UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PHILADELPHIA DISTRICT OFFICE
801 Market Street, Suite 1000
Philadelphia, PA 19107

KAREN SABA, Complainant,	)	EEOC No. 530-2012-00389X (formerly 570-2012-00754X)
v.	)	Agency Complaint No. DOS-F-120-11
ANTHONY J. BLINKEN, Department of State, Agency.	)	Allyson S. Jozwik Administrative Judge
	)	June 6, 2022

DECISION CERTIFYING CLASS COMPLAINT

INTRODUCTION

This matter came before the United States Equal Employment Opportunity Commission pursuant to section 717 of Title VII of the Civil Rights Act of 1964, as amended, and section 501 of the Rehabilitation Act of 1973, as amended. Before me for consideration is Saba's Motion for Class Certification, filed on June 25, 2021. I have also considered the Opposition to Saba's Motion for Class Certification filed by the Department of State (DOS) on August 24, 2021, and Saba's Response to Agency's Opposition for Class Certification filed on October 5, 2021. At my request, the parties submitted supplemental briefs on March 11, 2022, which I have also considered.

PROCEDURAL BACKGROUND

On April 1, 2013, Karen Saba filed a motion to add herself as a class agent in the case of *Meyer, et. al. v. Dep't of State,* EEOC Appeal No. 0720110007 (June 6, 2014) (affirming class certification for denials of pre-employment medical clearances by DOS's Bureau of Medical Services with respect to disabled applicants and the "worldwide availability" standard). On

April 8, 2013, EEOC Administrative Judge Mary Beth Palmer denied Saba's motion. (*See* April 8, 2013 Order Denying Motion to Subsume Case into *Meyer* Class Action and to Add Saba as a Class Agent in *Meyer*). Judge Palmer ordered Saba to redefine the proposed class and on April 11, 2013, Saba filed a Motion for Pre-Certification Discovery, which included a proposed class definition. In response, on April 18, 2013, DOS filed a Motion to Dismiss arguing that it was not a proper party for the litigation. On December 19, 2016, DOS filed a second Motion to Dismiss claiming that Saba had not met her evidentiary burden to maintain a class complaint under 29 C.F.R. § 1614.204(l)(1).

On December 12, 2018, Saba entered into a settlement agreement with USAID. (*See* Exh. G of Declaration of Bryan Schwartz, Esq., in support of Complainant's Motion for Class Certification).[1] USAID agreed to offer Saba a position in the Philippines, contingent upon her receiving the proper clearances, in exchange for a waiver of all claims and backpay against USAID concerning any demands or causes of actions that could have been asserted in *Saba v. Dep't of State and USAID*. While the settlement concerned USAID, only, Judge Palmer issued an Order of Dismissal on May 22, 2019 for the claims between Saba and DOS, in addition to USAID. Complainant filed a Request for Reconsideration of the May 22, 2019 Dismissal Order on August 21, 2019 to reopen proceedings against DOS. DOS filed its opposition to the motion on September 12, 2019. Following the passing of Judge Palmer, Administrative Judge David Norken was assigned to this matter.

On June 5, 2020, Saba filed a Motion for Pre-Certification Discovery seeking approval to modify the proposed class definition to "all applicants to and employees of the U.S. Government denied post-specific medical clearance by the U.S. Department of State from May 16, 2011 to the present." (*See* Saba's June 5, 2020 Renewed Motion for Pre-Certification Discovery). This Motion was granted on July 13, 2020 and a joint motion to extend discovery was granted on November 3, 2020.

Following the retirement of Judge Norken, this matter was reassigned to Administrative Judge Allyson Jozwik in December 2020. On June 25, 2021, Saba filed a Motion for Class Certification in which Sharon Lowry and John Fudala were named as additional proposed class agents. DOS filed a Motion to Dismiss and Opposition to Complainant's Motion for Class Certification on August 24, 2021. Saba filed a Response to Agency's Opposition for Class Certification and Opposition to Motion to Dismiss on October 5, 2021, in which Saba removed Sharon Lowry as a proposed class agent and substituted Kevin Rosier. On November 3, 2021, DOS replied to Saba's

[1] Appended to the Declaration of Bryan Schwartz, Esq., in support of Complainant's Motion for Class Certification are Exhibits A through Z and AA through AR. This Declaration, filed on June 25, 2021, will be referred to as "Schwartz Decl. June 2021."

response and opposed her motion to add Kevin Rosier as a class agent. A decision denying DOS's Motion to Dismiss was issued on February 25, 2022.

STATEMENT OF THE ISSUES

1) Whether the complaint of Karen Saba should be accepted as a class complaint of discrimination in accordance with EEOC regulation 29 C.F.R. § 1614.204(d).

2) Whether John Fudala and Kevin Rosier are appropriate additional class agents.

STATEMENT OF UNDISPUTED FACTS

The underlying issue here concerns DOS's practices with respect to the designation of medical clearance classifications for those seeking overseas employment, and in particular, the process for approving a post abroad following a "Class 2" designation.

