 54 (ER 283).

29 C.F.R. § 1614.204(a)(2) sets forth four prerequisites to maintaining a class action: (1) the class is so numerous that a consolidated complaint of the members of the class is impractical (numerosity); (2) there are questions of fact common to the class (commonality) (3) the claims of the agent of the class are typical of the claims of the class (typicality); and (4) 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).

In his decision granting class certification, Judge Peterson properly found that each of these elements had been satisfied; that there was significant evidence of systemic Agency discrimination.

38 For the purposes of this proposed class definition, the terms “d/Deaf” or “deaf” were to be read as synonymous with “deaf or serious difficulty hearing,” the first category of disability listed in Part A of question 5 of the Equal Employment Opportunity Commission's Demographic Information on Applicants form, located at https://www.eeoc.gov/sites/default/files/migrated_files/federal/2017-approved-Applicant-Form.pdf. Similarly, the word “employee” was to be read to include all members of the proposed class, including current d/Deaf civilian employees, d/Deaf applicants who have not been properly accommodated, and former d/Deaf civilian employees who were constructively terminated because of a lack of reasonable and necessary accommodations.
against d/Deaf employees; and that certification of a class was appropriate in this case. See Order at 4-7 (ER 4-7) (discussing evidence of systemic Agency discrimination against d/Deaf employees); see also id. at 9-13 (ER 9-13) (analyzing class certification factors). The Administrative Judge thus certified the following class:

“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.”
1. Judge Peterson correctly found that Complainants’ claims and those of the class depend on common questions that are capable of classwide resolution.

In ordering granting class certification, Judge Peterson highlighted numerous centralized Agency policies, practices, and systemic failures to act that are alleged to discriminate against Complainants and other d/Deaf civilian employees, along with significant evidence—drawn from the Agency’s own documents, the uncontroverted testimony of its head Disability Program Manager Kendra Shock, and the declarations of Class Agents—affirming the existence of these Agency-wide issues, as well as their alleged discriminatory effect. This included uncontroverted evidence that 1) necessary accommodations are routinely delayed or denied for supposed lack of funds (despite ample resources available to the Agency as a whole) and that this is a direct result of the Agency’s byzantine and broken process for funding accommodations; 2) that necessary accommodations like ASL interpreters are rarely granted; 3) that the Agency has failed to hire or contract for interpreters with high levels of security clearance; 4) that the Agency places the onus on its deaf employees to request “repeat” accommodations—such as ASL interpretation—every time they are needed, even when their need for that accommodation is known and has not changed; 5) that there are ongoing delays of months or even years with getting videophones and captioned telephones working on base networks, 6) that training videos and presentations are consistently not captioned; and 7) that the Air Force has completely failed to adequately staff its disability program, to the detriment of every employee (including every d/Deaf...
employee) who needs accommodations. See Order at 4-7 (ER 4-7). On the basis of such systemic issues
Judge Peterson properly found that “commonality” requirement of 29 C.F.R. § 1614.204(a)(ii) was
satisfied, and this decision should be affirmed.

As Judge Peterson noted, the Agency’s brief in opposition to class certification did not “grapple
with the[se] policies and practices,” did not “produce any evidence demonstrating that the allegations
are one-off instances at dispersed installations,” and did not address or rebut the testimony of its own
head Disability Program Manager Ms. Kendra Shock “that there are persistent issues across virtually all
installations.” Order at 10 (ER 10). The same is true of its appeal brief here, which ignores or attempts to
wish-away this extensive evidence, rather than to address any of it.40

As discussed in more detail below, any one of the allegedly-discriminatory Agency policies,
practices, or failures to act discussed in Judge Peterson’s order would be enough to establish the
“commonality” requirement of 29 C.F.R. § 1614.204(a)(ii), because whether or not they are
discriminatory is a common question whose answer is “apt to drive the resolution of the litigation.”
Abdullah v. U.S. Sec. Assocs., Inc., 731 F.3d 952, 957 (9th Cir. 2013) (emphasis in original, citations
omitted).

29 C.F.R. § 1614.204(a)(ii)’s “commonality” requirement, like that of Rule 23(a)(2), is satisfied
if the claims of plaintiffs and the proposed class “depend upon a common contention . . . capable of class
wide resolution” —meaning that a “determination of its truth or falsity will resolve an issue that is

Many of the Agency’s arguments along these lines are simply counter-factual. For example, the
Agency asserts that “Complainant has produced no evidence of the ‘denials of necessary
accommodations associated with the lack of [a centralized] fund.’” Agency Appeal Brief at 25. Of
course, Complainants offered pages of such evidence, including the Agency’s own Fiscal Year 2018
“Affirmative Action Plan for the Recruitment, Hiring, Advancement, and Retention of Persons with
Disabilities” report, which notes that accommodations are still “denied due to unit funding,” and cites
“[l]ack of centralized funding for reasonable accommodations” as a barrier affecting all employees with
disabilities. Betoulieere Decl., Exhibit F (Fiscal Year 2018 Affirmative Action Plan report) at 19 (ER
497) (emphasis added); see also § III(A)(1), above.

Similarly, the Agency says that Ms. Duckworth “stated unequivocally” that she “does not hold
[the] view” that what the Agency euphemistically terms “bureaucratic challenges” constitute evidence of
discrimination against deaf employees. Agency Appeal Brief at 23-24. The cited section of Ms. Shock’s
deposition says no such thing—and nor does any other. Rather, Ms. Shock testified extensively
regarding the ways in which the Agency’s current policies and practices serve to discriminate against
deaf employees. See § III, above.
central to the validity of each one of the [class members’] claims in one stroke.”

41 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 at 350 (2011). This does not “mean that every question of law or fact must be common to the class . . . .” Abdullah v. U.S. Sec. Assocs., Inc., 731 F.3d 952, 957 (9th Cir. 2013) (emphasis in original, citations omitted). Rather, “[F]or purposes of Rule 23(a)(2), even a single common question” can establish commonality. Wal-Mart Stores, 564 U.S. at 359 (internal quotations and citation omitted, emphasis added); see also Mazza v. Am. Honda Motor Co., 666 F.3d 581, 589 (9th Cir. 2012).

Here, Complainant Weimer and other class agents have alleged that centralized Air Force policies, practices, and failures to act have resulted in discriminatory denial of “consistent, reliable, or any sign language interpreter services at all,” as well as in the discriminatory denial of “consistent, reliable, or any” access to videophones, CART services, and other necessary accommodations; these are precisely the sort of claims that the Commission has previously found to satisfy commonality, and be suitable for class treatment. See Tessa L. v. Purdue (USDA), EEOC DOC 0720170021, 2017 WL 5564438, at *4-5 (Nov. 9, 2017) (certifying class of deaf employees challenging policy); see also Bates v. United Parcel Service, 204 F.R.D. 440, 445 (N.D. Cal. 2001) (“Plaintiffs in this case do not challenge the accommodations provided to particular individuals …. [r]ather, ‘at issue is the process that UPS follows in addressing (and failing to address) communication barriers and determining what jobs deaf workers can hold, not the specific outcomes that a valid process would produce for individual class members.’” (emphasis in original)).

Further, the declarations of class agents, the deposition testimony of head Disability Program Manager Ms. Shock, and other evidence already in the record establishes that these discriminatory

41 The Agency argues that Wal-Mart requires a showing that all class members have suffered the “same injury,” but it misstates what this requirement means. Agency Appeal Brief at 30. As Wal-Mart itself made clear, this does not require a showing of identical harms, but merely “a common contention . . . that is capable of classwide resolution” (such as, here, the contention that d/Deaf employees are subjected to discrimination as a result of specific centralized policies, practices, and failures to act). See Wal-Mart Stores, 564 U.S. at 350. As multiple courts have explained, following Wal-Mart, “[w]here the circumstances of each particular class member vary but [they] retain a common core of factual or legal issues with the rest of the class, commonality exists. Parsons v. Ryan, 754 F.3d 657, 675 (9th Cir. 2014) (citation omitted).
denials of necessary accommodations are not attributable to the discretionary decisions of isolated
departments or supervisors, but to failings in systems, processes, and trainings that come from the top
down, and that affect d/Deaf employees throughout the Air Force, regardless of the base at which they
are stationed or the position in which they work. See id.; see also § III, above (detailing factual support
for claims of systemic and centralized discrimination).

