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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Frank Solander,

10 Plaintiff,

11 v.

12 South Ponderosa Stables Incorporated,

13 Defendant.
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No. CV-14-02081-PHX-DGC

ORDER

15 On September 19, 2014, Plaintiff Frank Solander brought suit against Defendant
16 South Ponderosa Stables alleging violations of the Americans with Disabilities Act
17 (“ADA”), the Arizona Civil Rights Act (“ACRA”), and A.R.S. § 23-1501. Doc. 1.
18 Defendant seeks summary judgment, arguing that the employee numerosity requirement
19 under the ADA and the ACRA is not satisfied and that Plaintiff’s claim under A.R.S.
20 § 23-1501 is time-barred. Doc. 19. The motion is fully briefed. The Court will grant
21 Defendant’s motion.¹

22 **I. Background.**

23 South Ponderosa Stables (“Ponderosa”) hired Frank Solander as a stable worker
24 on June 11, 2012. Doc. 1, ¶ 14. Ponderosa paid Solander a salary of \$600 per month and
25 provided him with room and board. *Id.*, ¶ 15. Solander claims that he began to
26 experience serious health issues stemming from sinusitis in August 2012. *Id.*, ¶¶ 17-20.

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28 ¹ The request for oral argument is denied because the issues have been fully
briefed and oral argument will not aid the Court’s decision. *See* Fed. R. Civ. P. 78(b);
Partridge v. Reich, 141 F.3d 920, 926 (9th Cir. 1998).

1 He claims that he “requested a reasonable accommodation of time off from his work
2 duties due to his declining health and vision,” but that his employment was terminated on
3 November 24, 2012, approximately one week after submitting the request. *Id.*, ¶ 31, 32.
4 These facts, as well as the source of Solander’s health problems, are disputed by
5 Ponderosa. Doc. 15, ¶¶ 18-21, 32, 33. Solander claims that his employment was
6 terminated in violation of the ADA, the ACRA, and A.R.S. § 23-1501.

7 **II. Legal Standard.**

8 **A. Motion for Summary Judgment.**

9 A party seeking summary judgment “bears the initial responsibility of informing
10 the district court of the basis for its motion, and identifying those portions of [the record]
11 which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex*
12 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Summary judgment is appropriate if the
13 evidence, viewed in the light most favorable to the non-moving party, shows “that there
14 is no genuine dispute as to any material fact and the movant is entitled to judgment as a
15 matter of law.” Fed. R. Civ. P. 56(a). Summary judgment is also appropriate against a
16 party who “fails to make a showing sufficient to establish the existence of an element
17 essential to that party’s case, and on which that party will bear the burden of proof at
18 trial.” *Celotex*, 477 U.S. at 322. “Only disputes over facts that might affect the outcome
19 of the suit . . . [will] preclude the entry of summary judgment.” *Anderson v. Liberty*
20 *Lobby, Inc.*, 477 U.S. 242, 248 (1986). The disputed evidence must be “such that a
21 reasonable jury could return a verdict for the nonmoving party.” *Id.*

22 **III. Analysis.**

23 **A. Employee Numerosity Requirement under the ADA and the ACRA.**

24 The first six counts in Solander’s complaint are brought under the ADA and the
25 ACRA, and therefore rely on Ponderosa qualifying as an employer under the employee
26 numerosity requirement of the ADA and the ACRA. *See* Doc. 1. For purposes of these
27 statutes, an employer “means a person engaged in an industry affecting commerce who
28 has 15 or more employees for each working day in each of 20 or more calendar weeks in

1 the current or preceding calendar year” 42 U.S.C. § 12111(5)(A); *see* A.R.S. § 41-
2 1461(6)(a). Thus, to successfully bring his claim regarding the termination of his
3 employment in 2012, Solander must show that Ponderosa employed 15 or more
4 employees for 20 or more weeks in either 2011 or 2012.²

5 Solander alleges that Ponderosa had between six and nine paid workers during his
6 employment. Doc. 29-6, ¶ 8. Ponderosa has provided payroll records for May 1, 2011
7 through the end of 2012 showing that a total of 13 workers were paid during that period.
8 Doc. 20 at 4-9.³ Solander objects to the admission of the payroll records – even though
9 they show more paid employees than he asserts – arguing that they are irrelevant and are
10 not supported by personal knowledge. Doc. 28 at 12. Both objections are unfounded.
11 The payroll records are plainly relevant to the number of employees at Ponderosa. Fed.
12 R. Ev. 401. And the affiant, Beverly Hall, is the secretary of Ponderosa and attests that
13 the payroll records are valid records of Ponderosa. Doc. 20 at 4-5.