Medical Clearances

DOS's Bureau of Medical Services (MED) maintains a Medical Services Program abroad. Benefits of the program include access to the embassy/consulate/mission ("post") health unit, medical evacuation travel, and secondary payer coverage for hospitalizations. A system exists for the more than 25 U.S. Government agencies having a presence overseas to participate in the Medical Services Program while sharing in the expense required to administer it. *See* Chapter 6, Section 911.1 of the Foreign Affairs Manual (FAM). [2]

To receive benefits under the Medical Services Program, an individual must first receive a DOS medical clearance or a waiver. 16 FAM 211.1. MED has established a system of classification for medical clearances. The purpose of the medical clearance process is to ensure alignment between the medical resources available at a post and the medical needs of the individual. Therefore, the medical clearance designation depends on whether the individual has a medical impairment, and if so, the nature and extent of the effects of the medical impairment and/or the treatment required.

[2] The Foreign Affairs Manual is available online at https://fam.state.gov/.

The class certification issue here concerns "Class 2" ("Post Specific") medical clearances. A Class 2 is issued to individuals "with a medical condition that would pose a significant risk to the health or safety of the individual or others if the individual were assigned to work at one or more posts abroad." [3] 16 FAM 211.2(b). Individuals with a Class 2 medical clearance designation must receive a clearance specific to the post of assignment (i.e., "post approval"). The post approval process requires MED to sign off before the individual is officially brought on duty for a position abroad. (*See* Exh. A, Schwartz Decl. June 2021). Without MED's post approval, disabled individuals are not permitted to take an overseas assignment. *Id.*

MED nurse consultants evaluate post approvals for Class 2 designees using the medical clearance guidelines and tools in MED's Medical Capability Information (MCI) database. (*See* Exh. AE, Schwartz Decl. June 2021). The MED nurse consultants may receive assistance from MED's Clearance Director and Senior Advisor. *Id.* All individuals, including DOS applicants and employees, may appeal a DOS medical clearance classification determination. *See* 16 FAM 215 (Appeal of Medical Clearance Decision). With certain exceptions, applicants to and employees of agencies other than DOS may request a waiver of the medical clearance requirement. *See* 16 FAM 215-16.

DOS policy states that medical clearance determinations will be made based upon an individualized analysis that considers, among other things, the individual's diagnosis, prognosis, and stability, if applicable. (*See* Exh. B "Medical Clearance Manual" at STATE 1244-45, Agency's Renewed Motion to Dismiss and Opposition to Complainant's Motion for Class Certification).[4] MED draws upon additional resources to adjudicate medical clearances for individuals traveling to war zones. For example, in areas where DOS is dependent upon Department of Defense (DOD) medical assets, MED applies DOD medical guidelines, including CENTCOM guidelines for deployment to Afghanistan, to account for the medical resources available at the post and the

[3] MED can also issue a Class 1 ("Worldwide Available") medical clearance to individuals who have "no identifiable medical conditions that would limit assignment abroad." 16 FAM 211.2(a). A Class 5 ("Domestic Only") medical clearance is issued to individuals "who have a medical condition which is incapacitating, or for which specialized medical care is best obtained in the United States." 16 FAM 211.2(b).

[4] Appended to the Agency's Renewed Motion to Dismiss and Opposition to Complainant's Motion for Class Certification are Exhibits A through N. This motion will be referred to as "Agency's Renewed MTD and Opp to Class Cert."

applicable living environment.[5] (*See* Exh. D at STATE 1208, Agency's Renewed MTD and Opp to Class Cert).

Saba Received a Class 2 Medical Clearance Without Post Approval

On November 18, 2010, Saba applied to USAID for an appointment as a Foreign Service Limited (FSL) General Development Officer in Kabul, Afghanistan. (*See* Exh. B, Schwartz Decl. June 2021). This non-career, mid-level Foreign Service position at USAID had a term not to exceed five years. DOS does not dispute that Saba has a disability. Her medical history reflects a diagnosis of infantile cerebral palsy which severely limits her speaking, mobility, and other functions. (*See* Exh. B, Schwartz Decl. June 2021). Despite her disability, Saba has been employed overseas in classified warzones such as Iraq and Libya, as well as other challenging environments, including Egypt, Jordan, Vietnam, and the Philippines. *Id*.

On February 24, 2011, USAID sent Saba an offer of employment conditional upon attainment of a Top-Secret clearance, a medical clearance, acceptance of a base salary offer, and the availability of funds. Fulfillment of these conditions would place Saba on a roster of candidates eligible for hire, but did not guarantee employment. Neither party has referenced in their submissions how or when Saba's Class 2 designation came to be, but it appears to be undisputed, as the position she sought required post approval. Saba was evaluated under MED procedure using CENTCOM. On May 27, 2011, USAID informed Saba that she was denied post approval for Kabul and notified her that her "pre-employment phase with USAID will come to an end." (*See* Exh. A, Schwartz Decl. June 2021). *Id*. MED concluded that Saba's physical limitations/mobility issues rendered her unable to don 40 pounds of body armor; MED did not inquire or test her ability to do so, however. *Id.* MED further determined that Saba could not be approved for any war zones. *Id.* Saba did not seek a waiver of the medical clearance requirement from USAID.

