UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUCE C. HUBBARD, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civ. No. 03-1062 (RJL)**
	)	
JOHN E. POTTER, POSTMASTER, GENERAL, UNITED STATES POSTAL SERVICE,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER
(May 26, 2004) [#10, 18, 20]

Before the Court are the defendant's Motion to Strike or Dismiss Class Action Allegations of the Complaint, and the parties' opposing motions regarding the response to and scope of class-related discovery. The defendant, John E. Potter, Postmaster General of the United States Postal Service ("USPS"), moves for dismissal of the plaintiffs' class claims under the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791, et seq., on the grounds that they do not meet the commonality, typicality, or adequacy of representation requirements of the Fed. R. Civ. P. 23(a). USPS further argues that the plaintiffs' claims are time-barred and also fail for lack of proper venue. For the following reasons, the Court GRANTS the defendant's motion to strike the class allegations of the Complaint without prejudice. In addition, the Court GRANTS, in part, the plaintiffs' Motion to Compel, and DENIES the defendant's Motion for Protective Order.

Factual Background

On May 14, 2003, the five plaintiffs in this case, Bruce C. Hubbard, Judy M. Schuld, Grace J. Shirk-Emmons, Lucy I. Stieglitz, and George R. Westenberger ("named plaintiffs") filed a class action complaint, alleging systematic civil rights violations committed by the United States Postal Service ("USPS") against deaf and hard-of-hearing people under the Rehabilitation Act, as amended, 29 U.S.C. § 791, et seq. More specifically, the named plaintiffs, deaf individuals who have been employed at various USPS facilities around the country for sixteen or more years, allege that USPS has repeatedly refused to provide each of them with a certain type of "qualified sign language interpreter" (*i.e.,* American Sign Language ("ASL") qualified interpreters),[1] which they claim is a basic reasonable accommodation to which they, and other similarly situated deaf and hard-of-hearing employees, are entitled to as a matter of law.

The named plaintiffs bring their complaint on their own and on behalf of a class of persons composed of all current and future deaf and hard-of-hearing employees of USPS

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[1] Although their pleadings repeatedly use the general term "qualified sign language interpreter" and do not specifically limit their definition to qualified ASL interpreters, implicit in the plaintiffs' claims is that a "qualified sign language interpreter" is a qualified ASL interpreter, as opposed to an interpreter qualified in another sign language. Compl. ¶ 22. Accordingly, in applying the plaintiffs' term the Court will construe it to mean "qualified ASL interpreters." Plaintiffs also appear to draw a distinction between "qualified interpreters" and "unqualified" ASL signers, but do not clearly specify the basis for that distinction. *See, e.g.,* Compl. ¶ 32 n.10.

who use ASL as their primary means of communication [2] and who, at any time since October 19, 1998,[3] have been denied qualified ASL interpreters at work meetings. Compl. ¶ 22. Each named plaintiff has alleged that because USPS did not provide qualified interpreters at work meetings, he or she was unable to understand information given by supervisors or co-workers. The named plaintiffs assert that in order to do their job "safely and effectively," they need to understand what their supervisors and co-workers say at these meetings. Compl. ¶¶ 28, 37, 48, 57, 69. Allegations specific to plaintiffs Hubbard, Schuld, and Stieglitz are illustrative.

Plaintiff Hubbard, who is employed as an automation mail processing clerk at the Brentwood facility in Washington, D.C., alleges that it was impossible for him to understand information at weekly work meetings addressing safety issues, work procedures, work assignments, and USPS policies. Compl. ¶ 28. "Special meetings" every two weeks for deaf employees were either ineffective in providing him with the information he missed at work meetings or were cancelled. Compl.¶ 30. Moreover, in

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[2] The pleadings do not indicate what percentage of the deaf or hard-of-hearing employees at USPS uses ASL as their primary means of communication, or even what percentage of the deaf or hard-of-hearing population in the United States relies on ASL as their primary means of communication.

