



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Office of Federal Operations**  
**P.O. Box 77960**  
**Washington, DC 20013**

[REDACTED]  
Chasity C.,<sup>1</sup>  
Complainant,

v.

Dr. Mark T. Esper,  
Secretary,  
Department of the Army,  
Agency.

Appeal No. 2019000440

Agency No. ARDETRICK18JUN02500

**DECISION**

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from an Agency decision, dated August 7, 2018, pertaining to her complaint of unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. The Commission accepts the appeal in accordance with 29 C.F.R. § 1614.405.

**BACKGROUND**

In August 2017, Complainant accepted a position with DS Federal Incorporated (hereinafter “DSF Inc.”), a company that contracted to provide services for the Agency. Specifically, Complainant was the Project Manager (Pathology) for the U.S. Army Medical Research Institute of Infectious Diseases (USAMRIID) in Fort Detrick, Maryland.

On May 31, 2018, Complainant received a telephone call from the DSF Inc. Contract Manager,<sup>2</sup> asking her to meet outside the facility. During the meeting, Complainant was notified that she was terminated from her position due to “conflicts with government personnel.” According to Complainant, when she asked about the nature of the conflicts, the DSF Inc.

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<sup>1</sup> This case has been randomly assigned a pseudonym which will replace Complainant’s name when the decision is published to non-parties and the Commission’s website.

<sup>2</sup> This individual is also referred to as DSF Inc. “Task Manager”. For clarification purposes, we shall only use the title “DSF Inc. Contract Manager”.

Contract Manager stated that she did not know the details. Moreover, when asked if Pathology Division personnel could bring about her termination, Complainant noted that the DSF Inc. Contract Manager stated that Colonel [W], as Commander, has “quite an influence”. Days later, the reason for Complainant’s termination was described as a “descopeing the position.”

Believing that Agency officials brought about her termination due to her race (Middle Eastern), national origin (Iranian), and religion (Muslim), Complainant contacted an EEO Counselor on June 26, 2018. Informal efforts to resolve Complainant’s concerns were unsuccessful. Subsequently, on July 25, 2018, Complainant filed a formal complaint alleging that her termination from the Project Manager (Pathology) position for USAMRIID was discriminatory.

In its August 7, 2018 decision, the Agency dismissed the formal complaint on the grounds that Complainant was an independent contractor, and not an Agency employee.

Alternatively, the Agency dismissed the formal complaint for untimely Counselor contact. The Agency reasoned that since Complainant alleged that, at the end of April 2018, she learned that Colonel [W] communicated with Colonel [G] directing him to have her terminated, her contact should have occurred within forty-five days of April 30, 2018. The Agency found that, to be timely, the initial EEO Counselor contact should have been made by June 14, 2018.

Complainant filed the instant appeal.

### ANALYSIS AND FINDINGS

#### *Untimely Counselor Contact*

EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination should be brought to the attention of the Equal Employment Opportunity Counselor within forty-five (45) days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within forty-five (45) days of the effective date of the action.

As noted above, the Agency reasoned that Complainant should have contacted an EEO Counselor within forty-five days of learning that Agency officials had discussed her termination in late April 2018. The Commission disagrees. Complainant has alleged her termination from the Project Manager (Pathology) position was discriminatory. Timely contact would be within forty-five days of the effective date of that personnel action. The record reflects that Complainant’s June 26, 2018 contact was well within the time limit following her termination on May 31, 2018. Therefore, we find the Agency’s dismissal of the formal complaint for untimely EEO Counselor contact was improper.

#### *Employee or Contractor*

Next, we consider whether the Agency properly dismissed the instant formal complaint for failure to state a claim on the basis that Complainant was not its employee.

EEOC Regulation 29 C.F.R. §1614.103(a) provides that complaints of employment discrimination shall be processed in accordance with Part 1614 of the EEOC regulations. EEOC Regulation 29 C.F.R. § 1614.103(c) provides that within the covered departments, agencies and units, Part 1614 applies to all employees and applicants for employment.

