



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Detra W.,<sup>1</sup>  
Complainant,

v.

Gina M. Raimondo,  
Secretary,  
Department of Commerce  
(Census Bureau),  
Agency.

Appeal No. 2020003147

Agency No. 63-2019-00255

**DECISION**

On April 2, 2020, via her attorney, Complainant timely appealed a March 3, 2020 final decision (FAD) by the Agency to the Equal Employment Opportunity Commission (EEOC or Commission). The FAD dismissed her complaint of employment discrimination alleging violations 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 the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant, through a staffing firm, was an applicant seeking to work with the Agency as a Section 508 Accessibility Compliance Policy Subject Matter Expert at the Census Bureau Headquarters in Suitland, Maryland.

On July 19, 2019, Complainant filed an equal employment opportunity (EEO) complaint with the Agency alleging that she had been discriminated against based on her disability (kidney failure), race/national origin (Native American/African-American), color (Black), sex (female), religion (Seventh Day Adventist) and age (43) when, after she was offered the position by the

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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.

staffing firm, the offer was withdrawn because the Agency decided her telework request, necessitated by her disability, could not be accommodated.

The Agency subsequently issued a FAD dismissing Complainant's complaint for failure to state a claim, finding she was not an applicant for federal employment and the Agency did not have sufficient control over the position being filled to be considered her common law employer for the purposes of utilizing the 29 C.F.R. Part 1614 EEO complaint process.

The instant appeal followed.

### ANALYSIS AND FINDINGS

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. 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.

The matter before us is whether the Agency properly dismissed Complainant's complaint for failure to state a claim on the basis that she could not be considered an applicant for employment with the Agency.

We begin our analysis by noting that 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); 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; <sup>2</sup> 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 with the federal government. Instead, an analysis is required to determine if the federal agency exercises sufficient control of an individual to be considered as that person's joint employer. Compliance Manual, Section 2-III(B)(1)(a)(iii)(b). In making this determination, 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

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<sup>2</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).

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.

EEOC does not consider any one factor to be decisive and emphasizes that it is not necessary to satisfy a majority of the factors. Rather, the analysis is holistic and 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. Moreover, the language of the contract 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 provided that contract personnel were employees of staffing firm under its administrative supervision and control, agency actually retained supervisory authority over the contract workers). Moreover, it is not necessary for the federal agency to have complete control over when, where, and how the worker performs the job. Rather, the control may be partial or joint and still point to joint employment. See, e.g., Complainant v. Dep't of Justice, EEOC Appeal Nos. 0120141963 & 0120141762 (Jan. 28, 2015) (agency found to be joint employer where staffing firm terminated worker after the agency communicated it no longer wanted the worker's services).

Here, in January 2018, the Agency contracted with a staffing firm to assist it in establishing and operating a new division to provide advice and develop a program to ensure the Agency complied with Section 508 of the Rehabilitation Act requiring federal agencies make all electronic information and technology accessible to individuals with disabilities.

Around mid-2018, the staffing firm's Recruiting Director identified Complainant as a strong candidate for Section 508 work and passed her resume along to the staffing firm's Director, who interviewed her.

It is uncontested that the Agency's Chief of the Section 508 Program Office reviewed Complainant's resume prior to the staffing firm's decision to bring her onboard. The Recruiting Director, staffing firm Director and Complainant all stated that the Agency Chief also interviewed her in person. Report of Investigation (ROI), at Ex. 6, Bates Nos. (top left) 67, 69, Ex. 7, Bates No. 128, and Ex. 8, Bates No. 140. The Agency Chief countered that his only role was to review and give feedback on resumes presented by the staffing firm. He stated he met Complainant for a meet-and-greet on November 14, 2018, for five to ten minutes after the staffing firm decided to select her for the position.

However, the record shows that just prior to May 15, 2018, the staffing firm Recruiting Director emailed Complainant with logistical information for her “Interview with Census Customer [Agency]” and advising her the staffing firm Director would introduce her to “our Census Customer.” Id., at Ex. 6, Bates No. 103. We find by a preponderance of the evidence that the Agency Chief or an Agency official in his place interviewed Complainant for the job in May 2018 before the staffing firm, by email on November 15, 2018, advised her it intended to select her to serve the Agency.

The evidence also indicates the Agency Chief had final approval on all candidates the staffing firm presented to the Agency and the Recruiting Director stated that the staffing firm sent resumes to the Agency Chief for “his approval.” Id. at Ex. 7, Bates No. 128. The staffing firm Director stated that “agreement was reached by Census Bureau... that they would be moving forward with... [Complainant]”, and the Agency had final approval for onboarding. Id., at Ex. 8, Bates Nos. 140 – 141. Despite the Agency Chief’s assertions to the contrary, we find, by a preponderance of the evidence, that his approval was required before Complainant assume the 508 position. A spreadsheet the Recruiting Director emailed internally on the status of staffing firm Section 508 candidates contained comments on individual candidates that included, “No-go by client”, and “client liked but perhaps as future offer”. Id., Ex. 14, Bates Nos. 457 – 458. Also, the Agency Chief stated he approved Complainant to be cleared by the Agency clearance process for onboarding. Id., Ex. 10, Bates No. 182. Complainant passed the background check by the Agency’s Census Investigative Services around March 2019.