[3] October 19, 1998 is the date that plaintiff Hubbard requested informal EEO counseling due to USPS's failure to provide ASL interpreters at work meetings in September 1998. Compl. ¶ 12. Plaintiff Hubbard filed a formal EEO Complaint on February 20, 2001, and on September 27, 2002, he moved to amend his complaint to assert class allegations in conjunction with the four other named plaintiffs in this case. *Id.* at ¶¶ 13, 16. According to the plaintiffs, there has been no final action in this matter. Compl. ¶ 18.

October 2001, the Brentwood facility closed due to anthrax contamination and plaintiff Hubbard alleges that because of the lack of a qualified interpreter, he could not understand what was said at important anthrax-related meetings. Compl. ¶ 32. Although an unqualified "signer" was present at some of these meetings, the signer could not interpret the technical and medical terminology used by personnel at these meetings to explain the threat of anthrax. *Id.*

Plaintiff Schuld, employed as a mail processing clerk at a facility in Cleveland, Ohio, claims that she did not receive "important safety information" on several occasions, including during the October 2001 anthrax contamination of some USPS facilities and one instance in which she injured her Achilles tendon while pulling a mail cart, after having missed a meeting instructing employees to push mail carts to avoid injury. Compl. ¶ ¶ 39, 41. Plaintiff Stieglitz, employed as a mail processing clerk in a facility in Oklahoma City, Oklahoma, alleges that her supervisors use other USPS employees who have an ability to sign during meetings. Compl. ¶ 58. However, she claims that because these signers are not qualified interpreters, it is virtually impossible for her to understand what is said, or to participate in these work meetings. Although her supervisor provides her with a two to three-line written summary of work meetings, plaintiff Stieglitz alleges that these summaries do not provide her with information comparable to what is provided to her hearing co-workers. Compl. ¶ 62.

Plaintiffs Shirk-Emmons and Westenberger, who work at USPS facilities in

Lancaster, Pennsylvania and Harrisburg, Pennsylvania, respectively, also allege that they are unable to obtain important information at work meetings because of the lack of qualified interpreters. All five named plaintiffs allege that they were unable to understand information given at meetings regarding the anthrax contamination of certain USPS facilities since October 2001.

With regard to the putative class, the named plaintiffs claim that common questions of law and fact predominate over individual questions, including the issue of whether USPS discriminates against its deaf or hard-of-hearing employees by engaging in a "nationwide practice of failing to provide qualified sign language interpreters" during work meetings, Compl. ¶ 83, thereby denying them important work-related information and causing them to suffer frustration, anxiety, embarrassment, and distress. Compl. ¶¶ 93-94. The named plaintiffs allege that work floor or similar work-related meetings occur at USPS facilities throughout the nation and USPS's failure to provide qualified interpreters at these meetings affects deaf and hard-of-hearing employees across the nation. Compl. ¶ 83.

USPS moves to strike or dismiss the plaintiffs' class claims under Fed. R. Civ. P. 12(b)(1) and (6) on the grounds that the plaintiffs have failed to show that there is a single aspect or feature of the claims that would be common to all class members, and thus the commonality requirement of Rule 23(a) cannot be met. In addition, USPS asserts that the adequacy of representation requirement of Rule 23(a) has not been met because there is a

likelihood that if it were to prevail, not every member of the putative class would be bound by the judgment. Finally, USPS asserts that the plaintiffs' class claims are time-barred and that they fail for lack of proper venue. The present motion comes to the Court prior to the commencement of discovery and the filing of the plaintiffs' motion for class certification.