14 Despite the fact that Solander and the payroll records show that there were fewer
15 than 15 paid employees at Ponderosa in 2011 and 2012, Solander argues, for two reasons,
16 that there is a genuine dispute of material fact as to whether Ponderosa employed more
17 than 15 employees during these years: (1) Ponderosa used unpaid volunteers that should
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19 ² The Supreme Court has held that it is the plaintiff’s burden to establish that his
20 employer fulfills the employee numerosity requirement. *See, e.g., Arbaugh v. Y&H*
21 *Corp.*, 546 U.S. 500, 516 (2006) (holding that “the threshold number of employees for
22 application of Title VII is an element of plaintiff’s claim for relief, not a jurisdictional
23 issue”). The definition of employee and treatment of the numerosity requirement is
24 uniform under statutory regimes such as Title VII, the ADA, and the ADEA. *See*
25 *Fichman v. Media Center*, 512 F.3d 1157, 1161 (9th Cir. 2008) (finding that “[m]ost
26 courts consider the definition of ‘employee’ to be uniform under federal statutes where it
27 is not specifically defined, including the ADEA and ADA”); *Pawlowski v. Scherbenske*,
28 891 F. Supp. 2d 1077, 1082-83 (D. S.D. 2012) (relying on treatment of Title VII claims
in *Arbaugh* in its analysis of the employee numerosity requirement under the ADA); *see*
also *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1538 (2d Cir. 1996) (referencing
analogous definitions of “employee” in the ADEA, Title VII and FLSA).

³ Ponderosa claims to have submitted payroll records for the period beginning
January 1, 2011 and ending December 31, 2013, but the earliest record is dated May 1,
2011 and the latest record is dated January 12, 2013. The Court finds that this does not
affect the sufficiency of the record, as there are less than 20 weeks between January 1 and
May 1, 2011, and in no week between May 1 and December 31, 2011 did Ponderosa
make payroll to 15 or more employees.

1 be counted as employees, and (2) Ponderosa forms an integrated enterprise with
2 Sombrero Ranches and Colorado Horses, and the employee count should include the paid
3 workers at these entities as well. Doc. 28 at 13-19, 20-21. The Court will address each
4 argument in turn.

5 **1. Volunteers.**

6 Solander claims that during his employment Ponderosa used between eight and ten
7 unpaid volunteers each day. Doc. 29-6, ¶ 13. Solander argues that these volunteers
8 should be counted as employees in addition to the six to nine paid workers.

9 As the Supreme Court has explained, the key factor in determining whether an
10 individual is acting as an employee is whether his or her relationship with the alleged
11 employer mirrors the “conventional master-servant relationship as understood by
12 common-law agency doctrine.” *Clackamas Gastroenterology Associates, P.C. v. Wells*,
13 538 U.S. 440, 445 (2003) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318,
14 322-323 (1992)). “At common law the relevant factors defining the master-servant
15 relationship focus on the master’s control over the servant.” *Id.* at 448. The Ninth
16 Circuit has adopted the six-factor test used by the Supreme Court in *Clackamas* to
17 determine whether a non-traditional worker is an employee:

- 18 1) Whether the organization can hire or fire the individual or set the rules
19 and regulations of the individual’s work;
- 20 2) Whether and, if so, to what extent the organization supervises the
21 individual’s work;
- 22 3) Whether the individual reports to someone higher in the organization;
- 23 4) Whether and, if so, to what extent the individual is able to influence the
24 organization;
- 25 5) Whether the parties intended that the individual be an employee, as
26 expressed in written agreements or contracts;
- 27 6) Whether the individual shares in the profits, losses, and liabilities of the
28 organization.

27 *Fichman v. Media Center*, 512 F.3d 1157, 1160 (9th Cir. 2008) (citing *Clackamas*, 538
28 U.S. at 449-50). These factors are not exhaustive, and no single factor is decisive. *Id.*

1 The test is useful for determining whether an individual that considers himself to be a
2 volunteer qualifies as an employee. *See id.* at 1161.