Here, Complainants have identified numerous common questions whose answers are “apt to
drive the resolution of the litigation”—far more than the commonality element requires. See Abdullah,
731 F.3d at 957 (citation and quotation omitted). While “[a] single common question will suffice for
commonality,” Complainants have more than a single common question which will inevitably generate
common—rather than individualized answers. These include (but are not limited to) the following:

1. Whether the Air Force has 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 is lawful,” as
required by 29 C.F.R. § 1614.203(d)(3)(ii);

2. Whether the Air Force has failed and refused to provide a common fund for
accommodations, such that accommodations are frequently delayed or denied because of
cost, and a d/Deaf employee’s ability to get an interpreter or other necessary
accommodation rises or falls on the finances of their particular unit;

3. Whether the Air Force has failed to ensure that d/Deaf employees and applicants have
consistent, reliable access to American Sign Language interpreter services and other
necessary accommodations, and in many instances has provided no access at all;

4. Whether Air Force has a centralized discriminatory policy or practice that puts the onus
of requesting necessary accommodations on d/Deaf employees every time (for example,
for every meeting or training), even when the need for that accommodation is known to
the Agency, and has not changed;
5. Whether the Air Force has failed to implement a streamlined and standardized process for connecting videophones and other necessary devices to base networks and ensuring that they function, such that they languish unconnected or unusable for months or years even after they have been acquired;

6. Whether the Air Force has failed to whitelist appropriate assistive technology or to find workable alternative accommodations such as ASL interpretation or CART services for d/Deaf employees working in secure areas;

7. Whether the Air Force routinely fails to ensure that trainings, presentations, and videos for civilian employees are properly captioned or otherwise accessible; and

8. Whether the Air Force has 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.

As discussed in Section III above, Air Force documents, the declaration testimony of Ms. Shock, and the experiences of Complainants Hugo Perez, Sheila Burg, Matthew Wambold, Mika Hongyu-Perez and declarant Rachel McAnallen all suggest that the answer to all of the above questions is yes. See § III, above. However, the answer to even one would be sufficient to satisfy the commonality requirement of 29 C.F.R. § 1614.204(a) (ii). See Abdullah, 731 F.3d at 957.

Indeed, the declaration testimony of Complainants and Ms. McAnallen alone was already more than enough to satisfy this element: the fact that these d/Deaf employees or former employees have had markedly similar experiences of discrimination at a variety of different Air Force bases itself shows that these are not isolated incidents of discriminatory conduct, but rather, ones that are reflective of centralized discriminatory policies, practices, and failures across the Air Force as a whole.42 Mitchell v.

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42 Even the Agency admits that reliance on declarations, deposition testimony and other evidence to establish commonality is proper. See Appeal at 29-30 (“Complainant must establish some evidentiary basis from which one could reasonably infer the operation of an overriding policy or practice of discrimination...This showing can be made, for example, by supporting affidavits from putative class members containing anecdotal testimony that the identified agency practice or policy affected them in the same manner as it affected the class agent, with evidence of the specific adverse actions.”) (emphasis added).
In many ways, the class claims in this case are analogous to those asserted in **Tessa L.**, Complainant, EEOC DOC 0720170021, 2017 WL 5564438 (Nov. 9, 2017). There, complainants filed a class case alleging disability discrimination under the Rehabilitation Act, based on their hearing disabilities, alleging that when “the [a]gency transitioned funding for sign language interpreting services from the Department level to the sub-agency level without using the appropriate process and without providing adequate time and training … resulted in denial and delay of interpreting services and inhibited Class Agent from performing her job duties.” *Tessa L. v Perdue* (USDA), 2017 WL 5564438, at *4-5. Upon review, the Commission found the AJ’s decision to certify the class well-founded, noting the agency's decision to decentralize the system for approving and funding requests for qualified sign language interpreter services was the “‘glue’ that holds the reasons for the alleged discrimination experienced by each class member together.” *Id.* Further, the Commission found that the specific accommodations that were being denied (the lack of consistent, reliable, or any sign language interpreter services at all) were typical of class agent's claims as well as those of the putative class members.44

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43. The amount and scope of the commonality evidence submitted by class agents here stands in sharp contrast to cases like **Areccely J.**, where the Commission found that commonality and other key certification requirements were not satisfied. *See Areccely J., Complainant*, EEOC DOC 2019003498, 2020 WL 6134366, at *6 (Sept. 21, 2020) (“despite raising 14 alleged discriminatory practices, Complainant had not pointed to any specific incident that adversely affected the class members.”).

44. The Commission’s decision in **Complainant v. Ashton B. Carter** (Dep’t of Def.), EEOC DOC 0120103592, 2015 WL 5530294 (Sept. 9, 2015), is similarly in accord and provides further support for a finding of commonality. There, the Commission reversed the AJ’s determination that commonality was not established, instead finding that the class agent had “identified a policy or practice of the Agency which affects all employees seeking a reasonable accommodation” - the policy being that all employees seeking a reasonable accommodation were required to use a form and provide extensive medical information in support of any reasonable accommodation request. *Id.* at 5. The Commission found that
While it is true that the Air Force’s discriminatory actions and failures to act might affect claimants and class members in different ways, such different effects do not defeat commonality and certainly does not mean that class members must suffer the “same harm,” as the Agency wants the commonality standard to be. Agency Appeal Brief at 30. Where a civil rights class action lawsuit challenges “systemic policies and practices” that harm all putative class members—as this case does—Rule 23(a)’s commonality requirement is met even if variations in individual circumstances may result in slightly divergent harms. See Parsons v. Ryan, 754 F.3d 657, 681–83 (9th Cir. 2014) (discussing cases); Armstrong v. Davis, 275 F.3d 849, 868 (9th Cir. 2001) (“[Defendant] argues that a wide variation in . . . class members’ disabilities precludes a finding of commonality . . . [w]e reject this approach to class-action litigation.”); William B. Rubenstein, 1 Newberg on Class Actions § 3:20 (5th ed., 2020) (“varying degrees of injury[] will not bar a finding of commonality”); Felix Z. et al., Complainant, EEOC DOC 2020005328, 2021 WL 1928243, at *5 (Apr. 29, 2021) (“[t]he fact that some individuals chose to complete the reasonable accommodation form and provide the information while others did not, and/or the fact that some individuals were accommodated and others were not, did not destroy commonality or typicality because there was a common policy or practice at issue.”) (discussing Complainant v. Ashton B. Carter, 2015 WL 5530294, at *5 (Sept. 9, 2015)).

Moreover, the Commission should reject—as Judge Peterson did—any Agency argument that commonality cannot be established because no “Agency-wide” or “centralized” policy exists for handling reasonable accommodation requests (for example, because the Air Force has no policy regarding captioning of training videos or connecting videophones to base networks at all). In Bates, the court expressly rejected such a narrow approach to identification of a “policy”, explaining that “[a]dopting UPS’s position would lead to the unacceptable conclusion that an employer could protect itself from any class action suit simply by failing to adopt specific policies” and that this “result seems particularly egregious in cases like this one, where plaintiffs’ claims that an employer’s failure to adopt the Agency’s use of this process was sufficient to establish an “Agency Policy that violated the Rehabilitation Act which harmed the class as a whole.” Id.

specific policies is the very reason that the employer is in violation of anti-discrimination laws.” *Bates*, 204 F.R.D at 448; *see Siddiqi v. Regents of Univ. of California*, No. C 99-0790 SI, 2000 WL 33190435 at, *3 and *9 (N.D. Cal. Sept. 6, 2000) (certifying class where defendant “failed to adopt” various policies necessary to prevent discrimination, including a policy “requiring the use of closed captioning for video presentations during classes and other campus settings.”).

Because the claims of Claimants and the proposed class depend on common contentions that are “capable of classwide resolution,” the Commission should affirm Judge Peterson’s finding that the “commonality” requirement of 29 CFR § 1614.204(a)(ii) is met.

2. **Judge Peterson correctly found that Complainant’s claims are typical of the class.**

Judge Peterson correctly held that 29 CFR § 1614.204(a)(iii)’s typicality requirement was satisfied, noting that Complainant “Weimer was a deaf civilian employee for the relevant period, as were other Class Agents,” and that “each of the Class Agents has reported instances where they were discriminated against . . . or denied reasonable accommodations. . . . under one or all of the alleged policies or practices identified in the sub-issues (a)-(h)” of the certified class definition. Order at 10 (ER 10).