On or about June 30, 2011, Saba made EEO counselor contact at USAID. *Id*. She expressed concerns about the medical clearance process, inadequacy of the assessment to determine her physical ability, lack of communication from MED, and USAID's unwillingness to place disabled staff in field-based programmatic positions. Report of Investigation (ROI) at 21-25. On

[5] U.S. Central Command guidelines (CENTCOM) is a unified combatant command of the U.S. Department of Defense with an "Area of Responsibility" that includes Afghanistan. *See* https://www.centcom.mil/. CENTCOM maintains and publishes minimum standards of fitness for deployment within its Area of Responsibility, titled "Amplification of the Minimal Standards of Fitness for deployment to the CENTCOM AOR."

September 2, 2011, Saba filed a class complaint of discrimination, alleging that she was denied hire on May 27, 2011 and denied post approval. *Id*. at 5. The complaint asserted a class claim based on "non-hiring of disabled employees by USAID and the State Department Office of Medical Services, employing the non-individualized 'Class 1 /Class 2', 'worldwide availability' medical clearance system, which denied employees the individualized consideration and reasonable accommodations they are entitled to receive under the Rehabilitation Act." *Id*. at 5-6.

Proposed Class Agent John Fudala

In January 2017, John Fudala joined DOS Foreign Service as a Diplomatic Security Special Agent with a Class 1, worldwide available, medical clearance. (*See* Exh. L, Schwartz Decl. June 2021). His first assignment was a domestic placement in Chicago from February 2017 through March 2019. (*See* Exh. J, Agency's Renewed MTD and Opp to Class Cert). In March 2019, Fudala departed for his second assignment in Khartoum, Sudan. (*See* Exh. K, Agency's Renewed MTD and Opp to Class Cert). In September 2019, Fudala notified MED of his Rheumatoid Psoriatic Arthritis diagnosis, which resulted in a change of his medical clearance to a Class 2, without approval for the Khartoum position. (*See* Exh. L, Schwartz Decl. June 2021). Fudala was then assigned in November 2019 to the Office of Regional Directors, in Washington D.C. (*See* Exh. K, Agency's Renewed MTD and Opp to Class Cert). Fudala held this position for approximately five months before resigning.

As a result of the change in his medical clearance designation and lack of post approval, Fudala "did not pursue job opportunities at many posts around the world." (*See* Exh. L, Schwartz Decl. June 2021). Fudala further stated that he was "hurt financially" by the change to a Class 2 medical clearance because he "wanted to seek employment at designated high-threat posts," which "come with financial incentives like danger pay." *Id*. Beginning in February 2020, Fudala requested to remain in a domestic assignment and to be transferred back to the Chicago Field Office. (*See* Exh. M, Agency's Renewed MTD and Opp to Class Cert). He resigned shortly thereafter to pursue employment at another federal agency. Fudala does not allege that he made EEO counselor contact. (*See* Exh. L, Schwartz Decl. June 2021).

Proposed Class Agent Kevin Rosier

Kevin Rosier is a DOS Foreign Service Generalist who first joined the Foreign Service with a Class 1 medical clearance in 2006. (*See* Exh. 3 of Declaration of Bryan Schwartz, Esq., In Support of Complainant's Reply to Agency's Opposition to Motion for Class Certification and Opposition to

Motion to Dismiss). [6] Rosier resigned from the Foreign Service in 2013 but sought reappointment the following year, resulting in his receipt of a conditional offer of reappointment in November 2014. *Id*. In March 2015, Rosier notified DOS of his Mantle Cell Lymphoma diagnosis, resulting in a Class 5 medical clearance and the termination of his application for reappointment. *Id*.

In November 2015, Rosier was hired into DOS Civil Service. (*See* Exh. A, Agency's Reply to Complainant's Response to Motion to Dismiss and Opposition to Complainant's Motion to Add Kevin Rosier as a Class Agent).[7] In July 2018, Rosier pursued reappointment to the Foreign Service and successfully converted into the Foreign Service with a Class 1 medical clearance and assignment to Chad. (*See* Exh. B, Agency's Reply to Response). In August 2018, Rosier notified MED that he would be seeking to break his assignment to Chad due to the high risk of permanent side effects in individuals with his medical history receiving the yellow fever vaccination required for Chad. (*See* Exh. C , Agency's Reply to Response). Following this notification, Rosier disclosed to MED a relapse of his cancer. (*See* Exh. D, Agency's Reply to Response). As a result, MED modified Rosier's medical clearance to a Class 5 in August 2018 and Rosier was assigned domestically to the Iraq desk in Washington, D.C. (*See* Exh. E, Agency's Reply to Response).

In July 2019, Rosier's medical clearance was modified to a Class 2, allowing him to bid for assignments abroad. Rosier pursued various assignments and was denied approval for half of the posts, which included Algiers, Baku, Beirut, Cairo, Casablanca, Rabat, Riyadh, and Tunis. (*See* Exh. F, Agency's Reply to Response). In August 2020, Rosier received an assignment in Paris, France. He did not appeal the results of MED's 2019 post-approval process and did not make EEO counselor contact or otherwise file a complaint of discrimination against DOS. (*See* Exh. 3, Schwartz Decl. Oct. 2021).