3 Ponderosa's relationship with its volunteers does not reflect a conventional
4 master-servant relationship and is not indicative of common law agency. Beverly Hall,
5 who became manager of Ponderosa in August 2011, explained that volunteers have no
6 formal training and receive no formal instructions. Doc. 29-1 at 20. Volunteers "just
7 come and ride horses and do a guide ride now and again if they want to and such." *Id.* at
8 10. Hall stated that "there's no hiring and firing or anything [of volunteers]. They just
9 kind of disappear. . . . [Ponderosa doesn't] keep track of the volunteers." *Id.* at 12, 17.
10 She explained that Ponderosa has no control over the volunteers; she cannot tell them to
11 do anything, but can only "ask them, gee, do you want to take this ride out, do you want
12 to go on this ride?" *Id.* at 22. While at the corral, volunteers may pet the horses and
13 occasionally saddle them, but they do not feed or groom them. *Id.* While at the stables,
14 volunteers cannot take in money or recruit customers or other volunteers. *Id.* Volunteers
15 are required to sign an agreement to volunteer and are required to exercise common
16 sense. *Id.* at 20. If a volunteer were to violate certain standards, such as insulting a
17 customer, they would be told not to return. *Id.* Because volunteers can go out on guide
18 rides with guests, they can accept tips. *Id.* at 13.

19 Jacob Woodward also provided relevant deposition testimony. Doc. 29-2.
20 Woodward is a guide and is occasionally called in to Ponderosa to work for a half or full
21 day to lead trail rides. *Id.* at 2. He explained that volunteers help saddle horses and help
22 around the stables. *Id.* at 4. He stated that Ponderosa's office manager directs the
23 volunteers, explaining that the volunteers can be directed to "sweep the floor or scoop up
24 the [horse] poop." *Id.* at 5. "They help out with everything, just like everybody else. . . .
25 You're instructing them pretty much how to do that so they can do it on their own. You
26 know, it's a learning experience for them." *Id.* Woodward indicates that volunteers
27 show up irregularly. *Id.* "They come one weekend, they don't come the next two
28 weekends." *Id.* Finally, Woodward clarifies that volunteers and independent contractors,

1 unlike full-time employees, are not required to shovel horse poop, but do so only to
2 voluntarily help out. *Id.* at 8.

3 Solander’s affidavit does not differ substantially. He avows that volunteers “were
4 not paid by Ponderosa, but were eligible for tips from customers”; they “worked at
5 Ponderosa in hopes of securing a job or being allowed to take customers on trail rides so
6 they could get tips”; they tended to the riding stables and horses, saddled horses for
7 riding, and were allowed to lead tours; and their duties were directed and controlled by
8 Hall and the guides. Doc. 29-6, ¶¶ 14-17.

9 Considering the six factors identified in *Clackamas* and the undisputed facts in this
10 case, the Court concludes as a matter of law that the volunteers at Ponderosa are not
11 employees. It is undisputed that Ponderosa does not formally hire or fire volunteers; they
12 are not governed by any formal rules or regulations; they do not influence the operation
13 of Ponderosa; volunteers and Ponderosa do not intend that the volunteers be employees
14 as expressed in written agreements or contracts; and the volunteers do not share in the
15 profits, losses, and liabilities of the organization. *Fichman*, 512 F.3d at 1160. Indeed, the
16 volunteers are not paid at all by Ponderosa. The only factors favoring a common-law
17 employee relationship are that Hall and the guides supervise the work of the volunteers
18 and the volunteers presumably report to them. *Id.* But these facts would be present in
19 any purely volunteer labor relationship, and the Court does not find them sufficient to
20 overcome the balance of the undisputed evidence.

21 The other facts Solander asserts in his affidavit – that volunteers receive tips from
22 customers, hope to secure jobs at Ponderosa, and tend to horses and stables, saddle
23 horses, and lead rides (Doc. 29-6, ¶¶ 14-16) – do not alter this conclusion. These
24 additional facts are also entirely consistent with a volunteer relationship.

25 Because Solander asserts that Ponderosa employed only six to nine employees
26 while he was there, and volunteers do not count as employees, Ponderosa does not
27 qualify as an employer under the ADA or ACRA unless it is an integrated enterprise.

