

1 **I. Background**

2 In September 2008, McDonald filed his original complaint in the Superior Court for
3 Pinal County alleging violations of the Americans with Disabilities Act, 42 U.S.C. §§
4 12101–12213 (“ADA”), and defamation in connection with the termination of his
5 employment as a correctional officer at the Florence Correctional Center in Florence,
6 Arizona.³ (Doc. # 1-1 at Ex. A.) On or about December 11, 2008, McDonald filed a First
7 Amended Complaint. (Doc. # 1-1 at Ex. B.) On April 16, 2009, CCA removed this action
8 to the U.S. District Court for the District of Arizona. (Doc. # 1.) Pursuant to the Court’s
9 Rule 16 Scheduling Order, the discovery deadline was April 16, 2010. (Doc. # 14.) On May
10 14, 2010, CCA filed a Motion for Summary Judgment. (Doc. # 42.) Five days after the
11 Motion for Summary Judgment was fully-briefed, McDonald filed a motion for class
12 certification. (Doc. # 53.) Shortly thereafter, McDonald filed the pending motion: First
13 Amended Combined Motion to Request a Hearing/Petition for Class Certification/Motion
14 to Stay Proceedings. (Doc. # 54.)

15 The parties dispute whether McDonald was terminated due to his cognitive disability
16 in violation of the ADA (Doc. # 62 at p. 3), or due to his failure to adhere to Post Order 28
17 and CCA’s Code of Conduct (Doc. # 57 at p. 2–3). Accordingly, CCA maintains that
18 McDonald is unable to state a claim for disability discrimination or retaliation. (*Id.* at p. 4.)
19 The parties also dispute whether McDonald’s status as a protected individual under the ADA
20 is a primary issue in this litigation. (*Id.*)

21 McDonald’s proposed class action arises under the ADA. McDonald alleges that due
22 to recently enacted changes in the ADA, the Court may efficiently adjudicate the application
23 of the ADA, as amended, to “potential class members with the same or similar impairment
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26 *Lake at Las Vegas Investors Group, Inc. v. Pac. Dev. Malibu Corp.*, 933 F.2d 724, 729 (9th
27 Cir. 1991).

28 ³ The parties stipulated to the dismissal, with prejudice, of Count One (Title
VII/ACRA) of McDonald’s First Amended Complaint. (Doc. # 40.)

1 as [McDonald] suffer[ing] an adverse employment action by CCA in violation of . . . the
2 ADA.” (Doc. # 54-1 at p. 6.) McDonald states that the proposed class will seek economic
3 compensation for lost earnings. (*Id.* at p. 14.) CCA argues that the motion for class action
4 certification is a delay tactic, because this matter has been pending for two years, discovery
5 is closed, a motion for summary judgment is fully-briefed, and McDonald allegedly failed
6 to present any evidence of disability discrimination.

7 **II. Legal Standards**

8 Rule 23 of the Federal Rules of Civil Procedure gives this Court broad discretion to
9 determine whether a class should be certified. *Dukes v. Wal-mart, Inc.*, 509 F.3d 1168, 1176
10 (9th Cir. 2007). However, the Court should certify a class only after a rigorous analysis of
11 the Rule 23 requirements. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 961 (9th Cir. 2005)
12 (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982)). The party seeking
13 class certification bears the burden of showing that each of Rule 23(a)’s requirements and
14 at least one of Rule 23(b)’s requirements has been met. *Dukes*, 509 F.3d at 1176.

15 Rule 23 has two implicit prerequisites that Plaintiff must satisfy for the Court to grant
16 certification. *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 490 (S.D. Ill. 1999); *Singleton v.*
17 *Adick*, 2009 WL 3710717, slip op. at *2 (D. Ariz. Nov. 2, 2009). First, in order to maintain
18 a class action, the class must be adequately defined and clearly ascertainable. *DeBremaecker*
19 *v. Short*, 433 F.2d 733, 734 (5th Cir. 1970); *see also Lozano v. AT&T Wireless Servs., Inc.*,
20 504 F.3d 718, 730 (9th Cir. 2007) (“The district court’s failure to analyze the Rule 23(a)
21 factors in determining whether to grant class certification . . . resulted in its certifying a
22 theory with no definable class.”). The class cannot be overbroad, amorphous or vague, but
23 must be susceptible to a precise definition. *Clay*, 188 F.R.D. at 490. A class must be
24 precisely defined so the Court can determine whom will be bound by the judgment. *See*
25 *McHan v. Grandbouche*, 99 F.R.D. 260, 265 (D. Kan. 1983).

26 Second, the named representative must be a member of the class. *Bailey v. Patterson*,
27 369 U.S. 31, 32–33 (1962). The Ninth Circuit dovetails the class membership prerequisite
28 with the typicality requirement of Rule 23(a). “Typicality requires that the named plaintiffs

1 be members of the class they represent.” *Dukes*, 509 F.3d at 1184.