[6] Appended to the Declaration of Bryan Schwartz, Esq., in support of Complainant's Reply to Agency's Opposition to Motion for Class Certification and Opposition to Motion to Dismiss are Exhibits 1 through 5. This Declaration, filed on October 5, 2021, will be referred to as "Schwartz Decl. October 2021."

[7] Appended to the Agency's Reply to Complainant's Response to Motion to Dismiss and Opposition to Complainant's Motion to Add Kevin Rosier as a Class Agent are Exhibits A through F. This submission will be referred to as "Agency's Reply to Response."

APPLICABLE LAW AND ANALYSIS

Class Complaint Overview

EEOC regulation 29 C.F.R. § 1614.204(a)(2) provides that:

> A "class complaint" is a written complaint of discrimination filed on behalf of a class by the agent of the class alleging that:
>
> (i) The class is so numerous that a consolidated complaint of the members of the class is impractical;
>
> (ii) There are questions of fact common to the class;
>
> (iii) The claims of the agent of the class are typical of the claims of the class;
>
> (iv) The agent of the class, or his/her representative, if any, will fairly and adequately protect the interests of the class.

The AJ may reject a class complaint if any of the prerequisites are not met. *See Ty S. v. Dep't of State*, EEOC Appeal No. 2020005030 (Dec. 14, 2020) (*citing Garcia v. Dep't of Justice*, EEOC Request No. 05960870 (Oct. 10, 1998) and 29 C.F.R. § 1614.204(d)(2)). A class complaint must identify the policy or practice adversely affecting the class, as well as the specific action or matter affecting the class agent. *See* 29 C.F.R. § 1614.204 (c)(1).

Commonality and Typicality

As a practical matter, the "commonality and typicality requirements tend to merge." *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n. 13 (1982). Both serve as guideposts for determining whether, under the particular circumstances, maintenance of a class action is economical and whether the class agent's claim and the class claims are so interrelated that the interest of the class members will be fairly and adequately protected in their absence. *Id.*

The requirements of commonality and typicality require that the class agent's claim and the claims of the members of the proposed class raise common questions of fact and law. 29 C.F.R. §§ 1614.204(a)(2)(ii)-(iii). At the certification stage, the complainant need only identify specific facts that are common to the class, and not address the merits of the class claims. However, the class agent must submit more than mere bare allegations that these prerequisites are satisfied, and her individual claim must show some nexus with the claims of the putative class. *Hudson v. Dep't of Veterans Affairs*, EEOC Appeal No. 01A12170 (Mar. 27, 2003) (*citing Morrison v. Booth*, 763 F.2d 1366, 1371 (11th Cir. 1985)); *Hines, Jr., et al. v. Dep't of the Air Force*, EEOC Appeal No. 01931776 (July 7, 1994); *Falcon*, 457 U.S. at 157-58. For a class agent to represent a class, she must show that her claims are typical and common to the members of the class. A complainant can do so by presenting a claim which could be used as a "prototype for resolution of the

common claims of the class." *Stastny v. South. Bell Tel. & Tel. Co.*, 628 F.2d 267 (4th Cir. 1980). A class agent must be part of the class he or she hopes to represent and must "possess the same interests and suffer the same injuries" as unnamed class members. *Shad L. v. Consumer Fin. Prot. Bureau,* EEOC Appeal No. 0120162565 (June 15, 2018) (*citing Falcon*, 457 U.S. at 156).

Commonality

To demonstrate a question of fact common to the class, the class agent must establish an evidentiary basis from which one could reasonably infer the operation of an overriding policy or practice of discrimination. *See* 29 C.F.R. § 1614.204(a)(ii); *Mastren v. U.S. Postal Serv.*, EEOC Request No. 05930253 (Oct. 27, 1993); *Garcia v. Dep't of the Interior*, EEOC Appeal No. 07A10107 (May 8, 2003); *see also Hines*, *supra* (evidence to establish commonality may include statistical evidence, anecdotal testimony by other employees showing that there is a class of persons who were discriminated against in the same manner as the individuals and evidence of specific adverse actions). Factors to consider in determining commonality include whether the practice at issue affects the whole class or only a few employees, the degree of centralized administration involved, and the uniformity of the membership of the class in terms of the likelihood that the members' treatment will involve common questions of fact. *Garcia, supra* (citing *Mastren, supra*).