While Judge Peterson acknowledged “that there is factual variation as to how the policies and practices affected each individual,” he correctly held that “the interests of the class members will be appropriately encompassed within the sub-issues, and that “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.” Order at 10 (ER 10). In other words, because Class Agents had identified, experienced, and sought to challenge “centralized policies and practices that affect all other putative class members,” typicality was established, and certification was appropriate. *Id.* As explained in more detail below, this holding is wholly in accordance with applicable law, and should be affirmed.45

45 The Agency argues—without any citation to law or fact—that Complainant “has failed to present any evidence that her interests are aligned with the putative class members,” is “attempting to serve as
The Commission has held that “typicality is met when there is some nexus between the class agent’s claims and the class members' claims,” and cautioned that “this prerequisite does not mandate that the class agent’s circumstances be identical to those of the class members’.” Tessa L. v. Purdue (USDA), 2017 WL 5564438, at *5. Likewise, “[u]nder [Rule 23(a)(3)’s] permissive standards, representative claims are ‘typical’ if they are reasonably coextensive with those of absent class members; they need not be substantially identical.” Parsons, 754 F.3d at 685 (quoting Hanlon, 150 F.3d at 1020). “The requirement of typicality is not primarily concerned with whether each person in a proposed class suffers the same type of damages; rather, it is sufficient for typicality if the plaintiff endured a course of conduct directed against the class.” Just Film, Inc. v. Buono, 847 F.3d 1108, 1118 (9th Cir. 2017); see also Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (“Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought”); Lozano v. AT & T Wireless Servs., Inc., 504 F.3d 718, 734 (9th Cir. 2007) (citing Simpson v. Fireman’s Fund Ins. Co., 231 F.R.D. 391, 396 (N.D. Cal. 2005) for the proposition that “[i]n determining whether typicality is met, the focus should be ‘on the defendants’ conduct and plaintiff’s legal theory,’ not the injury caused”). Because typicality overlaps with commonality, a finding of commonality usually supports a finding of typicality. See Gen. Tel. Co. of the
Here, Complainant Weimer, other class agents, and the proposed class members’ claims all center upon the same discriminatory course of conduct: centralized Air Force policies, practices, and failures to act that serve to deny them of “consistent, reliable, or any” access to ASL interpreters and other necessary accommodations. See Tessa L. v. Purdue (USDA), 2017 WL 5564438, at *4-5 (certifying class of deaf employees raising claims of lack of ASL interpreters); see also § III, above (detailing Class Agents’ experiences, and systemic discriminatory policies and practices).

As other courts have observed, in most cases alleging discrimination on the basis of disability, "there will be individual variations among class members in terms of the nature of their disability, the types of aides used, and the individual nature of each class member’s . . . access to services and facilities” – however, such differences do not defeat typicality. Nat’l Fed’n of the Blind v. Target Corp., 582 F. Supp. 2d 1185, 1201 (N.D. Cal. 2007) (internal citations omitted). Again, the declarations of class agents and other evidence already in the record establishes that the lack of consistent and reliable accommodations for the Agency’s d/Deaf employees is not attributable to the discretionary decisions of isolated departments or supervisors, but to failings in systems, processes, and trainings that come from the top down, and that affect d/Deaf employees throughout the Air Force, regardless of the base at which they are stationed or the position in which they work. See § III, above.

Where—as here—all class members have been harmed by centralized discriminatory policies, practices, and failures to act, neither the fact that class members may need somewhat different accommodations, nor the fact that they may work at different locations or have different positions and supervisors is sufficient to defeat typicality. See Felix Z., 2021 WL 1928243, at *5 (whether some individuals chose to complete the reasonable accommodation form and provide the information while others did not, and/or the fact that some individuals were accommodated and others were not, did not destroy commonality or typicality); Tessa L., EEOC DOC 0720170021, at *6 (Nov. 9, 2017) (typicality found where “dismantling the centralized fund caused everyone to suffer lack of reasonable
accommodation in the form of consistent, qualified interpreting services for essential functions of their respective employment and Department-wide functions.

Bates v. United Parcel Service, 204 F.R.D. 440, 446-47 (N.D. Cal. 2001) (individualized nature of ADA determinations does not defeat typicality);

Nat’l Fed’n of the Blind, 582 F. Supp. 2d at 1201 (internal citations omitted); see also Turner v. Dep’t of Justice (Fed. Bureau of Prisons), EEOC Appeal No. 0720060041 (July 19, 2007) (“To the extent that the agency argues that the mere fact that individuals work in different positions in different locations automatically defeats a claim for class certification, we disagree. If there is sufficient evidence of a common policy or practice, the commonality test can be met, even if the employees hold different positions and work in different facilities.

Because Complainant, other class agents, and all members of the proposed class have been harmed by the same discriminatory course of conduct, and would benefit from the same declaratory and injunctive relief, Judge Peterson correctly found that the proposed class satisfies 29 CFR § 1614.204(a)(iii)’s typicality requirement. This finding should be affirmed.

3. Judge Peterson correctly found that the proposed class – which includes at least a thousand d/Deaf civilian employees throughout the Air Force – easily satisfies numerosity.

In finding that 29 C.F.R. §1614.204(a)(2)(i)’s “numerosity” requirement was satisfied, Judge Peterson noted that the Agency’s “2020 Total Workforce Distribution by Disability Status Report” identified “more than 700 Agency employees identified as being deaf or having serious difficulty hearing,” and that Disability Program Manager Ms. Shock “believed there were more than a thousand such individuals” across the Agency. As Judge Peterson reasonably concluded, this was far above the standard threshold (40 or more) for finding “numerosity.” Order at 11-12 (ER 11-12).

In doing so, Judge Peterson accepted the general principle—also accepted by the Agency—that classes with 40 or more members usually satisfy the numerosity requirement. See William B. Rubenstein, 1 Newberg on Class Actions § 3:12 (5th ed. 2020) (“A class of 40 or more members raises a presumption of impracticability of joinder based on numbers alone.”). See also Johnson-Feldman v. Secretary of Veterans Affairs, 01953168 (1997); see also Jeffries v. Secretary of Treasury, 01A02227.
(2003) (77 past and present employee sufficient for class certification); *Thockmorton v. Secretary of Interior*, 01A03994 (2003) (class of 74 meets numerosity requirement); *Lee v. Secretary of Army*, 01990384 (2000) (60 employees are sufficient for class certification). Where “the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied.” *In re Abbott Labs Norvir Anti-Trust Litig.*, 2007 WL 1689899, at *6 (N.D. Cal. Jun. 11, 2007) (citing *Cone, Newberg, Newberg on Class Actions* § 3.3 (4th ed. 2002); *Rannis v. Recchia*, 380 Fed. App’x. 646, 651 (9th Cir. 2010) (discussing standard, and affirming certification of 20-member class). *Cf. Aracely J., Complainant*, EEOC DOC 2019003498, 2020 WL 6134366, at *6 (Sept. 21, 2020) (26 putative class members who currently or previously worked at agency’s Regional Office was not so large or geographically dispersed that consolidated or separate complaints would be impractical).

The Agency critiques Judge Peterson’s conclusion that numerosity was satisfied as “shoddy and faulty reasoning,” but it offers no contrary evidence regarding the size of the class. Instead, it suggests—disingenuously—that a class cannot be certified on the basis of the six specific individuals named in Ms. Weimer’s original complaint. Agency Appeal Brief at 27-28. This, of course, is a straw man. Complainant’s motion for class certification is not based on these six individuals, but on centralized Agency policies, practices, and failures to act that serve to discriminate against d/Deaf employees across the Air Force—a class that, by the Agency’s own admission, is well in excess of 700 individuals.

The Agency’s 2020 Total Workforce distribution by Disability Status Report, which covered the period from October 1, 2019 to September 30, 2020 indicated that 773 employees identified as being deaf or having serious difficulty hearing. Betouliere Decl., Exhibit H (FY 2020 Workforce Tables) at 50 (ER 578). During her deposition, Ms. Shock testified that “as far as deaf employees, yes, I’d say there’s over a thousand.” Shock Dep. at 71:9-10 (emphasis added).

A class which according to the Agency’s own documents and testimony consists of anywhere

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46 That same report also identified 120 “qualified external applicants” who self-identified as deaf or having serious difficulty hearing during that same time period and were hired in that year alone—indicating that the “applicant” portion of the class also independently satisfies the “numerosity” threshold. *Id* at 78.
between 773 and over a thousand members readily clears the threshold to satisfy numerosity. See William B. Rubenstein, 1 Newberg on Class Actions § 3:12 (5th ed. 2020). In finding that the numerosity requirement has been satisfied, Judge Peterson confirmed that Complainants established that “the class is so numerous that a consolidated complaint of the members of the class is impractical.” See 29 C.F.R. § 1614.204(a)(2)(i). Judge Peterson’s decision is amply supported by the facts and law and should be affirmed.

4. **Judge Peterson correctly found that Complainants and their counsel will fairly and adequately protect the interests of the class.**

Judge Peterson properly found that Class Agents met the adequacy requirement. Order at 12 (ER 12) (“I find that adequacy of representation has been satisfied”). By not addressing this issue on appeal, the Agency concedes that Class Agents and their counsel meet the adequacy requirement.

Adequacy requires that the agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class. 29 C.F.R. § 1614.204(iv). To determine if plaintiffs “will fairly and adequately protect the interests of the class” under Fed. R. Civ. P Rule 23(a)(4), courts ask whether 1) “named plaintiffs and their counsel have any conflicts of interest with other class members” and 2) whether “the named plaintiffs and their counsel [will] prosecute the action vigorously on behalf of the class.” Sali, 909 F.3d at 1007, cert. dismissed, 139 S. Ct. 1651 (2019). To answer these questions, courts look at a range of factors, including “an absence of antagonism between representatives and absentees, and a sharing of interest between representatives and absentees.” Ellis v. Costco Wholesale Corp., 657 F.3d 970, 985 (9th Cir. 2011). “Only conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement. A conflict is fundamental when it goes to the specific issues in controversy.” In re online DVD-Rental Antitrust Litig., 779 F.3d 934, 942 (9th Cir. 2015) (internal citations omitted).

