



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Dinah L,¹
Complainant,

v.

Pete Hegseth,
Secretary,
Department of Defense
(Defense Health Agency),
Agency.

Appeal No. 2024002513

Agency No. DHASAN 23-0871

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated February 9, 2024, dismissing 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and Pregnant Workers Fairness Act of 2023. Upon review, the Commission finds that Complainant's complaint was improperly dismissed pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim.

ISSUES PRESENTED

Whether the Agency properly dismissed Complainant's claim for failure to state a claim because it was not her joint employer.

¹ 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.

BACKGROUND

During the period at issue, Complainant worked as a Preventionist/Exercise Physiologist through a contract between Agency and Bestica, Inc. (Bestica) at the Agency's Joint Base San Antonio, Texas.

In July 2021, Bestica hired Complainant. Thereafter, she worked in the Diabetes Center of Excellence at the Wilford Hall Ambulatory Surgical Center (WHASC).

On May 31, 2023, Complainant emailed the Human Resources Manager for Bestica, requesting to telework as a reasonable accommodation. On June 27, 2023, Complainant received an email from Bestica's Operations Manager that the company was working with the site to see if an accommodation could be provided.

Effective July 17, 2023, the Diabetes Center of Excellence was reorganized into Endocrinology Clinic at Brooke Army Medical Center (BAMC). When Complainant reported to BAMC, she no longer had a private office. Instead, she shared a workspace with eleven co-workers. Complainant was also required to attend staff meetings in person at the beginning of each day at BAMC. Complainant requested a private office, from her Agency managers the Chief Endocrinologist and the Endocrinology Clinic's Nurse Manager. She also asked to attend the staff meetings electronically or via proxy.

Complainant's request for a private office and to not attend the staff meetings in-person were not granted. Agency management explained to Complainant that there was not enough space. On September 13, 2023, Bestica's Operations Manager verbally denied Complainant's request for telework.

On November 17, 2023, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the bases of sex (female), disability (allergy), and reprisal (for requesting accommodations) when:

1. From December 2021 to present, the Agency, at both WHASC and BAMC, failed to provide Complainant with an effective reasonable accommodation;
2. From July 17, 2023 to August 4, 2023, the Agency failed to provide Complainant a computer, desk, or storage space for job-related items;

3. From July 17, 2023 to present, the Agency required Complainant to attend an 8AM staff meeting in person that has a negative impact upon her health due to allergens in the air;
4. From July 17, 2023 to present, during the mandatory staff meetings, the Agency required Complainant to sit in a separate room, and on one occasion, closed the door to the staff meeting so Complainant could not participate;
5. From July 17, 2023 to present, the Agency has failed to provide Complainant with a private office, despite providing other employees with a private office;
6. From July 17, 2023 to mid-August 2023, the Agency failed to provide Complainant an effective space to breastfeed, resulting in her having to stop breastfeeding;
7. On or around September 13, 2023, the Agency told Complainant her reasonable accommodation was denied, but failed to provide a written copy of the decision; and
8. On November 6, 2023, the Bestica Program Manager, threatened Complainant with disciplinary action if she did not report exactly by 7:30 AM.²

In a document dated December 13, 2023, Complainant's Counsel stated that she had emailed the Agency requesting to amend the formal complaint by adding the following claims:

On or around November 29, 2023, the Agency directed Complainant to work in Exam Room 5, which is functionally a storage room, with the hospital storing supply carts, an ultrasound machine, loose sharps containers, blood pressure machine, and procedural lamp and an exam table chair;

On November 30, 2023, Complainant learned that the Agency filed a complaint making false and/or unjustified allegations against her based on the following matters:

² The Agency outright dismissed Claim 8 because the allegation did not implicate the Agency as required under 29 C.F.R. § 1614.106(a). We agree with the Agency's disposition of this claim.

- a. Complainant's hanging a sign on her office door, which stated something along the lines of "Fragrance Free Zone – Please do not use/spray fragrance/cologne/perfume products in this area," referring to Complainant's office; and
- b. Complainant's alleged decline in patient encounters and poor work performance.

On February 9, 2024, the Agency issued a final decision dismissing the complaint pursuant to 29 C.F.R. 1614.107(a)(1). Specifically, the Agency reasoned that Complainant failed to state a claim because it was not her joint employer for purposes of standing under EEO law. The Agency's decision did not address Complainant's effort to amend her complaint to include the two additional claims.

On March 5, 2024, Complainant resigned from her position with the Agency.

CONTENTIONS ON APPEAL

On appeal and through Counsel, Complainant argues that the record established that the Agency was her joint employer. Applying Ma v. Dep't of Health and Human Servs., EEOC Appeal Nos. 01962389 and 01962390 (May 29, 1998), Complainant maintains that the factors to be considered as to whether the Agency was a joint employer weighed in Complainant's favor. Complainant argues that it was the Agency that exercised de facto control over Complainant's work and that it was the Agency which denied Complainant's requests for accommodation which ultimately caused Complainant to be constructively discharged.