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1 **2. Integrated Enterprises.**

2 Solander also argues that Ponderosa forms an integrated enterprise with Sombrero
3 Ranches and Colorado Horses, and that the companies jointly employ 15 or more
4 individuals. Doc. 28 at 20. The Ninth Circuit employs a four-factor test to determine
5 whether two or more entities operate as an integrated enterprise: “(1) interrelation of
6 operations, (2) common management, (3) centralized control of labor relations, and (4)
7 common ownership or financial control.” *Kang v. U. Lim America, Inc.*, 296 F.3d 810,
8 815 (9th Cir. 2002).⁴ Solander has failed to present evidence that this four-part test is
9 satisfied.

10 The first factor, interrelation of operations, weighs against finding that the entities
11 are integrated. In *Kang*, this factor weighed in favor of an integrated enterprise because
12 the two companies shared a single factory, the employees of both companies worked in
13 the factory, and one company kept the other’s accounts, issued its paychecks, and paid its
14 bills. *Id.* There appears to be no similar interrelation of operations here.

15 With respect to Sombrero Ranches, Beverly Hall avows that Sombrero Ranches is
16 located in Colorado and operated separately from Ponderosa. Doc. 29-1 at 4. Solander
17 asserts in his statement of facts that Ponderosa and Sombrero Ranches shared employees
18 in 2011 and 2012 (Doc. 30, ¶ 31), but his citations to the record (Hall Deposition pages
19 13 and 67 (Doc. 29-1 at 4, 18)) do not support that assertion. Indeed, Hall testified that
20 the two entities *did not* share employees in 2011 and that she was unsure whether any
21 2012 employee had in fact worked for Sombrero Ranches. Doc. 29-1 at 4-5. Solander
22 also asserts that Ponderosa and Sombrero Ranches “shared equipment needed for
23 horseback riding” (Doc. 30, ¶ 38), but he provides no factual support for this assertion
24 (Doc. 29-6 ¶ 21). He does not identify the equipment that was shared, when it was

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26 ⁴ The integrated enterprise test was first used in labor relations cases, but its use
27 has been expanded to the civil rights context. *See Hukill v. Auto Car, Inc.*, 192 F.3d 437,
28 442 (4th Cir. 1999). It has been directly used in ADA cases to determine whether an
entity can be held liable for ADA claims. *See Myers v. Scottsdale Bariatric Ctr.*, No.
CV-05-504-PHX-FJM, 2006 WL 1882766, at *1 (D. Ariz. July 6, 2006); *Praseuth v.*
Newell-Rubbermaid, Inc., 219 F. Supp. 2d 1157, 1181 (D. Kan. 2002); *EEOC v.*
Chemtech Int’l. Corp., 890 F. Supp. 623, 625 (S.D. Tex. 1995).

1 shared, or whether it involved any payment.

2 With respect to Colorado Horses, Solander asserts that Ponderosa leased horses
3 from Colorado Horses “without consideration.” Doc. 28 at 20-21. Solander cites to
4 Beverly Hall’s deposition testimony that Ponderosa does lease horses from Colorado
5 Horses from time to time, but she does not know how many were leased in 2011-2012.
6 Doc. 30, ¶ 32; Doc. 29-1 at 23. He also cites to informal document production requests
7 in which Ponderosa states that the leases were verbal. Doc. 30, ¶ 32; Doc. 29-7 at 2.
8 Solander asserts that Ponderosa has no proof that it paid for the leased horses (Doc. 30,
9 ¶ 33), but he cites only to an informal document request he made to Ponderosa which
10 contains no response (Doc. 29-8 at 1).

11 The facts and evidence provided by Solander do not come close to the kind of
12 evidence found sufficient in *Kang*. He provides no evidence of interrelated operations.
13 *See Hutchinson v. American Family Mut. Ins. Co.*, No. CV-11-00785-TUC-CKJ, 2013
14 WL 1340051, at *11 (D. Ariz. Apr. 1, 2013) (finding no interrelation of operations when
15 there was no evidence of shared facilities or bank accounts and no indication that
16 companies paid each other’s bills and paychecks).