Complainant Weimer and other class agents are adequate class representatives because they are directly affected by the discriminatory Air Force policies, practices, and failures to act at the heart of this case, which serve to deprive them of consistent and reliable access (or any access at all) to accommodations that they need to do their jobs, advance their careers, apply for positions at the Air
Force, or participate in the Agency’s EEO processes. *See* § III, above.

Complainants’ interests are not antagonistic to, nor in conflict with, the interests of the class as a whole. Rather, the relief they seek would benefit themselves and every member of the proposed class, by ensuring that class agents and other class members have equal and nondiscriminatory access to the same opportunities for “hiring, advancement [. . .], employee compensation, job training, or other terms, conditions, and privileges of employment” that are available to their nondisabled peers. 29 C.F.R. § 1614.203(b); *see also* 29 U.S.C. § 791(f). Complainant and other class agents are incentivized to vigorously pursue this requested relief on behalf of the class. Weimer Decl. ¶¶ 1-2 (ER 1917); Perez Decl. ¶¶ 1-2 (ER 2280); Hongyu-Perez Decl. ¶¶ 1-2 (ER 2357); Burg Decl. ¶¶ 1-2 (ER 2327); Wambold Decl. ¶¶ 1-2 (ER 2436); *see also* Ellis, 657 F.3d at 985 (affirming adequacy, where nothing in record suggested that representative would not “vigorously pursue injunctive relief on behalf of the entire class”).

Complainants’ attorneys also satisfy the adequacy requirement. Adequate representation of counsel is “usually presumed in the absence of contrary evidence,” *Californians for Disability Rts., Inc. v. California Dep’t of Transp.*, 249 F.R.D. 334, 349 (N.D. Cal. 2008) and there is nothing to rebut that presumption in this case. *See* Musell Decl. ¶¶ 1-36, 38 (ER 8184-8197); Betouliere Decl. ¶¶ 3-16 (ER 310-314); *see also* William B. Rubenstein, 1 Newberg on Class Actions § 3:72 (5th ed. 2020). Where there is no conflict, the only relevant questions are whether “proposed class counsel [is] qualified and would prosecute the action vigorously.” *Sali*, 909 F.3d at 1007. Here, the answer to both questions is yes.

Complainants’ attorneys have already devoted a significant amount of time and effort to investigating and prosecuting this action on behalf of Complainant, class agents, and the class (as revealed by the record so far) and they have more than enough resources to continue vigorously prosecuting this case. *See* Musell Decl. ¶ 38 (ER 8196 – 8197). Complainants’ counsel also has substantial experience litigating complex and novel class action cases such as this one. Disability Rights Advocates (“DRA”) has specialized in disability law and class action institutional reform litigation for
nearly three decades, and has served as class counsel in dozens of disability rights class actions. Betouliere Decl. ¶¶ 3-14 (ER 310 – 316). Law Offices of Wendy Musell has extensive decades-long experience representing public employees and federal workers, including in class action cases. Musell Decl. ¶¶ 4-34 (ER 8184 – 8196). Both firms are thus well-qualified to litigate claims on behalf of the class, and ably meet standards for appointment as class counsel. *See Sali*, 909 F.3d at 1007–08.

In its February 8, 2022 opposition to complainant’s request for an extension to file this motion and to take discovery related to class certification, the Air Force “concedes that the information contained [in] Complainant’s Response and its attachments likely satisfy the adequacy requirement” of 29 C.F.R. § 1614.204(iv). *See* Agency Opp’n at 3. Judge Peterson subsequently found that class agents and their counsel meet the adequacy requirement. The Agency fails to challenge this issue in its appeal. Therefore, the Commission should find that the adequacy requirement of 29 C.F.R. § 1614.204(iv) is satisfied as to both Complainants and their counsel and should affirm Judge Peterson’s decision.

5. **Certification of a class is appropriate, because a single injunction or declaratory judgment would provide relief to each member of the class.**

While Rule 23(b)(2) does not apply in this administrative context, class-wide injunctive relief is still appropriate, because the Air Force has “acted or refused to act on grounds that apply generally to the class . . . .” Fed. R. Civ. P. 23(b)(2). Indeed, the claims raised by Complainant Weimer and other class agents are of precisely the sort that Rule 23(b)(2) was designed to facilitate: the “primary role of [the rule] has always been the certification of civil rights class actions . . . .” *Parsons*, 754 F.3d at 686; *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (noting that “[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples” of proper (b)(2) actions). When conducting a Rule 23(b)(2) inquiry, courts do not “examine the viability or bases of class members’ claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them.” *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2011); *Parsons*, 754 F.3d at 689 n.35 (holding, in the context of Rule 23(b)(2) inquiry, that “the class certification hearing is not a dress rehearsal of the trial on the merits (let alone a dress rehearsal of the remedy proceedings).”)

Complainants’ Opposition to Agency Appeal of Class Certification
EEOC Appeal No. 2023000892, EEOC Case No. 550-2021-00060X
Certification is also appropriate because “final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole”—meaning that “a single injunction or declaratory judgment would provide relief to each member of the class.” See Jennings v. Rodriguez, 138 S. Ct. 830, 851–52 (2018). The Ninth Circuit has held that this requirement “ordinarily will be satisfied when plaintiffs have described the general contours of an injunction that would provide relief to the whole class, that is more specific than a bare injunction to follow the law, and that can be given greater substance and specificity at an appropriate stage in the litigation through fact-finding, negotiations, and expert testimony.” Parsons, 754 F.3d at 689 n.35.

Here, Complainants and class agents have asked for a variety of revisions to the Air Force’s discriminatory policies and practices regarding accommodation of d/Deaf employees—the benefit of which would redound to the class as a whole. For example, in her original January 24, 2020 Complaint, Complainant Weimer requested relief including (but not limited to) the following:

1. The creation of captioned and signed videos explaining the Air Force EEO process and associated rights, along with the provision of ASL interpreters [or other necessary accommodations] for d/Deaf employees who need them in order to participate fully in the EEO process.

2. The establishment of a centralized Air Force fund to pay for ASL interpreters and other necessary reasonable accommodations.

3. The establishment of long-term Air Force-wide contracts for ASL interpreters, CART, and similar services, to address current contract-related delays in finding appropriate providers.

4. The establishment of procedures to ensure that all work events (including webcasts, trainings, and the like) are accessible to d/Deaf civilian employees.
5. The establishment of procedures for all NAFs, MAJCOMs, and bases to promptly and
timely connect videophones and captioned telephones to base networks upon receipt of
the videophone or captioned telephone.\textsuperscript{47}

\textit{See} Weimer January 24, 2020 Complaint (Record of Investigation at 455-456).

6. The Commission routinely finds that claims under § 501 of the Rehabilitation
Act are suitable for class treatment.

29 C.F.R. §1614.204 (a)(1) states that “a class is a group of employees, former employees or
applicants for employment who, it is alleged, have been or are being adversely affected by an agency
personnel management policy or practice that discriminates against the group on the basis of [. . . ]
handicap.” “The purpose of class action complaints is to economically address claims common to a class
as a whole . . . turning on questions of law applicable in the same manner to each member of the class.”
\textit{Melodee M. et al., Complainant,} EEOC DOC 2020004194, 2020 WL 7243675, at *2 (Nov. 23, 2020)
(internal citations omitted).

The Commission has certified numerous cases on behalf of federal agency employees with
disabilities who allege their rights have been violated under § 501 of the Rehabilitation Act. \textit{See}
(noting that the EEOC “has found in certain cases, a large number of disabled persons can be an
appropriate group for class certification” and certifying class of “[a]ll permanent rehabilitation
employees and limited duty employees who have been subjected to NRP [national reassessment
process]”); \textit{Walker v. United States Postal Serv.,} EEOC Appeal No. 0720060005 (March 18, 2008)
certifying class comprised of individuals with disabilities in permanent rehabilitation positions who had
their duty hours restricted); \textit{Complainant v. Dep’t. of Def.,} EEOC DOC 0120103592, 2015 WL
5530294, at *7 (Sept. 9, 2015) (preliminarily certifying class of all employees, current and former, who
requested reasonable accommodation and were required to complete and sign the Agency’s Reasonable
Request Form beginning in 2002 until such time as the use of the contested form was discontinued);
\textit{Glover v. United States Postal Serv.,} EEOC Appeal No. 01A04428 (April 23, 2001) (certifying class

\textsuperscript{47} This is only a partial list of what Ms. Weimer requested.
where Complainant alleged that the agency maintained a nationwide policy of denying promotional opportunities to individuals with disabilities in permanent rehabilitation duty positions); *Meyer v. Kerry* (State), EEOC Appeal No. 0720110007 (2014), at *10 (certifying class challenging policy denying the benefits of employment within the Foreign Service to those with disabilities, without regard to accommodation, and without any individualized assessment into the individual’s specific condition.”); see also *Travis v. United States Postal Serv.*, EEOC Appeal 01992222 (October 10, 2002) (rejecting argument that actions brought under the Rehabilitation Act are “ill-suited” for class treatment).