2 A plaintiff seeking class certification must also prove that his proposed classes and
3 subclasses meet the following four requirements of Rule 23(a):

4 (1) the class is so numerous that joinder of all members is impracticable; (2)
5 there are questions of law and fact common to the class; (3) the claims or
6 defenses of the representative parties are typical of the claims or defenses of
the class; and (4) the representative parties will fairly and adequately protect
the interests of the class.

7 *Dukes*, 509 F.3d at 1176 (quoting FED.R.CIV.P. 23(a)). Finally, a plaintiff must prove that
8 at least one of the following Rule 23(b) requirements is met:

9 (1) the prosecution of separate actions would create a risk of : (a) inconsistent
10 or varying adjudications or (b) individual adjudications dispositive of the
11 interests of other members not a party to those adjudications; (2) the party
12 opposing the class has acted or refused to act on grounds generally applicable
13 to the class; or (3) the questions of law or fact common to the members of the
class predominate over any questions affecting only individual members, and
a class action is superior to other available methods for the fair and efficient
adjudication of the controversy.

14 *Id.* (citing FED.R.CIV.P. 23(b)).

15 **III. Analysis of McDonald’s Motion to Certify a Class**

16 McDonald’s proposed class for certification includes:

17 All individuals employed by Corrections Corporation of America at any time
18 since July 1, 2007, who have been or may be subjected to termination,
discipline, or reprimand, resulting from CCA’s failure to comply with the
ADA.

19 (Doc. # 54-1 at p. 10.)

20 *A. Implicit Prerequisites*

21 1. Adequately Defined and Clearly Ascertainable

22 As an initial matter, the Court does not find that McDonald’s proposed class is
23 adequately defined and clearly ascertainable. As CCA points out, McDonald’s proposed
24 class is “imprecise, overbroad and unascertainable.” (Doc. # 57 at p. 6.) McDonald was a
25 correctional officer at the Florence Correctional Center in Florence, Arizona. However,
26 McDonald’s proposed class certification has no geographical boundaries, and CCA operates
27 more than 60 facilities in 19 states (*id.* at 7). McDonald’s proposed class members each
28 worked in Arizona facilities (Doc. # 62 at 6), but this potential geographic limitation is not

1 contained in the proposed class definition and McDonald relies upon the lack of geographic
2 limitation in his argument in support of sufficient numerosity.

3 The proposed class definition also does not specify whether class members include
4 all CCA employees, or only those employees similarly situated to McDonald in terms of
5 position (correctional officer) and facility (Florence Correctional Center). Again,
6 McDonald's proposed class members do not support such limitations. *See e.g.*, proposed
7 class member, Ms. Ruby Erkinen, who was a computer instructor and mail room employee
8 at an unknown CCA facility prior to her termination (Doc. # 54-1 at p. 3).

9 Finally, McDonald's class definition includes employees who "may be subjected to
10 termination, discipline, or reprimand." This proposed class is not susceptible to a precise
11 definition. *See Clay*, 188 F.R.D. at 490; *McHan v. Grandbouche*, 99 F.R.D. at 265. It is not
12 administratively feasible for the Court to determine whether a particular employee of CCA
13 is a member of the proposed class, because the criteria "may be subjected to" is not objective.
14 Employees who "may be subjected to termination, discipline or reprimand" have not yet
15 suffered an injury. Accordingly, this definition is overly broad, because it includes
16 individuals who are without standing to maintain an action on their own behalf.
17 Nevertheless, even if the Court were to utilize its broad discretionary powers and attempt to
18 redefine the membership of the proposed class, such efforts would be futile because the
19 plaintiffs have not met the requirements of Rule 23.

20 2. Named Representative Falls Within Proposed Class

21 As stated above, the Ninth Circuit dovetails the class membership prerequisite with
22 the typicality requirement of Rule 23(a). *See Dukes*, 509 F.3d at 1184. As an initial
23 observation, the Court notes that McDonald may not, in fact, be a member of his own
24 proposed class, if CCA's allegations are true that McDonald's employment was terminated
25 due to violations of Post Order 28 and CCA's Code of Conduct, and not due to his medical
26 condition or in retaliation for any complaints of discrimination (Doc. # 57 at p. 3). The
27 pending Motion for Summary Judgment purports to resolve this very issue.