In Serita B. v. Department of the Army, EEOC Appeal No. 0120150846 (November 10, 2016), the Commission reaffirmed its long-standing position on “joint employers” and noted it is found in numerous sources. See, e.g., EEOC Compliance Manual Section 2, “Threshold Issues,” Section 2-III(B)(1)(a)(iii)(b) (May 12, 2000) (Compliance Manual)<sup>3</sup>; EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (Dec. 3, 1997) (Enforcement Guidance), “Coverage Issues,” Question 2; Ma v. Dep’t of Health and Human Servs., EEOC Appeal Nos. 01962389 & 01962390 (May 29, 1998). We reiterate the analysis set forth in those decisions and guidance documents in this decision.

Agencies often conclude that an individual is not an employee based solely on the fact that the individual performs work pursuant to a contract between the federal government and an outside organization and the outside organization, not the federal government, controls the pay and benefits of that individual. See, e.g., Helen G. v. Dep’t of the Army, EEOC Appeal No. 0120150262 (Feb. 11, 2016); Nicki B. v. Dep’t of Educ., EEOC Appeal No. 0120151697 (Feb. 9, 2016). These elements are just two of the factors relevant to joint employment under the Commission’s long-standing position and it is not at all surprising that they would be present when an individual working under a federal contract for a federal agency raises a complaint of discrimination.

The term “joint employer” refers to two or more employers that each exercise sufficient control of an individual to qualify as the worker’s employer. Compliance Manual, Section 2-III(B)(1)(a)(iii)(b). To determine whether the Agency has the right to exercise sufficient control, EEOC considers factors derived from common law principles of agency. See Enforcement Guidance, “Coverage Issues,” at Question 2. EEOC considers, *inter alia*, the Agency’s right to control when, where, and how the worker performs the job; the right to assign additional projects to the worker; whether the work is performed on Agency premises; whether the Agency provides the tools, material, and equipment to perform the job; the duration of the relationship between the Agency and the worker whether the Agency controls the worker’s schedule; and whether the Agency can discharge the worker. EEOC Compliance Manual, Section 2-III(A)(1) (citing Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-24 (1992)); EEOC v. Skanska USA Bldg., Inc., 550 F.App’x 253, 256 (6<sup>th</sup> Cir. 2013) (“Entities are joint employers if they ‘share or co-determine those matters governing essential terms and conditions of employment’”) (quoting Carrier Corp. v. NLRB, 768 F.2d 778, 781 (6<sup>th</sup> Cir. 1985); see also Ma, EEOC Appeal Nos. 01962389 & 01962390.

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<sup>3</sup> The EEOC Compliance Manual and other guidance documents, as well as federal-sector appellate decisions, are available online at [www.eeoc.gov](http://www.eeoc.gov).

The language of the contract between the agency and the staffing firm is not dispositive as to whether a joint-employment situation exists. In determining a worker's status, EEOC looks to what actually occurs in the workplace, even if it contradicts the language in the contract between the staffing firm and the agency. Baker v. Dep't of the Army, EEOC Appeal No. 01A45313 (Mar. 16, 2006) (while contract between staffing firm and agency provided that contract personnel were employees of staffing firm under its administrative supervision and control, agency actually retained supervisory authority over the contract workers).

On the factor of the right to control when, where, and how the worker performs the job and to assign additional projects, complete agency control is not required. Rather, the control may be partial or joint and still point to joint employment. Shorter v. Dep't of Homeland Sec., EEOC Appeal No. 0120131148 (June 11, 2013) (where both staffing firm and agency made assignments, this pointed to joint employment); Complainant v. Dep't of the Navy, EEOC Appeal No. 0120143162 (May 20, 2015), request for reconsideration denied, EEOC Request No. 0520150430 (Mar. 11, 2016) (where staffing firm wrote and issued complainant's appraisal with input from agency, this pointed toward joint employment). Likewise, where both the agency and staffing firm provided tools, material, and equipment to perform the job, this pointed to joint employment. Elkin v. Dep't of the Army, EEOC Appeal No. 0120122211, 2012 WL 5818075 (Nov. 8, 2012). Similarly, where a staffing firm terminates a worker after an agency communicates it no longer wants the worker's services, this supports a finding that the agency has joint or de facto power to discharge the worker. See, e.g., Complainants v. Dep't of Justice, EEOC Appeal Nos. 0120141963 & 0120141762 (Jan. 28, 2015); see also Skanska USA Bldg., Inc., 550 Fed. App'x at 254, 256 (where defendant removed staffing firm's workers from job site without challenge from staffing firm, and after such removals staffing firm generally fired worker, this pointed to joint employment); Butler v. Drive Auto. Indus. of America, Inc., 793 F.3d 404, 414-15 (4<sup>th</sup> Cir. 2015). The EEOC considers an entity's right to control the terms and conditions of employment, whether or not it exercises that right, as relevant to joint employer status. Enforcement Guidance, "Coverage Issues," at Question 2, Example 5 (where an entity reserves the right to direct the means and manner of an individual's work, but does not generally exercise that right, the entity may still be found to be a joint employer).