Saba has identified the common practice of MED determining Class 2 post approval for federal employees and applicants based upon disability stereotypes, without individualized assessments from the individual's own medical records, including physician opinions; and further, without proper evaluation of whether the individual's medical impairment creates a direct threat, such that consideration of, and identification of, potential ways to accommodate safety concerns should be undertaken.[8]

The required element of commonality has been established. MED's practice affects all members of the proposed class on the basis of disability and is administered centrally by DOS. MED conducts medical clearance reviews for all applicants to and current employees of any agencies that have assignments abroad and determines whether the individual receives post-specific clearance. The common question of fact is whether for disabled individuals, MED fails in its obligation to conduct an individualized assessment based upon medical information and any other information addressing the individual's ability to perform the essential functions of the job at the post. Stated alternately, the common question of fact is whether for disabled

[8] A "direct threat" is defined as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r). A "direct threat evaluation must be based on an individualized assessment of the person's ability to safely perform the essential functions of the job," including whether reasonable accommodation may reduce or eliminate the risk of harm. *See Alonzo N. v. Dep't of Homeland Security,* EEOC Appeal No. 0120180739 (June 21, 2019).

individuals, MED bases its determinations on stereotypes and generalized assumptions or speculation. In turn, the common question of law is whether doing so violates the Rehabilitation Act.

The practice that Saba identified affects her and all other disabled individuals who seek post approval. The common adverse event that arises from MED's practice is the denial of post approval. The harm/injury experienced because of this adverse event is shared by all – being improperly considered because of a disability would undeniably and universally cause emotional injuries, such as humiliation, disappointment, and dejection, as well as lost employment opportunities and career potential that relate directly to the denial of post approval.

DOS contends that various factors defeat commonality: 1) the pool of class members is rendered too large by including all applicants to and employees of the federal government; 2) the pool is too broad and too diverse based upon the types of positions involved; 3) the proposed class agents and members do not have the same injuries; 4) basing a class on medical clearance designations is improper due to variations in the policies of the agencies implementing them, including the waiver process; and 5) some proposed class agents/members had their post approval denied by the application of DOD's CENTCOM guidelines.

First, DOS asserts that by removing reference in the class definition to "denial of hire" and extending the class definition to applicants and employees who apply for career and term positions of all federal agencies, the broadness and diversity of individuals and employment practices of other federal agencies cut against common questions of fact. These concerns are misplaced, however, because commonality is premised upon common questions of fact, which, under the class as defined here, are unaffected by the factors DOS propounds. DOS's contention that commonality is defeated because the class is too broad depends upon whether the question of fact identified above remains common to all despite the number of and diversity of potential class members. The common question of fact is whether DOS's MED subjected disabled individuals seeking post approval to a process that fails to consider their individual medical circumstances, needs, and abilities. The particular career path that these individuals seek or position they currently have is irrelevant to this common question of fact—MED operates in the same manner regardless. The nature of MED's approval process is at issue, not variables related to the individual seeking post approval. It is undisputed that MED has repeatedly denied post approval to those with disabilities; MED's practice affects the whole class of disabled individuals who have sought post approval and were denied, regardless of where they came from or what their career goals were.

Concerning DOS's argument of a lack of commonality based upon the involvement of other federal agencies, DOS has merely pointed out that MED's denial of post approval may have led to subsequent, *additional* adverse events by other agencies, such as non-hiring. DOS neglects to

recognize that MED's discriminatory denial of post approval, alone, creates an injury irrespective of what may subsequently have happened at a different agency as a result of the denial. Hence, DOS's argument that "a medical clearance only has the significance as is ascribed to it by the human resources policy of an agency that chooses to implement it" (Agency's Renewed MTD and Opp to Class Cert at p. 32) is misplaced. The non-hiring by another agency would be a distinct adverse event creating additional injury/harm. It is for this same reason that Saba was able to settle with USAID separately for the direct harm it caused by not hiring her.

Moreover, contrary to DOS's assertions, Saba does not present an "across the board" class claim as in the cases of *Neufield v. U.S. Postal Service*, EEOC Appeal No. 01A32782 (Apr. 1, 2004) and *Glover v. Department of the Treasury*, EEOC Appeal No. 01972950 (Dec. 1, 1999), which DOS cites. (Agency's Renewed MTD and Opp to Class Cert at p. 33). These cases concern various unrelated allegations, from discrete acts of retaliation to harassment, where the Commission found that the class agent failed to identify any discriminatory policy or practice that had the effect of discriminating against the proposed class as a whole. In contrast, Saba, the proposed additional class agents, and potential class members have all undergone the same post approval process that MED administers. The proposed class members in *Neufield* and *Glover* alleged harassment and other discriminatory practices that were dependent upon having the same chain of command and/or same comparators, which they had not shown. None of those factors matter when the class agent identifies a discriminatory practice that all class members were subjected to (non-individualized post approval consideration). There are no "across the board" concerns here.

Finally, DOS contends that the use of the Department of Defense's CENTCOM guidelines for certain of the proposed class agents'/members' requests for post approval defeats commonality because these guidelines are applicable only to those seeking post approval in war zones. It does not. The proposed class definition concerns "all applicants to and employees of the U.S. Government denied post-specific medical clearance by the U.S. Department of State from May 16, 2011 to the present." They key here is the denial of post-specific medical clearance by DOS. DOS's MED is responsible for administering the post approval process regardless of whether the post at issue requires the application of CENTCOM guidelines. The final determination and failure to individually assess applicants still falls under DOS's centralized policy, not the Department of Defense. The alleged discriminatory practice remains the same—failure to consider relevant information specific to the disabled individual. Moreover, as Saba set forth in her October 5, 2021 Reply Brief, should the creation of a subclass concerning denials under the CENTCOM guidelines be necessary, that can be done later.