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1 B. Numerosity

2 The focus of the numerosity inquiry is whether joinder of all potential plaintiffs would
3 be impracticable. FED.R.CIV.P. 23(a)(1). Numerosity requires examination of the facts of
4 each case and does not impose any absolute limitation. *Gen. Tel. Co. of the Nw., Inc. v.*
5 *Equal Employment Opportunity Comm’n*, 446 U.S. 318, 330 (1980). While no absolute
6 limits exist, the Supreme Court has suggested that a class of fifteen members is too small to
7 meet the numerosity requirement. *Harik v. Cal. Teachers Ass’n*, 326 F.3d 1042, 1051 (9th
8 Cir. 2003) (citing *Gen. Tel.*, 446 U.S. at 330).

9 McDonald argues that the proposed class meets the numerosity requirement, because
10 joinder of each potential class member’s claim would produce an inefficient and overly
11 burdensome vehicle for litigation as each claim of the currently identified class members is
12 at a different stage of litigation. (Doc. # 54-1 p. 11.) McDonald’s motion describes four
13 potential class members, including McDonald, and proposes that by “simple mathematical
14 extrapolation,” 0.2% of CCA’s current employees fall within McDonald’s proposed class
15 definition.⁴ (Doc. # 62 at p. 9.) CCA responds that McDonald’s proposed class is not
16 sufficiently numerous to satisfy the numerosity requirement.

17 The Court agrees with CCA. McDonald has identified “at least three additional . . .
18 and perhaps five other Arizona CCA employees” as members of the proposed class. (Doc.
19 # 54-1 at p.2.) McDonald’s mathematical extrapolation that 0.2% of all employees of CCA
20 in all geographic regions fit within the proposed class definition is insufficient to establish
21 numerosity. *See Celano v. Marriot Inter., Inc.*, 242 F.R.D. 544, 549 (N.D. Cal. 2007)
22 (“Beyond the speculative data, plaintiffs can only point to a handful of individuals who
23 would be class members.”). The Court does not expect or require McDonald to show the
24 number of potential class members with certainty; however, the Court does expect that any
25 common sense inferences (or mathematical extrapolations) that McDonald urges the Court
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27 ⁴ McDonald requests the Court order additional discovery to permit McDonald to
28 discover additional class action plaintiffs. The Court denies this request.

1 to make are based on something other than rank speculation untethered to real facts. *See id.*
2 at 550.

3 Finally, McDonald has not even provided evidence that his three proposed class
4 members have been polled and confirmed their interest in joining the class. As CCA points
5 out, at least one of these proposed class members is currently represented by other counsel
6 and may not even consent to joining a class action (Doc. # 57 at p. 9 n.6). Accordingly, it
7 would not be impracticable to join any interested proposed class members in suit.

8 *C. Commonality*

9 Rule 23(a)(2) requires that “there are questions of law or fact common to the class.”
10 FED.R.CIV.P. 23(a)(2). Commonality focuses on the relationship of common facts and legal
11 issues among class members. *Dukes*, 509 F.3d at 1177 (citing 1 HERBERT B. NEWBERG &
12 ALBA CONTE, *NEWBERG ON CLASS ACTIONS* § 3:10 at 271 (4th ed. 2002)). The Ninth Circuit
13 has noted:

14 Rule 23(a)(2) has been construed permissively. All questions of fact and law
15 need not be common to satisfy the rule. The existence of shared legal issues
16 with divergent factual predicates is sufficient, as is a common core of salient
17 facts coupled with disparate legal remedies within the class.

18 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). The commonality test is
19 qualitative rather than quantitative—one significant issue common to the class may be
20 sufficient to warrant certification. *Dukes*, 509 F.3d at 1177 (citing *Savino v. Computer*
Credit, Inc., 173 F.R.D. 346, 352 (E.D.N.Y. 1997), *aff’d*, 164 F.3d 81 (2d Cir. 1998)).

21 McDonald argues that in each proposed case, CCA was aware of the employee’s
22 individual condition and that the employees were entitled to accommodation under the ADA,
23 but CCA failed to comply with the ADA and terminated the employees. The Court finds this
24 satisfies the commonality requirement of Rule 23(a)(2), because McDonald has proposed one
25 significant issue common to the class—whether CCA’s alleged failure to comply with the
26 ADA resulted in adverse action taken against class members.

27 *D. Typicality*

28 Rule 23(a)(3) requires that “the claims or defenses of the representative parties be

1 typical of the claims or defenses of the class.” FED.R.CIV.P. 23(a)(3). The Ninth Circuit has
2 stated that “[u]nder the rule’s permissive standards, representative claims are ‘typical’ if they
3 are reasonably coextensive with those of absent class members; they need not be
4 substantially identical.” *Hanlon*, 150 F.3d at 1020; *see also Dukes*, 509 F.3d at 1184. Some
5 degree of individuality is to be expected in all cases, but that specificity does not necessarily
6 defeat typicality. *See Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). The Court
7 must consider whether the injury allegedly suffered by the named class members and the rest
8 of the class resulted from the same allegedly discriminatory practice. *Dukes*, 509 F.3d at
9 1184.