In response, the Agency argues that it was not a joint employer under significant Ma factors. The Agency states that its control of Complainant's work was limited to assigning her duty location, while Bestica determined the manner and timing of her work pursuant to the contract's Performance Work Statement. The Agency further states that Complainant's accommodation requests were under the control of Bestica and that Bestica alone had been responsible for denial of Complainant's requests for accommodation.

STANDARD OF REVIEW

The Agency's decision to dismiss a complaint is subject to de novo review by the Commission, which requires the Commission to examine the record without regard to the factual and legal determinations of the previous decision maker and issue its decision based on the Commission's own assessment of the record and its interpretation of the law. 29 C.F.R. § 1614.405(a). The Commission should construe the complaint in the light most favorable to the complainant and take the complaint's allegations as true. See Cobb v. Department of the Treasury, EEOC Request No. 05970077 (March 13, 1997). Thus, all reasonable inferences that may be drawn from the complaint's allegations must be made in favor of the complainant.

ANALYSIS

EEOC Regulation 29 C.F.R. § 1614.103(a) provides that complaints of 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 department, agencies, and units, Part 1614 applies to all employees and applicants for employment.

In Serita B. v. Dep't of the Army, EEOC Appeal No. 0120150846 (Nov. 10, 2016), the Commission reaffirmed its longstanding position on "joint employers" and noted that it is found in numerous sources. EEOC Compliance Manual Section 2, "Threshold Issues," Section 2-III(B)(1)(a)(iii)(b) (May 12, 2000) (Compliance Manual); 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. 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, however, 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. 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 (6th 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 (6th Cir. 1985); see also Ma, EEOC Appeal Nos. 01962389 & 01962390).

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 (Nov. 8, 2012).

In the instant matter, the Agency's decision and appellate brief maintained that Bestica, and not Agency, bore responsibility for how Complainant was managed. The Agency decision stated that Bestica handled notice and enforcement for conditions of Complainant's employment, including responses to her requests for reasonable accommodation. The Agency relied on the terms as stated in the Performance Work Statement governing its contractual agreement with Bestica.

The language of the contract does not preclude the Commission from finding that a de facto joint employment relationship existed. We find that, by compelling Complainant to attend the daily staff meetings in-person at the BAMC Endocrinology Clinic, the Nurse Manager, in particular, exercised sufficient control to reflect a joint employment relationship. Such mandatory and regular interaction between Complainant and Agency management indicates that the Agency actually supervised Complainant and was indeed her joint employer. We expressly note that when Complainant requested to attend staff meetings in a manner that did not require her physical presence, the Endocrinology Clinic's Nurse Manager, instead of Bestica officials, directed Complainant to wear a mask and position herself at the periphery. In other words, in handling Complainant's request concerning the daily staff meetings, the Nurse Manager functioned as Complainant's direct supervisor. The record does not suggest that Bestica made that decision.

Moreover, the explanation for denial of Complainant's request for a private office supports a finding that the Agency exerted sufficient control over Complainant to be considered a joint employer for EEO purposes. When Complainant requested a private office, it was the Chief Endocrinologist who acted as her Agency manager. According to his sworn statement, the Chief Endocrinologist followed-up with BAMC's Department of Medicine and determined that private offices were reserved for medical providers who saw patients face-to-face as opposed to those who saw patients via webcam. The record is devoid of documentation to imply that Bestica played a role in denying Complainant's private office request.

We acknowledge that, regarding Complainant's telework request, Bestica management fielded the matter and verbally told her that telework was denied. However, the Operations Manager for Bestica, had initially informed Complainant that Bestica was "working proactively with the site" to see if "they" were able to provide Complainant telework as an accommodation. This shows that Agency management had important input into the matter and was exercising at least partial control over Complainant's request for telework.

In addition, Complainant's performed specialized work that was part of the regular endocrinology business of the Agency at WHASC and then at BAMC. Furthermore, the Performance Work Statement of indicated that contractors, such as Complainant, were issued Agency identification, a Common Access Card, and were subject to drug testing as well as other procedures applicable to Agency civilian employees.

Under the circumstances presented here, we find that the Agency possessed sufficient control over Complainant, in the performance and exercise of her duties, to qualify as a joint employer. The record simply did not contain preponderant evidence to support the Agency's position that it was not her joint employer. We find therefore that the complaint states a claim upon which relief can be granted in the 29 C.F.R. Part 1614 EEO complaint process.

CONCLUSION

Accordingly, the Agency's final decision dismissing Complainant's complaint is REVERSED. The formal complaint is REMANDED to the Agency for further processing in accordance with the ORDER below.

ORDER (E0224)

The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108. The Agency shall acknowledge to the 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 also 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 resolved prior to that time. If the 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.

As provided in the statement entitled "Implementation of the Commission's Decision," the Agency must send to the Compliance Officer: 1) a copy of the Agency's letter of acknowledgment to Complainant, 2) a copy of the Agency's notice that transmits the investigative file and notice of rights, and 3) either a copy of the complainant's request for a hearing, or a copy of the final agency decision ("FAD") if Complainant does not request a hearing.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

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.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the 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(f).


COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0124)

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 their 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

February 3, 2025

Date