7. **The Commission endorses the Teamsters method of proof for class claims under § 501 of the Rehabilitation Act**

Class Agents in this pattern and practice case assert that the Agency has discriminated against members of the class as “the standard operating procedure – the regular rather than the unusual practice.” *See Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 (1977). To prove such a case, complainants must ultimately “prove more that the more than the mere occurrence of isolated or ‘accidental’ or discriminatory acts.” *Id.* Instead, the Class Agents must show that the denial of rights was repeated, routine, or of a generalized nature. *Id.*

Class Agents have in large part already met this ultimate burden, and have far more evidence of centralized discriminatory policies, procedures, and practices than is required at this initial certification stage, as Agency documents and deposition testimony obtained during the pre-certification discovery process affirm. *See § III, above.*

When a class alleges a broad-based policy of employment discrimination such as this, it may pursue its pattern or practice claims in a bifurcated proceeding. *Velva B.*, 2017 WL 4466898, at *11. In the first stage, the Class Agent must establish that unlawful discrimination has been a regular procedure followed by an employer. *EEOC v. Bass Pro Outdoor World, LLC*, 826 F.3d 791, 797 (5th Cir. 2016), *citing Teamsters, supra*, at 336 n.16. The Class Agent may establish that class-wide and systemic discrimination occurred at the Agency at this merits stage by submitting evidence utilizing the burden shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). If the Class Agent meets her burden to establish class-wide discrimination using this framework, a subsequent
remedial phase determines the scope of individual relief. *Id.*

In *Velva B.* the agency defendant argued to the Commission that a bifurcated *Teamsters* proceeding could not be used for claims under the Rehabilitation Act. *Velva B.*, 2017 WL 4466898, at *14. The Commission rejected this argument and explained that the agency’s suggested approach was inconsistent with Congressional intent and the Commission’s obligation to address class-wide discrimination based on disability:

> Expecting every potential class member to undertake the individualized inquiry that the Rehabilitation Act requires during the liability phase of the *Teamsters* process is inherently impractical, unworkable in practice, and would effectively bar the use of class complaints as a means of challenging workplace policies that discriminate against individuals with disabilities. Such a result would clearly be contrary to Congress's intent in enacting the Rehabilitation Act and the ADA.6

A far more efficient and effective way to resolve the individualized-inquiry dilemma is to require prospective class members to prove that they are qualified individuals with disabilities during the remedies phase of the *Teamsters* proceeding, as opposed to the liability phase. The remedies stage is where proof of one’s status as a qualified individual with a disability under the Rehabilitation Act naturally aligns with proof of one’s membership in a class under *Teamsters*.

*Id.* The Commission’s use of the *Teamsters* method of proof for class-wide disability discrimination claims is consistent with the approach employed by the federal court in *Bates v. United Parcel Service*, 204 F.R.D. 440 (N.D. Cal. 2001). In *Bates*, plaintiffs pursued a class action similar to the case at bar, seeking to address extensive communication access barriers in the workplace. Plaintiff alleged the company frequently ignored requests for interpreters, and often failed to provide video captioning, access to teletype telephones, and reliable emergency alert systems. *Bates*, 204 F.R.D at 442. The Court granted class certification together with plaintiffs’ motion for bifurcation of the class action trial. *Id.* 449-50.

Just as the Commission did in *Velva B.*, the court in *Bates* rejected the defendant’s argument that a *Teamsters-type* bifurcated proceeding was not viable for ADA claims. In dismissing the argument, the court explained how the bifurcated proceeding would work in practice. For the first phase, “liability, as well as what equitable relief would be appropriate should liability be found, depends on questions of law
and fact common to the class and subclass; these questions relate to the policies and practices UPS has employed during the period in question and whether those policies comply with the ADA and California laws.” Bates, 204 F.R.D at 449. By contrast, the second phase, regarding “the appropriate level of damages … depends on individualized questions, such as each class member’s employment history, the particular communication barriers faced by each class member, and the accommodations UPS has provided to each class member.” Id. The court emphasized that “[e]ach phase would therefore require the parties to present different types of evidence” and that “UPS is simply mistaken when it argues that the evidence in the liability phase ‘must include’ evidence of ‘each individual’s need for accommodation, considering his or her particular limitations and essential job functions, what accommodations he or she was offered and how they were inadequate, if at all, what other reasonable accommodations was available …’” Id.48

In sum, well-established Commission and federal court precedent authorizes the use of a Teamsters-type bifurcated proceeding for the Rehabilitation Act claims in this case. Even those courts that take a more restrictive approach to class certification endorse the Teamsters method of proof for

48 A minority of federal courts have taken a different approach, finding that the Teamsters method of proof cannot be used under the ADA. See Semenko v. Wendy’s Int’l, Inc., No. 2:12-CV-0836, 2013 WL 1568407, at *1 (W.D. Pa. Apr. 12, 2013). Those courts have found that “there is an important distinction between Title VII and ADA claims for class action purposes and courts presiding over ADA cases must determine not just whether the employer acted improperly, but also ‘whether class members are ‘qualified’—which includes whether they can or need to be reasonably accommodated—before a classwide determination of unlawful discrimination … can be reached.” Hohider v. United Parcel Serv., Inc., 574 F.3d 169, 191 (3d Cir. 2009). (“[i]t is the ADA … and not the Teamsters evidentiary framework, that controls the substantive assessment of what elements must be determined to prove a pattern or practice of unlawful discrimination …”). This approach finds it necessary to resolve individualized questions under the ADA at the liability stage of any Teamsters proceeding, and as a result, these courts believe that individualized inquiries will often overwhelm the common issues at the liability stage. Hohider, 574 F.3d at 191.

However, even this most restrictive approach does not find all disability-related employment class actions ill-suited for class treatment. In fact, the district court in Semenko acknowledged “that there are situations when ADA class actions are certified” and approvingly cited the class certification decisions in Bates v. UPS and Wilson v. Pa. State Police Dep’t, 1995 WL 422750 (E.D. Pa. July 17, 1995) – both cases that are analogous to this one. Semenko, 2013 WL 1568407, at *8 (discussing cases) As that court explained, certification is unquestionably appropriate in cases where “there appear to be some unifying criteria, such as common disability or requested accommodation, for example, so that classwide evaluation of ‘qualification’ may be conducted without requiring a prohibitive number of individualized mini-trials.” Id. (citations and internal quotation marks omitted) (discussing cases). Exactly such unifying criteria are present here.
cases where there is “unifying criteria” such as “common conditions suffered” or “accommodations sought” – all of which exist here. See Semenko, 2013 WL 1568407, at *8. In other words, even under the more restrictive approach to class certification adopted in Semenko, certification would still be appropriate in this case, because all proposed class members share a common disability (deafness or serious difficulty hearing), require the same or similar accommodations, and have been subjected to common Air Force policies and practices that discriminate against all of them in essentially the same way – as detailed above. See § III above; §§ VI(A)(1-3), above.

Moreover, to the extent any federal case conflicts with Commission precedent such as that established in Velva B, Commission precedent controls. Velva B., 2017 WL 4466898, at *49, n. 6 (“A primary purpose of the ADA, and by extension the Rehabilitation Act, is to eliminate discrimination against individuals with disabilities.”) 42 U.S.C. § 12101(b)(1). In enforcing these statutes, the Commission's responsibility is to eliminate employment policies and practices that purposefully or effectively discriminate against qualified individuals with disabilities because of their disabilities. Consequently, the Commission is not compelled to interpret the Rehabilitation Act or the ADA in a manner that conflicts with its mandate.”) See Haywood C. v. U.S. Postal Service. EEOC Appeal No. 0120132452 (Nov. 18, 2014) (referring to the fact that the Commission is not bound by federal circuit court precedent for purposes of adjudicating federal sector complaints); see also, e.g., Huddleson v. U.S. Postal Service, EEOC Appeal No. 0720090005 n. 6 (Apr. 4, 2011); Turtle v. U.S. Postal Service, EEOC Appeal No. 0720080025 n. 2 (Mar. 5, 2009) (rejecting lower court case law inconsistent with Commission precedent). Class Agents are civilian Air Force employees with a disability, thus satisfying the threshold requirement for bringing this class case.

The Commission has explained that “[i]n order to bring a class complaint of disability discrimination, Complainant must demonstrate at a minimum, that [they have. . .] a disability within the meaning of the Rehabilitation Act.” Cyncar, EEOC Appeal No. 0720030111 (February 1, 2007). Disability means a physical or mental impairment that substantially limits one or more major life activity. 29 C.F.R. § 1630.2(g)(1). A person is substantially limited in a major life activity if they are
“significantly restricted as to the condition, manner or duration under which [he] can perform a particular major life activity as compared...to the average person in the general population.” 29 C.F.R. § 1630.2(j)(ii). A complainant must also show that they are a “qualified individual with a disability” under 29 C.F.R. § 1630.2(m).