10 The Court finds that McDonald has failed to satisfy the typicality requirement. As
11 CCA points out, class certification in this instance is inappropriate because McDonald is
12 “subject to unique defenses which threaten to become the focus of the litigation.” *Hanon v.*
13 *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citing several cases for this
14 proposition). CCA argues that McDonald cannot assert a claim under the ADA on his own
15 behalf, and, therefore, cannot represent the class in an action alleging violations of the ADA.
16 It is CCA’s position in this matter that McDonald violated CCA’s policies and procedures
17 and this violation resulted in McDonald’s termination, and that McDonald’s termination is
18 unrelated to any ADA violations. CCA has also presented a defense to McDonald’s claim
19 for post-termination defamation. These issues certainly undermine the typicality requirement
20 in Rule 23(a)(3). Further, injuries allegedly sustained by the proposed four class members
21 are not typical among themselves. Not all of the proposed class members held the same
22 position, alleged the same disability, and suffered the same allegedly discriminatory conduct.
23 Accordingly, the typicality required to sustain a class action is absent.

24 *E. Adequacy*

25 Rule 23(a)(4) permits certification of a class action only if “the representative parties
26 will fairly and adequately protect the interests of the class.” FED.R.CIV.P. 23(a)(4). This
27 factor requires: (1) that the proposed representative class members do not have conflicts of
28 interest with the proposed class; and (2) that the proposed representative class members are

1 represented by qualified and competent counsel. *See Dukes*, 509 F.3d at 1185; *Hanlon*, 150
2 F.3d at 1020. McDonald states that he is not aware of any conflicts of interest between
3 himself, the other class members and the potential class members, and that McDonald’s
4 counsel is sufficiently prepared and adequately experienced. (Doc. # 54-1 at p. 13; Doc. #
5 62 at p. 12.)

6 The Court can find no discernable conflicts of interest that exist between the proposed
7 class representatives and the absent class members. However, with respect to the second
8 factor, McDonald’s counsel has offered no evidence in support of her qualifications. More
9 importantly, McDonald’s counsel does not represent the three other proposed class members,
10 and counsel has not offered any evidence to indicate that she has contacted these proposed
11 class members about joining a class action. Accordingly, McDonald and his counsel have
12 failed to demonstrate that they can adequately represent the interests of the class.

13 The proposed class does not satisfy the requirements of Rule 23(a), particularly the
14 “numerosity” requirement of Rule 23(a)(1), the “typicality” requirement of Rule 23(a)(3),
15 and the “adequacy” requirement of Rule 23(a)(4). Additionally, the Court has concluded that
16 the proposed class does not satisfy the implicit prerequisites that the class must be adequately
17 defined and clearly ascertainable, and that the named representative, McDonald, falls within
18 the proposed class.

19 *F. Rule 23(b) Requirements*

20 Because the Rule 23(a) requirements have not been satisfied, the Court refrains from
21 addressing the specific requirements of Rule 23(b). The Court notes, however, that CCA
22 identifies a number of issues that might cause the Court to disagree with McDonald’s
23 argument that the common questions “predominate over any questions affecting only
24 individual members, and that a class action is superior to other available methods for fairly
25 and efficiently adjudicating the controversy.” FED.R.CIV.P. 23(b)(3). CCA identifies
26 affirmative defenses that would require individualized inquiries into each class member’s
27 claims. Also, it is not clear that the class action procedure is “superior” to individual
28 litigation due to the case-by-case inquiries required to support each proposed member’s place

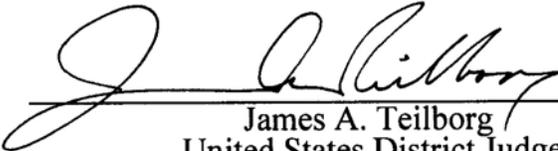
1 in the class action.

2 Further, the Court is not convinced that prosecuting separate actions by individual
3 class members would create a risk of inconsistent adjudications establishing incompatible
4 standards of conduct for the party opposing the class. FED.R.CIV.P. 23(b)(1)(A). The Ninth
5 Circuit has held that certification under Rule 23(b)(1)(A) is not appropriate in an action for
6 damages. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1193 (9th Cir. 2001).
7 McDonald seeks only monetary damages; therefore, based on precedent, class certification
8 under Rule 23(b)(1)(A) is inappropriate.

9 For the foregoing reasons, McDonald's motion to certify a class is denied.
10 Accordingly,

11 **IT IS ORDERED** that Plaintiff Robert McDonald's Proposed First Amended
12 Combined Motion to Request a Hearing / Petition for Class Action Certification / Motion to
13 Stay Proceedings (Doc. # 54) is DENIED in its entirety.

14 DATED this 4th day of November, 2010.

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18 James A. Teilborg
19 United States District Judge
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