For the following reasons, the Court finds that the plaintiffs have failed to allege a set of facts under which the commonality and typicality requirements of Rule 23(a) could be satisfied. The class claims in the Complaint are thus dismissed without prejudice, and this action will proceed on the claims of the five individual plaintiffs.[4]

Discussion

In evaluating a motion to dismiss or strike class allegations prior to discovery, the Court must apply the standard of review set forth in Fed. R. Civ. P. 12(b)(6). *See Quarles v. General Investment & Development Co.*, 260 F.Supp.2d 1, 4-5 (D.D.C. 2003); 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1759 (2d ed. 1986). It will only dismiss claims pursuant to Fed. R. Civ. P. 12(b)(6) if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). However, even if the Court accepts as true all of the factual allegations set forth in

[4] Given this basis for dismissal, the Court need not engage in further analysis of USPS's alternative arguments in support of dismissal.

the complaint, *Doe v. United States Dept. of Justice,* 753 F.2d 1092, 1102 (D.C. Cir. 1985), and construes the complaint liberally in favor of the plaintiff, *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979), it "need not accept inferences drawn by [the] plaintiffs if such inferences are unsupported by the facts set out in the complaint." *Kowal*, 16 F.3d at 1276.

Fed. R. Civ. P. 23(a) sets forth the prerequisites for the filing of a class action. The prerequisites are that the class: (1) is so numerous "that joinder of all members is impracticable"; (2) has common issues of law or fact; (3) that the claims of the class representatives "are typical of the claims...of the class"; and (4) that the interests of the class will be "fairly and adequately protect[ed]" by the representative parties. Fed. R. Civ. P. 23(a); *see also Quarles*, 260 F.Supp.2d at 5; *Mayfield v. Meese*, 1987 WL 10494, *1 (D.D.C., April 24, 1987). These prerequisites must be alleged in the plaintiff's complaint at the time of filing and must be established prior to the certification of a class. LCvR 23.1(a)(2). Although the Court does not possess "any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action...it is evident that some inspection of the circumstances of the case is essential to determine whether the prerequisites of Rule 23 have been met." *Wagner v. Taylor*, 836 F.2d 578, 587 (D.C. Cir. 1987); *see also* Fed. R. Civ. P. 23(c)(1) (determination of whether a class action can be maintained shall be made "at an early practicable time...").

The commonality and typicality requirements of Rule 23(a) overlap because both "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *General Telephone Co. of the Southwest v. Falcon*, 457 U.S.147, 157 n.13 (1982) ("*Falcon*"). Indeed, the ultimate inquiry is whether the plaintiffs can allege or identify a common injury. *Hartman v. Duffey*, 19 F.3d 1459, 1474 (D.C. Cir. 1994). The mere existence of factual dissimilarities will not preclude findings of commonality and typicality, so long as "a single aspect or feature of the claim is common to all proposed class members," and the representatives of the class suffered a similar injury from the same course of conduct as the injury alleged for the entire class. *Bynum v. District of Columbia*, 217 F.R.D. 43, 46-47 (D.D.C. 2003).

The plaintiffs argue that their complaint clears the low hurdle of notice pleading because they have alleged that USPS failed to comply with its own policy regarding its obligation to provide qualified sign language interpreters. Pl. Supp. Mem. 2-3. However, assuming *arguendo* that USPS did have a nationwide policy regarding the provision of qualified interpreters, as the Court must, the plaintiffs still need to allege a common injury that would justify litigating the claims of putative class members, who comprise a subset of the current and future deaf and hard-of-hearing employees of the USPS (*i.e.*, those dependent on qualified ASL interpreters). The Court finds that the plaintiffs have not

alleged a set of facts that could satisfy the Rule 23(a) requirements of commonality and typicality and would put USPS on notice of the claims of the putative class.