As a civilian Air Force employee who is Deaf (as well as a very experienced and highly-qualified Air Force attorney), Ms. Weimer easily satisfies these threshold requirements. See § III(B)(1), above. The same is true for every other Class Agent, as set forth above. See §§ III(B)(2)–(5), above.

8. **Damages for Complainant Weimer and the class can be determined at a later stage.**

Class members’ entitlement to individual damages can be determined in a second phase of this action, after the Air Force’s liability and the scope of appropriate injunctive relief are determined. This procedure is routinely employed in cases before the Commission. See, e.g., *Burke-Thompson v. Attorney General*, Appeal No. 05870473 (1988) at *5-7 (explaining bifurcated liability and damages phases articulated in *Teamsters v. United States*, 431 U.S. 324, and applying same).

B. **The Agency repeatedly ignored Judge Peterson’s orders on pre-certification discovery and attempted to impede the development of an adequate record.**

The Agency spills much ink regarding the underlying pre-certification discovery proceedings before the EEOC, preferring to focus on ad hominin attacks against the Administrative Judge rather than the substance of the matter supposedly at issue: whether class certification was properly granted. However, even a cursory review of the factual record demonstrates that the Agency is misrepresenting the record below and failing to accurately set forth its own dilatory and sanctionable discovery conduct.

1. **Complainants diligently sought pre-certification discovery.**

The Agency’s brief opens with the absurd suggestion that Class Agent Weimer failed to “take advantage of the two year time lapse between the filing of this complaint and the provision of renewed certification pleadings, to locate and develop evidence to support her efforts to gain certification.” This, however, profoundly misrepresents the record, and ignores the fact that the Agency acted to oppose and delay pre-certification discovery at every turn.
Ms. Weimer initiated this action in 2020, and the matter was originally venued in the San Francisco District Office. The San Francisco office’s initial and amended Acknowledgement Orders did not allow class agents to commence discovery until permitted by the Administrative Judge following an Initial Conference. See Acknowledgement Order (ER 4199 – 4200); Amended Acknowledgement Order (ER 4213 – 4214). Complainants repeatedly requested to commence discovery related to class certification, and requested a case management conference in order for the EEOC to set forth the reasonable parameters of pre-certification discovery. See, e.g., Complainants Request for Extension to File Class Certification Motion, Request for Discovery and Request for Case Management Conference, dated January 29, 2021 (ER 4425-4437); Complaints Renewed Request for Extension to File Class Certification Motion, Request for Discovery and Request for Case Management Conference and Declaration in Support of Wendy Musell, dated February 6, 2021, and related filings (ER 4438-4458).

As the record shows, the Air Force opposed these requests. Agency February 8, 2021 Opposition to Request for Extension and Discovery (ER 4459-66).

The San Francisco District Office Administrative Judge originally overseeing this action did not rule on Complainant’s request for pre-certification discovery or convene an informal conference while the case was pending in the San Francisco District Office, and Complainants were thus precluded from conducting any discovery during this period. The Agency’s argument that Complainants failed to seek discovery while the case was pending in the EEOC San Francisco District Office is baseless.

2. The Agency violated or ignored every pre-certification discovery order in this case, including an order to show cause.

On January 12, 2022, this case was transferred to the Los Angeles District Office, and subsequently assigned to Judge Peterson. As discussed below, the failure of the Agency to comply with discovery orders began from the Administrative Judge’s first discovery order. On January 20, 2022 Judge Peterson issued an “Initial Processing Order,” which gave the Parties until February 2, 2022 to file statements regarding “whether the party requests pre-certification discovery,” along with “the specific, written interrogatories, requests, and testimony that it would seek if [he] allowed pre-certification discovery” (and, if not obvious, an explanation of their relevance). Initial Processing Order at 1 (ER
Complainants filed their statement regarding pre-certification discovery and proposed requests on February 2, 2022, as ordered, which included eleven proposed interrogatories, 10 proposed categories of document production, and four categories of desired deposition testimony—all tailored to produce information relevant to the question of whether a class should be certified in this case. Complainant’s Statement Regarding Pre-Certification Discovery (ER 4473-4482). The Agency chose not to file a statement regarding pre-certification discovery, and not to seek any. See Exhibit A to May 24, 2022 Supplemental Declaration of Sean Betouliere in Response to Sanctions Notice (CART Transcript of February 4, 2022 Hearing) at ER 8043-8044 (Counsel for Agency stating, “And as you know, the agency because it did not believe that pre-certification discovery was necessary or appropriate here, we did not file a discovery request, but I know that your order says that if we do not file one, it may be deemed -- may be deemed a waiver of the right to request pre-certification discovery.”)

Following a February 4, 2022 hearing, Judge Peterson largely granted Complainant’s proposed pre-certification discovery. February 4, 2022 Discovery Order (ER 4501 – 4503). In its appeal brief, the Agency faults the order granting this discovery for supposedly “depriving it of its right to make arguments regarding burden,” but this argument misrepresents the Administrative Judge’s reasons for not allowing further objections of burden or relevance, which is that he had already reviewed Complainants’ / Class Agents requests and found them to be both relevant and not overly burdensome.

As stated at the February 4, 2022 hearing:

I will be granting pre-certification discovery. I want to share some of those parameters with you in advance of reading the order, just so that you'll know what to expect. It's not maybe typical and, you know, with class cases, they get run a little bit differently and they are run differently by different administrative judges. And by different tribunals. So I want to just give you some advanced notice here. I will be ordering the agency to produce to the class agents certain information by a certain date, without objections based on relevance or burden. However, the agency will be able to identify privilege objections if there are any which would then, of course, necessitate production of a privilege log. So, in other words, this is more like an order to produce information than it is granting the parties leave to engage in written discovery. So, essentially, what's going to happen is the agency will be producing information to the class agent on the date that's set, and I find that this method is a little bit more streamlined and more appropriate for -- in a case like this, where I've reviewed the record, I've reviewed the requests. I'm not as concerned about objection -- objectionable requests.
To the extent the Agency wished to bring any issues about burden to Judge Peterson’s attention that may not have been apparent upon his initial review of the requests, it could easily have done so in opposition to one of the many motions to compel that Complainant’s were forced to file. Instead, it chose to simply disobey Judge Peterson’s order on pre-certification discovery (repeatedly) and to make no effort to explain or justify its actions (such as by opposing a motion to compel or responding to Judge Petersons’ eventual order to show cause).

The Agency’s failure to comply with Judge Peterson’s orders on pre-certification discovery began with its very first response, which was supposed to be the identification of employees who could testify to Complainant’s four narrowly-tailored deposition topics. See Complainants’ February 25, 2022 Motion to Compel and related filings (ER 4510 – 4539).

The Agency’s refusal to identify potential deponents who could even potentially have the requisite knowledge resulted in a Second Precertification Discovery Order, dated March 7, 2022. See March 07, 2022 Second Pre-Certification Discovery Order (ER 4550-4551). As Judge Peterson noted in that order, his original order required production of a deponent or deponents who could testify regarding Complainants’ four narrowly-tailored pre-certification deposition topics, each of which contemplated production of someone with “Agency-wide knowledge as appropriate, especially where the putative
matter for certification is addressed to the entire Agency.”

Next, the Agency failed to respond to interrogatory requests or produce even a single document by the deadline imposed in Judge Peterson’s first pre-certification discovery order, necessitating yet another motion to compel. See Complainants’ March 23, 2022 Second Motion to Compel and related filings (ER 4552 – 7886). Judge Peterson then issued a Third Pre-certification Discovery Order, dated April 12, 2022, which required the Agency on before April 19, 2022 to respond to certain interrogatory requests and requests for production of documents. April 12, 2022 Third Pre-Certification Discovery Order (ER 8107 – 8108).

When the extended discovery due date from Judge Peterson’s third pre-certification discovery order also came and went with no compliance on behalf of the Agency, Complainants filed another motion to compel compliance, and requested an order to show cause. See April 20 2022 Motion to Compel and Related filings (ER 8109 – 8183).

On May 2, 2022, the Administrative Judge’s Order to Show Cause required the Agency to take two actions. First, the Order to Show Cause ruled:

As of the date of this order, the Agency has failed to comply with the Pre-Certification Discovery Order and the Third Pre-Certification Discovery Order. Therefore, before May 92022 at noon (PDT), I order the Agency to file, a submission, together with a supportive declaration (see 28 U.S.C.§ 1746 regarding language for declarations), showing good cause why, as appropriate, the Agency failed to comply with item nos. 1-7 in the Third Pre-Certification Discovery Order. Failure to provide such a showing of good cause, supported by a declaration, may result in sanctions allowed under the authority of 29 C.F.R. § 1614.109(f)(3), up to and including a decision in the other party's favor. Dionne W. v. Dep’t of the Air Force, EEOC Appeal No. 0720150040 (Mar. 27, 2018) (noting that before imposing a sanction the administrative judge is required to issue an order to show cause to the offending party).