Typicality

As noted above, commonality and typicality tend to merge. Typicality requires that the claims or discriminatory bases alleged by the class agent be typical of the claims of the class, so that the interests of the putative class members are encompassed within the class agent's claims. *Complainant v. Fed. Bureau of Prisons*, EEOC Appeal No. 0720110008 (Sept. 15, 2015) (*citing Falcon*, 457 U.S. at 156). "A class agent must be part of the class she seeks to represent and must 'possess the same interest and suffer the same injuries' as class members." *Id.* (citing *Garcia v. Dep't of the Interior*, EEOC Appeal No. 07A10107 (May 8, 2003)).

DOS contends that the interests and injuries of Saba and the proposed class agents, Fudala and Rosier, are not typical of the class. With respect to Saba, DOS contends that her claim is not typical because of her settlement with USAID. Her settlement, however, does not change the fact that she has the same interests and injuries. As noted above, the settlement provided a remedy for her non-hire to USAID. Saba's non-hire to USAID does not negate the fact that she was first subjected to the adverse event of post approval denial, and that she suffered a distinct harm/injury as a result. Saba has yet to be made whole from the alleged discriminatory practice of MED. Saba's receipt of a remedy from USAID via the settlement does not take away the injury that she suffered because of MED's practice. MED's alleged discriminatory practice caused the adverse event of denial of post approval, which caused the alleged harm or injury of emotional pain and loss of potential career opportunities, which can then be distinctly remedied at the damages phase. At most, the USAID settlement provided a remedy related to the "non-hiring" part of her overall injury. The settlement did not address the injury she suffered from the denial of post approval, as USAID does not control MED's practices -- DOS does; therefore, her claim is typical, as she experienced the same injury as all others who were denied post approval.

Notably, in making its USAID settlement argument, DOS makes a statement that supports a conclusion that Saba's claim *is* typical and that her claim is a solid prototype for resolution of the common claims of the class. DOS states that because of the settlement, "[Saba] now has an incentive to attempt to maximize the relief she seeks from DOS." (Agency's Renewed MTD and Opp to Class Cert at p. 30). DOS cannot now be heard to disagree with the notion that no one seems better to represent the class' interests than someone who seeks to "maximize the relief" from the alleged wrongdoer.

Typicality has been established. The potential class members and Saba suffered the same adverse event of the denial of post approval which was based upon an alleged discriminatory failure to employ an individualized approach. The class members' shared interest speaks directly to rectifying the reason for the adverse event; i.e., having DOS be required to conduct an individualized assessment such that disabled individuals seeking post approval are appropriately considered and have a legitimate chance at being granted post approval with or without reasonable accommodation. This is the class members' shared interest, and Saba's settlement with USAID does not take it away.

With respect to proposed class agent Fudala, DOS asserts he is not typical because he never sought EEO counseling. (*See* Agency's Renewed MTD and Opp to Class Cert at pp. 23-25). As Saba points out, DOS's position is contrary to *Brown v. General Services Administration*, EEOC Appeal No. 01880220 (Apr. 22, 1988) (citations omitted), where the Commission made it clear that commencement of a class action suspends the applicable statute of limitations for class members. A lack of EEO counseling would only create a problem if the issue in Saba's claim and resultant injury differed from Fudala's, and he never sought EEO counseling. DOS views Saba's injury as "non-selection," and its theory concerning a lack of EEO counseling is based upon the false premise that Fudala's injury differs from Saba's because it is not a non-selection. As discussed above, their injuries are the same. The adverse event that MED caused is not a non-selection for any class members. Saba's MED-caused injury resulted from the denial of post approval, which is the adverse event that MED caused. Non-selection was the injury-causing adverse event for which USAID was responsible.

Here, DOS again conflates injuries from two different adverse events. The first adverse event is shared and common to all— denial of post approval. Whatever does or does not happen subsequently with another agency or within DOS but not related to MED's authority is of no consequence to the analysis of commonality and typicality. MED's denial of post approval affected all class members in some negative way. For Fudala, it was having the opportunity to serve at certain high threat posts taken away. The common injury relates to career potential, as well as emotional harm. Fudala's injury is, therefore, not distinct. The same is true for proposed class agent Rosier. DOS propounds the identical argument concerning Rosier's failure to undergo EEO counseling. The same analysis applies to Rosier, as his claims raise the same questions of fact and law; his claim is the same and his injuries are the same. He suffered emotional and other harm from DOS's alleged discriminatory denial of post approval.

With respect to Fudala, DOS further asserts that he is not typical because his position was in law enforcement where additional requirements and certain unique defenses apply. I do not find that this defeats typicality. First, fitness standards and the ability to carry a weapon have nothing to do with the alleged discriminatory process by which MED considers requests for post approvals. Whether someone qualifies based upon these additional requirements does not change how MED considers disabled individuals for post approvals. As Saba correctly points out, "Mr. Fudala was not denied post approval due to these additional requirements." (Saba Reply at p. 12). Moreover, whatever distinct defenses may be available for Fudala's claim does not change the fact that he suffered the same injury and shares the same interest in having the MED's practice changed to ensure individualized assessments.