17 The second factor, common management, also weighs against finding an
18 integrated enterprise. Solander provides no evidence of common management. His
19 statement of facts asserts only that Hall managed Ponderosa after August 19, 2011, that
20 Katherine Lloyd and Susan Capriotti managed it before then, and that Ponderosa,
21 Sombrero Ranches, and Colorado Horses are owned by Rex Walker. Doc. 28 at 21;
22 Doc. 30, ¶¶ 4, 6, 8, 29, 30. He provides no evidence that Hall, Lloyd, or Capriotti also
23 managed Sombrero Ranches or Colorado Horses, or that Rex Walker manages any of the
24 entities. Solander’s evidence, even if taken as true, is insufficient to establish common
25 management of day-to-day operations. *See Hukill*, 192 F.3d at 443 (finding no common
26 management where executives did not exercise control over operations).

27 The third factor, centralized control of labor relations, is often held to be the most
28 important factor. *See Kang*, 296 F.3d at 815. “To satisfy the control prong, a parent must

1 control the day-to-day employment decisions of the subsidiary.” *Frank v. U.S. West,*
2 *Inc.*, 3 F.3d 1357, 1363 (10th Cir. 1991). Solander provides no evidence that Ponderosa,
3 Sombbrero Ranches, or Colorado Horses were under joint control for hiring, firing, or
4 supervising employees. Solander states that Hall “had the authority to hire, fire, and
5 direct [his] duties of employment” at Ponderosa (Doc. 29-6, ¶ 5), but there is no evidence
6 that she controlled the hiring or firing of any employee of Sombbrero Ranches or Colorado
7 Horses. Solander also cites to his assertion that Ponderosa and Sombbrero Ranches shared
8 common employees in 2011 and 2012 (Doc. 28 at 21; Doc. 30, ¶ 31), but, as noted above,
9 his citation to Hall’s deposition (Doc. 30, ¶ 31) does not support this assertion. Hall
10 testified that the two entities did not share employees in 2011 and that she was unsure
11 whether any 2012 employee of Ponderosa had in fact worked for Sombbrero Ranches.
12 Doc. 29-1 at 4-5. Solander has presented no evidence that the entities had centralized
13 control of labor relations. *See Hutchinson*, 2013 WL 1340051, at *11 (holding that the
14 most critical factor, centralized control of labor relations, did not weigh in favor of
15 finding an integrated enterprise when a parent company did not control its subsidiary’s
16 decisions to hire or fire the employee bringing discrimination claims).

17 As to the final factor, common ownership or financial control, there is evidence
18 that Ponderosa, Sombbrero Ranches, and Colorado Horses are owned by Rex Walker.
19 Doc. 29-1 at 3-4. But this fact alone does not show that the entities are integrated. *Frank*
20 *v. U.S. West, Inc.*, 3 F.3d 1357, 1364 (10th Cir. 1993) (holding that common ownership
21 alone is not sufficient to “establish parent liability”).

22 In sum, Solander has failed to present evidence from which a reasonable jury
23 could find that Ponderosa, Sombbrero Ranches, and Colorado Horses form an integrated
24 enterprise. Summary judgment is therefore appropriate. *Celotex*, 477 U.S. at 322. The
25 employees of Sombbrero Ranches and Colorado Horses may not be counted towards the
26 employee numerosity requirement, and Ponderosa has too few employees to qualify as an
27 employer for purposes of claims brought under the ADA and the ACRA.⁵

28 ⁵ Ponderosa has submitted new evidence in its reply. Doc. 35. The Court will not

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B. Statute of Limitations.

Solander's employment at Ponderosa was terminated on November 24, 2012. Doc. 1, ¶ 32. His complaint was filed almost two years later on September 19, 2014. Ponderosa argues that Solander's claim under A.R.S. § 23-1501 is barred by the one-year limitation period in A.R.S. § 12-541(4). Solander does not address this issue in his response. The Court finds that Solander's claim for wrongful termination under A.R.S. § 23-1501 is barred by the one-year statute of limitations.

IT IS ORDERED:

1. South Ponderosa Stables, Inc.'s motion for summary judgment (Doc. 19) is **granted.**
2. The clerk is directed to enter judgment and terminate this action.

Dated this 9th day of July, 2015.



David G. Campbell
United States District Judge

consider this evidence as Solander has not had an opportunity to respond. *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007).