In assessing the right to control, EEOC does not consider any one factor to be decisive and emphasizes that it is not necessary to satisfy a majority of the factors. In particular, the fact that an individual performs work pursuant to a contract between the federal government and an outside organization and is paid and provided with benefits by that organization, on its own, is not enough to show that joint employment does not exist. Rather, the analysis is holistic; all the circumstances in the individual's relationship with the agency should be considered to determine if the agency should be deemed the worker's joint employer. Enforcement Guidance, "Coverage Issues," at Qs. 1 and 2. In sum, a federal agency will qualify as a joint employer of an individual if it has the requisite right to control the means and manner of the individual's work, regardless of whether the individual is paid by an outside organization or is on the federal payroll. See id., at Q. 2.

As an initial matter, we note that the Agency's decision lacks *any* analysis regarding Complainant's employment status. The final decision fails to make even passing reference to the numerous factors that must be considered, let alone the relevant facts. Instead, the Agency simply states: "An analysis of [Complainant's] employment status with DSF Federal Inc. finds that you are not an Agency employee within the meaning of [Title VII]."

A review of the instant record also reflects various deficiencies. The complaint file provided by the Agency contains a copy of an August 2, 2017 offer letter from DSF Inc., a job description, and a document of questions and answers entitled "EEO Joint Employer Guidance."

While the offer letter lacks Complainant's acceptance signature, we acknowledge that it does establish that DSF Inc. set Complainant's salary, paid her semi-monthly, and provided her with leave benefits.

The job description, which appears to be two pages of a larger document, sets forth many broad responsibilities (i.e. provide administrative oversight for all supported protocols, purchase equipment and supplies for pathology operations, assist project management staff in the preparation of materials for review by PMC, serve as facilitator at PMC meetings, and coordinate in-processing of new soldiers.) Many of these duties seem essential to the functions of the pathology unit, thereby indicating a potential employer/employee relationship with the Agency. However, this document is not informative with respect to daily performance of the position. For instance, it does not indicate who provided Complainant with her assignments and oversaw her work.

The "EEO Joint Employer Guidance" appears to be an internal Agency document that contains some of the analysis that is missing in the Agency's final decision. Many of the relevant factors are considered, with answers provided by the Agency's Chief, Human Resources Division, who functions as the Contracting Officer Representative (hereinafter "HR Chief"). According to HR Chief, DSF Inc. assigns Complainant's work "based on the performance work statement in the contract", leave requests are submitted to DSF Inc., and the Agency does not provide medical insurance. Moreover, the HR Chief stated that although contractors do hold Agency access badges, they are color coded to reflect their contractor status and they are required to identify themselves as contractors when answering the phone and in the contact information provided in their emails. Such facts would suggest a contractor relationship.

The majority of the complaint file, however, is comprised of multiple copies of a few email exchanges between Agency officials. The emails reveal that an Agency employee complained to an Agency management official about Complainant. In addition to communication problems between Complainant and the Agency employee, the e-mails also reflect discussions about Complainant's assignments. In particular, the Agency officials discussed Complainant's part-time work for "BIP" and whether she should be returned to full-time work in the Pathology Division. Although Complainant's assignment from DSF Inc. was as the Project Manager in Pathology, it appears that she was also back-filling for an employee in the BIP unit. According to the emails, Complainant had "alienated everyone that works in BIP."