In addition, for the class agents' claims to be typical of the class, they must be qualified individuals with a disability. *See Meyer v. Dep't of State,* EEOC Appeal No. 0720110007 (June 6, 2014) (where the Commission stated, "one bringing a claim of disability discrimination must first establish that she is a member of the class of persons protected by the Rehabilitation Act, i.e., a qualified individual with a disability"). The Commission has stated that, "In order to be entitled to protection from the Rehabilitation Act, the Class Agent must also make a showing that she was 'a qualified individual with a disability.'" *Id.* Saba contends that each proposed class agent

has shown status as a qualified individual with a disability (QID) because each maintains that they have the requisite skill, experience, education, and other job-related requirements of the positions they sought, with or without accommodation. (Saba's Supplemental Brief at p. 1). Saba correctly points out that each class member does not need to make a showing of status as a QID during the certification phase, or during the liability phase, but only during the remedies phase.[9] *Id.* With respect to QID status and typicality, DOS does not dispute that the proposed class agents are individuals with a disability, and, for the purposes of class certification only, assumes that they are qualified individuals with a disability.[10] Hence, QID status does not create a typicality dispute in this matter.

Numerosity

To satisfy the numerosity prerequisite, the potential class must be sufficiently numerous such that a consolidated complaint by the members of the class is impractical. *See* 29 C.F.R. § 1614.204(a)(2)(i). No set number of class members is required, and each case is evaluated based upon its own circumstances. *See Gen. Tel. Co. of the Northwest, Inc. v. Equal Emp't Opportunity Comm'n*, 446 U.S. 318, 330 (1980). The Commission has held that the factors relevant to the determination of numerosity are the size of the class, the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action at issue, and the size of each member's claim. *Carter, et al v. U.S. Postal Serv*., EEOC Appeal No. 01A24926 (Nov. 14, 2003). The exact number of class members need not be shown prior to certification, but some showing must be made of the number of individuals affected by the alleged discriminatory practices who may therefore assert a claim. *See Moten v. Fed. Energy Regul. Comm'n*, EEOC Request No. 05960233 (April 8, 1997) (citing *Harris v. Pan American World Airways*, 74 F.R.D. 24, (N.D. Cal. 1977)). No numerical minimum or cut-off point for the size of the class applies, but rather an examination of the facts of each case. *See Complainant v. Dep't of Housing & Urban Dev*., EEOC Appeal No. 0120113119 (June 6, 2014) and *Martin v. U.S. Postal Serv*., EEOC Appeal No. 01A24445 (Apr. 22, 2004) (citing *Harris, supra*). The key for determining whether the class is sufficiently numerous for certification is the number of persons affected by the agency's alleged discriminatory practice(s). *See White, et al. v. Dep't of the Air Force*, EEOC Appeal No. 01A42449 (Sept. 1, 2005). The administrative judge retains the authority to redefine a class, subdivide a class, or recommend dismissal of a class if it becomes apparent that there is no longer a basis to proceed with the class complaint as initially defined. *See* 29 C.F.R. § 1614.204(d); *Dumbar v. Soc. Sec. Admin*., EEOC Appeal No. 01975435 (July 8, 1998), *request for recon. denied*, EEOC Request No. 05981075 (Jan. 22, 1999).

[9] *See Int'l Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 335 (1977) (establishing the bifurcated "Teamsters" approach) and *Velva B. v. U.S. Post. Serv.*, EEOC Appeal No. 0720160006 (Sept. 25, 2017).

[10] In its Supplemental Briefing in Opposition to Class Certification, DOS reserved its right to argue that the proposed class agents do not have QID status, should the class be certified.

Saba aptly relies on the case of *Complainant v. Department of Defense*, EEOC Appeal No. 0120103592 (Sept. 9, 2015),[11] where the Commission reversed the AJ's finding that the proposed class lacked numerosity. In that case, the class agent showed 12 complaints related to the issue of reasonable accommodation during the relevant period with some additional uncertainty concerning the use of a form. *Id.* (citing *Moten, supra*). The Commission stated that the correct focus in determining whether a proposed class is sufficiently numerous for certification purposes is on the number of persons who possibly could have been affected and who, thus, may assert claims. The Commission found numerosity to be satisfied, as the proposed class would consist of all employees who had to complete or completed the form in question when requesting an accommodation; the form had been used for several years; and the entity against whom the complaint was lodged was geographically diverse with overseas facilities and encompassing several states. *Id.*

Saba has satisfied her burden to demonstrate numerosity for the potential class. In the instant matter, Saba presents a stronger case for numerosity than the Department of Defense case with her submission of declarations from 17 individuals with similar claims. Moreover, the proposed class members in Saba all held or sought foreign positions, which establishes geographic dispersion— a significant factor in determining whether joinder is impractical. *See Joel P. v. U.S. Postal Serv.,* EEOC Appeal No. 0120120181 (Oct. 13, 2017). The declarations submitted show locations from all around the world— Europe, Africa, the Middle East, Central America, Southeast Asia, and Oceania.[12] The sufficient size of the potential class cannot be denied given that it consists of all disabled individuals designated with a Class 2 medical clearance and denied post approval over the relevant period; the nature of the issue here guarantees that all went through the same process of MED considering their requests. All affidavits reflect a denial of post approval stemming from the same MED practices. The provided affidavits demonstrate the wide-reaching nature of the MED's centralized policy and suggest that the practice affected a substantial number of employees and applicants to the federal government who had to rely on MED when seeking clearance.