May 2, 2022 Order to Show Cause (ER 7895 – 7897) at ER 7896 (emphasis in original).

The second action required by the Order to Show Cause was as follows:

In this order, Judge Peterson properly found that head Disability Program Manager Kendra Shock had the requisite knowledge, and that the Agency should make her available for deposition. As he observed, the Agency’s own documents stated that Ms. Shock was responsible for “strategic-level planning, policy development and oversight of … the Air Force reasonable accommodation policy and Disability Program.” Second Pre-Certification Discovery Order at 2 (ER 4551).
Further, **before May 9, 2022 at noon (PDT)**, I order the Agency to comply with the Third Pre Certification Discovery Order by serving the discovery materials to the Class Agent. Failure to comply may result in sanctions up to and including a decision in the other party’s favor, in accordance with EEOC Regulations and Commission case law. See 29 C.F.R. § 1614.109(f)(3); EEO MD-110, Ch. 7 § III.D.10.

*Id.* (emphasis in original).

The Agency did not comply with either requirement of the Order to Show Cause and did not file a motion or other request demonstrating good cause for its failure to comply with the Order to Show Cause by the date specified. Indeed, the Agency **did not respond to the Order to Show Cause at all.**

As a result, Judge Peterson issued a Sanctions Notice, dated May 11, 2022, giving notice to the parties that the Administrative Judge intended to issue sanctions. See Sanctions Notice (ER 7940).

As discussed below, it was not until the Agency’s May 19, 2022 response to this sanctions notice that the Agency made any attempt to justify its repeated and flagrant disregard for the Administrative Judge’s pre-certification discovery orders. See Complainants’ May 16, 2022 Response to Sanctions Notice (summarizing history of noncompliance) (ER 7941 – 7959); Agency May 19, 2022 Response to Sanctions Notice (ER 7988 -8001). However, just as with the Agency’s current appeal brief, this belated attempt at justification contained demonstrable untruths and misrepresentations of the factual record. See May 24, 2022 Supplemental Declaration of Sean Betouliere in Support of Complainants’ Response to Sanctions Notice at ¶¶ 2 – 11 (ER 8022 – 8025); *id.* at Exhibit A.

The Administrative Judge then issued its Order Granting Class Certification on October 13, 2022. Order (ER 1- 17). The Order Granting Certification ruled regarding sanctions as follows, “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.” Order at 13 (ER 13).

The Order Granting Class Certification also ordered the Agency to produce documents identified during the deposition of Ms. Kendra Shock that had indisputably been withheld. *Id.* at 16 (ER 16). Just as it had done with every prior discovery order in this matter, the Agency did not comply with this
portion of Judge Peterson’s order, necessitating yet another motion to compel and for sanctions that is currently pending (which, once again, the Agency did not even bother to oppose). See Class Agents’ Motion to Compel Compliance with this Court’s October 13, 2022 Granting Class Agents’ June 14, 2022 Motion to Compel, and related documents (ER 8095-8106).

With each pre-certification discovery order, the Administrative Judge warned the Agency regarding the consequences of non-compliance with its orders. The Agency’s failure to comply with orders regarding pre-certification discovery interfered with the timely development of an adequate record. The record demonstrates that the Agency simply at times refused to respond altogether, missed ordered deadlines, and failed to even file oppositions to motions to compel, effectuating waiver.53 The Administrative Judge twice extended the pre-certification discovery deadline and the amended certification submission deadline due to the Agency’s failure and refusal to comply with pre-certification orders in this case. See April 12, 2022 Third Pre-Certification Discovery Order (ER 8107 – 8108) (first extension); May 2, 2022 Order to Show Cause (ER 7895 – 7897) (second extension).

The Agency attempts to miscast the facts and redirect the proper focus of this appeal, bemoaning that it was subjected to some sort of unfair application of rules and orders. The factual record instead demonstrates that the Agency was given every opportunity to respond to and comply with discovery orders but refused to do so over and over again. Far from being treated unfairly by the Administrative Judge, the Agency ultimately was not even sanctioned, despite its flagrant disregard for the Judge’s discovery orders and its dilatory and abusive discovery tactics, which were plainly designed to frustrate the development of a full record in an (unsuccessful) attempt to avoid class certification in this case.

C. Judge Peterson did not abuse his discretion in ordering production of a class list, but even if he had the error would be harmless, because he subsequently issued a protective order limiting its use, and the assertedly-confidential information from it formed no part of Complainants’ motion or the class certification decision.

The Agency argues that Judge Peterson erred in ordering it to produce a list of civilian employees who identify as deaf or have serious difficulty hearing (the “class list”), without regard to its concerns that doing so would violate provisions of the Americans with Disabilities Act and/or the

53 See fn. 17 and 51, above (compiling motions and orders regarding history of noncompliance)
Rehabilitation Act concerning the confidentiality of information obtained during medical
examinations. This argument fails for two distinct reasons, and it has no bearing on Judge Peterson’s
class certification ruling in any event, because information from the class list was not relied on in any
portion of Complainant’s motion or the ultimate decision.

First, as the record in this case establishes, and as Judge Peterson pointed out in his certification
order, the Agency did not actually bring any specific privacy concerns to his attention until long
after he ordered production of this information, despite having had multiple opportunities to do so. See
Order at 15 (“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.”).

The Agency has repeatedly misrepresented the record on this point, including in sworn
declarations, and it continues to do so the same in its appeal brief. However, its false statements about
what was communicated to Judge Peterson and when are plainly refuted by the actual record. See May
24, 2022 Supplemental Declaration of Sean Betouliere in Support of Complainants Response to
Sanctions Notice at ¶¶ 2-9 (ER 8022 – 8024); see also id. at Exhibit A (CART Transcript of February 4,
2022 Hearing) (ER 8027 – 8044).

Second, if the Agency had actually bothered to articulate its asserted privacy concerns to Judge

54 The ADA and its regulations prohibit the disclosure of information about the medical condition
or history of an employee when that information is obtained through any medical examination or in
response to a medical inquiry allowed under the ADA. 42 U.S.C. § 12112(d)(3)(B); 29 C.F.R. §
1630.14(c). Both the statute and the regulations provide that such medical information must be collected
and maintained on separate forms and kept in separate medical files and “treated as a confidential
medical record.” 42 U.S.C. § 12112(d)(3)(B); 29 C.F.R. § 1630.14(c)(1). The statute and regulations set
forth three express exceptions to these confidentiality rules: “(i) supervisors and managers may be
informed regarding necessary restrictions on the work or duties of the employee and necessary
accommodations; (ii) first aid and safety personnel may be informed, when appropriate, if the disability
might require emergency treatment; and (iii) [that] government officials investigating compliance with
[the ADA] shall be provided relevant information on request.” Id.
Peterson, he would have been free to disregard them, because it is well-established that “the ADA's prohibitions against disclosure of medical information do not amount to a ‘privilege’ that protects the requested documents from disclosure.” *Scott v. Leavenworth Unified School District*, 190 F.R.D. 583 (D.Kan. 1999); *see also* Order at 13-14 (ER 13 – 14). As the court held in that case—which also concerned a request for the information of similarly-situated disabled employees—“*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.*” *Scott*, 190 F.R.D. at 587 (emphasis added); *see also* Complainants’ Renewed Motion for Class Certification at § V(B)(1) (ER 302 – 305) (discussing additional cases); Order at 13 – 14 (ER 13 – 14) (same)

Moreover, even if Judge Peterson *had* somehow “erred” in ordering production of a class list, this error would be harmless from a class certification perspective, because as soon as the Agency (belatedly) brought its specific concerns to Judge Peterson’s attention, he issued a Limited Stay and Protective Order prohibiting Complainant’s from contacting Air Force employees identified in the class list, and requiring all information about them to be kept confidential. *See* June 1, 2022 Limited Stay and Protective Order at 1-2 (ER 8048-8049) (“I issue a limited protective order that the Class Agent not contact individuals whose names and contact information have been provided in response to the discovery orders in this complaint. Additionally, the Class Agent must keep confidential the information produced pursuant to the discovery orders in this complaint.”)

As Complainants explained in § V(B)(4) of their Renewed Motion for Class Certification (ER 306-307), immediately after receiving this June 1, 2022 “Limited Stay and Protective Order” and its instruction not to contact individuals whose names and contact information had been provided in response to discovery orders, counsel for Complainants suspended all contact with putative class members, and cancelled scheduled phone calls. Complainants’ Renewed Motion for Class Certification at 77-78 (ER 306-307); Betouliere Decl. ¶¶ 17-18 (ER 317). For this reason, counsel could not complete two additional class member declarations they had already begun drafting, and could not continue
interviewing putative class members in an effort to obtain more. Betouliere Decl. ¶ 19 (ER 317).