These emails were submitted to Agency counsel in response to questions regarding “descope” Complainant’s position. The emails state that three Agency officials decided to descope the position, which was the secondary reason provided for Complainant’s termination.<sup>4</sup>

While perhaps such emails were included in the complaint file to support a legitimate, non-discriminatory reason for Complainant’s termination, the Commission finds that they undercut the Agency’s contention that it is not a joint employer of Complainant. The emails show that Complainant worked closely with Agency employees; that Agency officials assigned her to units and duties beyond what her job title indicated; and that Agency managers were involved with the decision to remove her. They also conflict with some of the general statements made by HR Chief. For example, one email string includes an email from Complainant, revealing that she was assigned an Agency email account and did not use a DSF Inc. or contractor identifier. Also, Complainant’s purported DSF Inc. supervisor is notably absent from these email discussions. These factors, along with working at an Agency facility with Agency equipment and materials, during core Agency hours, indicate an employer/employee relationship.

The Commission reiterates that the Agency’s final decision provided no facts nor analysis to support its conclusion that Complainant was not an Agency employee. The documents provided in the complaint file are limited, and do not even include the contract between DSF Inc. and the Agency. The most detailed inquiry is contained within the EEO Counselor’s Report. The “Witness Inquiry” portion of the report contains notes from informal interviews with HR Chief and the DSF Inc. Contract Manager. According to the DSF Inc. official, she received a call from the Agency stating that it was going to de-scope Complainant’s position and her termination needed to occur that day. Although an EEO Counselor’s Report is not equivalent to an affidavit, with actual statements by witnesses, and is inadequate for the basis of the instant Agency’s decision, we find that the information therein supports the belief that it is a joint employer.

Moreover, the nature of Complainant’s complaint itself suggests an employer/employee relationship. Complainant alleges that Agency management officials influenced or directed DSF Inc. to remove her from her Project Manager (Pathology) position at USAMRIID. Even the limited record before us, indicates such influence. As noted above, Complainant’s description of her termination meeting, as well as the Agency emails, allude to sufficient influence to support joint employer status.

Finally, in response to the instant appeal, the Agency, for the first time, submits arguments reflecting the type of analysis that was missing in its decision. In support of its assertions, it also provides two declarations. We note the declarations were taken *after* the issuance of its final decision. The Deputy Chief of Pathology provided a conclusory statement that “the Agency did not control how [Complainant] performed her job and it did not provide direct supervision of her.”

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<sup>4</sup> According to Complainant, she was initially told that the reason for her termination was communication problems with government employees. Only days later, the proffered reason for the termination was de-scoping.

She also stated that the scope of Complainant's work and assigned duties were dictated by the Performance Work Statement, and assignments made by the Deputy Chief were in accordance with the PWS. In a declaration by the DSF Inc. Contract Manager, she explained that as the contracting company representative she submitted monthly reports to the Agency regarding the completion of contract work, approved Complainant's leave requests, conducted Complainant's termination, and offered Complainant an alternative position. The Agency, however, was responsible for supporting its reasons for dismissal in its final decision, and to allow it to now provide new evidence or change its arguments after Complainant has filed her appeal would be unfair to Complainant. See Woods v. Dep't of Veterans Affairs, EEOC Appeal No. 0120091027 (May 7, 2009) (Commission reversed dismissal when Agency offered up a new, alternative date for training taken by Complainant to support claim that she was aware of time limitation after she established first date was incorrect).

Accordingly, the Commission finds that a holistic analysis of the instant record, in accordance with our prior decisions and Commission guidance, brings us to the conclusion that the Agency is a joint employer for the purpose of the EEO process.

#### CONCLUSION

The Agency's final decision to dismiss the formal complaint was improper and is **REVERSED**. The formal complaint is **REMANDED** to the Agency for further processing in accordance with the **ORDER** below.

#### ORDER (E1016)

The Agency is **ORDERED** to process the remanded claims in accordance with 29 C.F.R. § 1614.108 et. seq. The Agency shall acknowledge to Complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision was issued. The Agency shall issue to Complainant a copy of the investigative file and shall notify complainant of the appropriate rights **within one hundred-fifty (150) calendar days** of the date this decision was issued unless the matter is otherwise resolve prior to that time. If Complainant requests a final decision without a hearing, the Agency shall issue a final decision **within sixty (60) days** of receipt of Complainant's request.

A copy of the Agency's letter of acknowledgment to Complainant, including the notice of consolidation, and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

#### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0618)

Under 29 C.F.R. § 1614.405(c) and § 1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored.

Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

#### STATEMENT OF RIGHTS - ON APPEAL

##### RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.



Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director  
Office of Federal Operations

December 18, 2018

Date