Significantly, DOS cannot deny the information provided by its own MED officials. That information, which came from the depositions of Ty Flewelling, Dr. Ernest Davis, and Jackie Levesque, establishes that roughly 1,500 to 2,000 individuals receive a Class 2 designation from MED each year, resulting in at least 800 to 1,000 post denials per year. (*See* Exhibits A, H, and I, Schwartz Decl. June 2021; Saba's Motion for Class Certification at p. 7, n. 15). The 10+ year period in this matter would yield far greater than 10,000 potential class members. With respect to the factor of ease of identifying class members, Saba has set forth a plan of action for meeting and conferring with DOS counsel to make use of data from DOS's Medical Informatics ("MedIT") office to conduct a search via the eMed system for individuals who were designated

[11] *See* Saba's Motion for Class Certification at pp. 22-23.
[12] *See* Saba's Motion for Class Certification at p. 23, n. 121.

as Class 2 during the class period. The results from this search would then be filtered for those who were granted versus denied post approval. Saba also suggested alternative approaches.[13] Hence, this factor supports a finding that numerosity has been satisfied.

At this juncture, Saba need not identify a precise number of class members. *See* EEOC Appeal No. 0120103592, *supra.* She has, however, demonstrated overall that MED's practice of denying post approval to disabled individuals without individualized consideration clearly produces a potential class of sufficient size to satisfy the numerosity requirement.

Adequacy of Representation

Finally, adequacy of representation 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). The class representative should have no conflicts with the class and any attorney representing the class agent and class must have the requisite skill and experience. *Sedillo v. Dep't of Agric.*, EEOC Appeal No. 07A20071 (Aug. 7, 2002). DOS does not challenge the skill and experience of Saba's attorney, who has been found to be adequate class counsel by the Commission many times in the past. DOS presents a challenge only to the adequacy of Saba and Fudala being class agents. As discussed at length above, such concerns are unfounded, as they, and Rosier, all share common interests. Saba's settlement with USAID has no impact on her desire for MED to undertake an individualized approach to considering post approval; and any unique defenses that may apply to Fudala in no way render his interests divergent to the class. His ability to fairly represent the class is maintained by his shared interest in MED properly considering disabled individuals with Class 2 medical clearances for posts abroad. Thus, I find that there is adequacy of representation both with respect to the class agents and class counsel.

CONCLUSION

For the reasons set forth herein, I find that the complaint fulfills the requirements for class certification. Therefore, Saba's request for class certification is hereby GRANTED. I accept and certify Saba's class complaint, with additional class agents Fudala and Rosier. The class is defined as:

> All applicants to and employees of the U.S. Government who have been denied post-specific medical clearance because of a disability, by the U.S. Department of State from May 16, 2011 to present.

[13] *See* Saba's Motion for Class Certification at pp. 24-25.

The Agency is hereby ORDERED to issue a final order in accordance with 29 C.F.R. § 1614.204(j), and to comply with the Notice provided at the end of this Decision.

IT IS SO ORDERED.

FOR THE COMMISSION:

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Allyson S. Jozwik
Administrative Judge
(267) 589-9769
Allyson.Jozwik@eeoc.gov

NOTICE

The Administrative Judge's decision to accept or dismiss the class complaint is subject to final agency action. The agency has forty (40) days from receipt of the Administrative Judge's decision to take final action by issuing a final order informing complainant as to whether the agency will fully implement the decision. If the agency informs class agent that it does not intend to fully implement the decision, the agency must simultaneously file an appeal with the Commission and append a copy of the appeal to the final order. The agency may use the form provided at EEOC Management Directive 110, Appendix O to file its appeal with the Commission. Complainant will have thirty (30) days from receipt of the final order to file an appeal and the agency shall provide complainant with a copy of EEOC Form 573m Notice of Appeal/Petition (Appendix K). Agencies are advised to refer to the April 6, 2020 and July 27, 2020 memoranda issued by Carlton Hadden to the Federal Sector EEO Directors and officials at https://www.eeoc.gov/update-april-6-2020-memorandum-processing-information for information and directives regarding the tolling of timeframes during the pandemic. The EEOC is instructing Agencies to return to issuing final actions in the usual manner, unless there are compelling reasons not to do so.

Served by Electronic Mail on June 6, 2022, as follows:

bryan@bryanschwartzlaw.com

devin@bryanschwartzlaw.com

cassidy@bryanschwartzlaw.com

CohenY@state.gov

LounsberryAL@state.gov

DespainJ@state.gov

MorganYB@state.gov