With regard to the plaintiffs' claim for failure to accommodate a disability under the Rehabilitation Act, 29 U.S.C. § 791, the D.C. Circuit has held that although "'[t]he government is not obligated under the statute to provide the plaintiff with every accommodation he may request,' the government must, at a minimum, provide 'reasonable accommodation as is necessary *to enable him to perform his essential functions*.'" *Carter v. Bennett*, 840 F.2d 63, 67 (D.C. Cir. 1988). Because of the myriad of potential factual distinctions between individual plaintiffs with regard to their disability and what would reasonably accommodate such a disability, *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 198-99 (2002), there must be a unifying factor common to the named and putative class members that would prevent this action from disintegrating into hundreds, if not thousands, of individualized suits litigating the issue of whether a qualified ASL interpreter, as opposed to other signers or other possible accommodations, is necessary for the putative class members to engage in the essential functions of their jobs. This is especially crucial where the putative class could potentially include deaf or hard-of-hearing employees performing a wide variety of functions within USPS, who have already been provided with varying levels of accommodation. *Cf. Falcon*, 457 U.S. at 158-59. Indeed, the allegations of the five named plaintiffs, some of whom hold different positions at the USPS and who appear to have been provided with different

means of accommodation up to this point, demonstrate the potential for individual questions to predominate.

For reasons known to the plaintiffs, they have chosen to pursue a class claim challenging the failure to provide a specific accommodation, not a class claim challenging a systemwide policy governing the *process* through which accommodations for all deaf or hard-of-hearing employees are addressed or provided.[5] Unlike the case the plaintiffs claim could "serve[] as a useful model for the management of the instant proceedings," Pl. Supp. Mem. 15, *Bates v. United Parcel Service*, 204 F.R.D. 440 (N.D. Cal. 2001), which expressly states that the class claims involved "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..." *id.* at 445-46, the plaintiffs here allege that USPS must provide a specific accommodation -- qualified ASL interpreters. This failure to either allege, or identify, a set of facts that might support a theory that an alleged refusal to provide qualified ASL interpreters necessarily impacts the ability of

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[5] *See, e.g., Siddiqi v. Regents of the University of California*, 2000 WL 33190435, at *3, *6 (N.D. Cal., Sept. 6, 2000) (certifying class action by deaf or hard-of-hearing students where class claims alleged that university policies governing the termination or cancellation of accommodations resulted in the denial of meaningful access to educational programs, and where the issue of whether reasonable accommodation was provided to each named plaintiff would be litigated in second phase); *Guckenberger v. Boston University*, 957 F.Supp. 306, 326 (D. Mass. 1997) (certifying class action by learning disabled students, but noting that "[t]he plaintiffs here are not challenging the university's failure to accommodate particular students, nor are they seeking to secure a specific accommodation for any particular type of learning disability.").

putative class members to perform essential functions of their job leaves unaddressed the commonality and typicality requirements of Rule 23. In sum, merely alleging that the USPS refusal to provide qualified ASL interpreters, as opposed to other interpreters or signers, has "caus[ed] them to suffer frustration, anxiety, embarrassment, and distress" does not satisfy these requirements. Compl. ¶ 94. Since the class claim will ultimately hinge on whether USPS is required by law to provide a specific accommodation to deaf or hard-of-hearing employees, the plaintiffs must at least *allege* a common injury, such as the inability to perform an essential function, to meet the commonality and typicality requirements of Rule 23. Accordingly, the Court will strike without prejudice the class claims of the Complaint and this action will proceed as to the claims of the five named plaintiffs.

ORDER

For the reasons set forth above, it is this 26th day of May, 2004, hereby

ORDERED that the defendant's Motion to Strike or Dismiss Class Action Allegations of the Complaint [#10] is **GRANTED** without prejudice; and it is further

ORDERED that the plaintiffs' Motion to Compel [#18] is **GRANTED** in part; and it is further

ORDERED that the defendant shall respond to the plaintiffs' First Set of Interrogatories and Document Requests on or before July 1, 2004, and that such response

to shall be limited to those interrogatories and document requests that are relevant to the claims of the named plaintiffs, unless the plaintiffs file an amended Complaint, in which case the parties may re-file any necessary motions governing the scope of discovery; and it is further

ORDERED that the defendant's Motion for Protective Order [#20] is **DENIED.**

SO ORDERED.

RICHARD J. LEON
United States District Judge