In other words, Complainant’s Renewed Motion for Class Certification did not rely on any assertedly confidential information contained in or derived from the class list. Nor did such information form the basis for any portion of Judge Peterson’s order. See Order at 11-12 (ER 11-12) (finding numerosity on the basis of Ms. Shock’s testimony and the Agency’s 2020 “Total Workforce Distribution by Disability Status Report,” which identified over 700 Agency employees as being deaf or having serious difficulty hearing); id. at 15 (ER 15) (noting that Class Agents ceased all efforts to rely on information received from the class list upon receipt of the Limited Stay and Protective Order, and that “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.”).

There is no reason to overturn Judge Peterson’s class certification decision based on his ordered disclosure of information that 1) was not made in error, 2) was not relied on in any way, in the class certification context, and 3) concerning which the Agency repeatedly failed to object. The Agency’s arguments to the contrary should be rejected.

D. Judge Peterson did not abuse his discretion in ordering the Agency to make its head Disability Program Manager available for deposition, and the Agency’s refusal to designate her as a “30(b)(6)” witness is irrelevant because the certification decision did not rely on any finding that her testimony “bound” the Agency.

EEOC Administrative Judges are “charged with the responsibility to assure full development of

"55 To this end, 29 C.F.R. § 1614.109(f)(1) requires production of “such documentary and testimonial evidence as the administrative judge deems necessary.” 29 C.F.R. § 1614.109(f)(1). Judge Peterson’s order that the Agency produce head Disability Program Manager Kendra Shock for deposition—in a case credibly alleging centralized discrimination against the Agency’s d/Deaf employees—was properly made pursuant to this authority.

As Complainants discuss in more detail below, that the Agency had not “designated” Ms. Shock as a witness pursuant to Federal Rule of Civil Procedure 30(b)(6) is irrelevant, because “the federal

sector EEO administrative process is not bound by the Federal Rules of Civil Procedure.” 56 Moreover, whether or not Ms. Shock was the Agency’s “designated” 30(b)(6) witness had no bearing on Judge Peterson’s class certification decision, because he expressly did not consider her to be someone whose testimony “binds” the Agency—as would have been the case for a 30(b)(6) designee in federal court. Order at 4, n. 3 (ER 4).

On February 4, 2022, Judge Peterson issued a Pre-Certification Discovery Order “to ensure an appropriate record upon which to determine whether the Class Agent can satisfy the prerequisites for class certification.” Pre-Certification Discovery Order at 1 (ER 4501). This order authorize[d] the Class agent to depose the Most Knowledgeable Designee(s) as to Topic Nos. 1-4 (limiting topic 4 to obstacles identified regarding DEAF OR HARD OF HEARING accommodations and actions related thereto.)

Specifically, Judge Peterson ordered the Agency to identify its “most knowledgeable” designees to testify regarding:

1. “YOUR57 policies, practices, and/or procedures RELATING TO reasonable accommodation for DEAF OR HARD OF HEARING civilian employees and applicants from January 1, 2018 to the present, including all related training, and any policies, practices, and/or procedures RELATING TO provision [of] specific accommodations for DEAF OR HARD OF HEARING civilians such as ASL Interpretation, CART, or videophones, and all records or other DOCUMENTS RELATING TO the same.

2. The number of YOUR civilian employees or applicants for employment since January 1, 2018 who are DEAF OR HARD OF HEARING, and all related records.

3. YOUR processes, practices, or procedures for ensuring that required trainings, presentations, videos, webcasts and the like are accessible to DEAF OR HARD OF HEARING civilian employees.

4. YOUR initiative to “Reduce Bureaucratic Obstacles to Providing Reasonable

57 “YOUR” was defined as the “AGENCY” for purposes of these requests. See Claimaints’ February 2, 2022 Statement Regarding Pre-Certification Discovery at 3-4 (ER 4776-4777).
Accommodations for Individuals with Disabilities,” as noted in YOUR 2016 “Memorandum for All Commanders” titled 2016 Diversity & Inclusion (D&I) Initiatives,” including all “bureaucratic obstacles” identified regarding DEAF OR HARD OF HEARING accommodations and actions related thereto, and any related records.”

In response, on February 18, 2022, the Agency designated five (5) officials at the bases at which some Complainants experienced discrimination (Nellis Air Force Base, Joint Base San Antonio Lackland and Randolph, and Offutt Air Force Base), along with a lower-level Agency “HR Specialist” at the Pentagon – individuals who were put forth as having knowledge regarding each Class Agent’s requests for reasonable accommodation at their respective bases at the “installation level,” but who could reasonably be expected to have little knowledge regarding Agency-wide policies, procedures, and practices. See February 18, 2022 Agency Identification of ‘Most Knowledgeable’ Designees (ER 4504 – 4509).

As Judge Peterson noted in his March 7, 2022 “Second Pre-Certification Discovery Order,” his original order requiring production of a deponent who could testify regarding Complainants’ four narrowly-tailored pre-certification deposition topics, each of which contemplated production of someone with “Agency-wide knowledge as appropriate, especially where the putative matter for certification is addressed to the entire Agency.” Second Pre-Certification Discovery Order at 1 (ER 4550).

Judge Peterson properly found that head Disability Program Manager Kendra Shock had the requisite knowledge, and that the Agency should make her available for deposition. As he observed, the Agency’s own documents stated that Ms. Shock was responsible for “strategic-level planning, policy development and oversight of … the Air Force reasonable accommodation policy and Disability

58 See Claimants’ February 2, 2022 Statement Regarding Pre-Certification Discovery at § II(C) (ER 4481); February 4, 2022 Pre-Certification Discovery Order at § 2 (ER 4501-4502).

59 Specifically, the Agency designated the following five individuals: 1) Kathy Wiltse, Chief of Civilian Personnel Flight at Nellis Air Force Base; 2) Irene Treviño, Chief of the Affirmative Employment Section (Staffing) at Joint Base San Antonio Lackland; 3) Patty Rivera, Chief of the Affirmative Employment Section at Joint Base San Antonio Randolph; 4) Shaylea Caris, Chief of Employee and Management Relations at Offutt Air Force Base; and 5) Leslie O. Brown, an HR Specialist (Employee Relations) with the Office of the Secretary of the Air Force at the Pentagon. See Agency February 18, 2022 Response to Pre-Certification Discovery Order at 2-3 (ER 4505 – 4506).
The Agency argues that Judge Peterson’s order requiring it to produce Ms. Shock for deposition was issued in error, because it had not designated her as a “most knowledgeable” witness pursuant to Federal Rule of Civil Procedure 30(b)(6). As the Air Force puts it, “the AJ and the Complainant conveniently chose not to acknowledge the applicability of Federal Rule of Civil Procedure 30(b)(6)” to the underlying EEOC proceeding. See Agency Appeal Brief at 15. This, however, is only proper, because the Federal Rules of Civil Procedure do not have any applicability in this context: as the Commission has repeatedly held, the “federal sector EEO administrative process is not bound by the Federal Rules of Civil Procedure.” Bedynek-Stumm v. Dep’t. of the Interior, EEOC DOC 0520110587, 2011 WL 5894136, at *3 (Nov. 15, 2011); see also, e.g., Shaw v. DOJ, EEOC DOC 01A51519, 2006 WL 228804, at *3 (Jan. 20, 2006) (holding that the “EEOC AJ is not bound by the Federal Rules of Civil Procedure or Evidence. The AJ is bound only to the EEOC Regulations”).

Notably, the Agency does not contest that Ms. Shock—who served as the head Disability Program Manager of the Air Force for eight years—has first-hand knowledge relevant to this case. See Shock Dep. at 7:13-15 (Agency Council’s statement at deposition that Ms. Shock “is a witness, of course, who's been designated and who's been determined to be relevant to this proceeding, and obviously, we have no objection to that”).

As discussed above, Judge Peterson was very clear that he did not consider Ms. Shock to be someone who “‘binds’ the Agency with her testimony” (as would be the case for a “person most knowledgeable” designee in federal court). Order at 4, fn. 3 (ER 4). Rather, he noted that “her role and experience as the central Disability Program Manager is illustrative,” and that 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.” Id. In other words, Judge Peterson gave Ms. Shock’s unrebutted testimony only the weight that it was naturally due, given her eight years of experience as head Disability Program Manager for the Air Force, and her first-hand knowledge of relevant policies and
practices. See id.

For the above reasons, the Agency’s argument that it did not “designate” Ms. Shock as a 30(b)(6) witness cannot serve as a basis for overturning Judge Peterson’s class certification decision. This argument should be rejected.

VII. Conclusion

For the reasons stated above, Judge Peterson’s order granting class certification in this case should be affirmed.

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Respectfully submitted,

DISABILITY RIGHTS ADVOCATES

Sean Betouliere
Jinny Kim

LAW OFFICES OF WENDY MUSELL

/s/ Wendy Musell
Wendy Musell
Brittany Wightman Shamma

Attorneys for Complainants