Throughout this process, Complainant was on dialysis due to renal failure. According to Complainant, in January 2018, she had advised the staffing firm Director that because she required dialysis several times a week, with each session being 6 – 8 hours at home during the day, she needed to telework four days a week but she could work at her desk while receiving treatment. This was later adjusted in a doctor’s note from November 2018, recommending Complainant be allowed to telework from home three days a week.

The Agency Chief stated that he was informed for the first time by the staffing firm Director in early May 2019, that Complainant had a disability which required her to telework from home three or four days a week. The Agency Chief responded that contractors were allowed a standard two days a week to telework. Id., Ex. 10, at Bates No. 173 – 174.

On May 9, 2019, the Agency Chief emailed his supervisor and the Agency’s contract officer representative (COR) with a copy to the staffing firm Director:

... please **do not** [bold in original] move forward with [Complainant] for now; let me talk to [my supervisor]... first. Please see the following concerns:

- I am not sure how she will be able to contribute effectively and meet our deliverable deadline when she will [be] working 3 days from home doing her dialysis. She needs to understand our process and procedures, needs exposure to applications to which she will be working on, conduct

customer engagement, etc[.] while going through her dialysis. **That makes me nervous.** [Bold in original].

- Decennial product owners... are very demanding on... dates/timelines for Decennial applications that we cannot negotiate or change. If I assign a Decennial task and she is not able to deliver [this] will be a huge risk for the program office because [the] application will not be able to move to the next level due to Section 508 noncompliance. [The] Section 508 Program Office is not in a position to take that kind of risk at this point because 2020 Decennial is right around the corner.

Id., Ex. 13, Bates No. 271. On May 17, 2019, the Agency Chief's supervisor sent his own questions to the COR on reasonable accommodation, who forwarded them to the Agency's Contractor Representative for response. The Contractor Representative promptly replied that it was up to the COR to work out with the staffing firm whether Complainant would be approved to telework more than the two standard days, and the COR should coordinate closely with the government team receiving the support to determine if the contract requirements could be satisfied if additional remote work is granted.

On May 22, 2019, the staffing firm Director emailed the Recruiting Director that she had been advised by the Agency that for any telework beyond two days the staffing firm would be responsible to financially cover it unless the Agency's Program Area could work within Complainant's constraints. She added that since Program Area did not believe Complainant could ramp up effectively unless she teleworked less, the COR was indicating this was a non-starter. The next day, the staffing firm Director emailed the COR confirming her understanding that it was already decided by the Agency that Complainant could not participate effectively if she needed to telework three days a week. She added that the staffing firm could not afford the third day without billing the Agency. Given all this, she indicated she was submitting another candidate for the slot. Id., Ex. 14, Bates No. 759, 761 – 762. The COR in her EEO investigatory statement cited to the second email and echoed its content.

The staffing firm then informed Complainant of the Agency's unwillingness to allow her to telework more than two days per week and the resulting necessity to rescind the job offer. The instant EEO complaint followed.

The issue to be decided in this appeal is whether the Agency had sufficient control over the position in question to be considered a joint employer of the position's incumbent.<sup>3</sup>

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<sup>3</sup> We note that the Commission has previously reversed dismissals and found joint employment in the context of a claim of denial of reasonable accommodation. See Sally M. v. Dept. of Defense, EEOC Appeal No. 2019000753 (July 14, 2020); Virginia T. v. Dept. of Energy, EEOC Appeal No. 0120181738 (Oct. 16, 2018); Alisa M. v. Dept. of State, EEOC Appeal No. 0120171892 (Oct. 11, 2017).

The Agency found that because work hours were determined by the staffing firm in consultation with the COR and the duration of the job was jointly agreed to in advance by the staffing firm and Agency, this weighed against joint employment. We disagree. Even if we accept these Agency factual findings, they would weigh in favor of both the staffing firm and the Agency controlling the position.

The Agency found that it did not control when, where, and how work was performed. It referred to contract language that all work was to be done under the supervision of the contractor or contract employees, and any communications with Census Bureau personnel must be done in the presence of a staffing firm representative regarding management issues, specific tasking, and performance. It also found that Agency management deferred to the staffing firm's decision not to offer Complainant a third telework day a week as a reasonable accommodation. However, we disagree with how the Agency weighed the facts on these control factors. We give more weight to the COR and Recruiting Director statements that the Agency controlled the above factors.

We find that, at a minimum, the Agency had significant input into the denial of Complainant's reasonable accommodation request – the Agency Contractor Representative wrote that it was up to the COR to work out with the staffing firm whether Complainant would be approved to telework more than the two standard days and the COR should coordinate closely with the government team receiving the support to determine if the requirements can be satisfied if additional remote work is granted. The evidence shows that the Agency's operations area and COR, not the staffing firm, decided that Complainant could not satisfy the requirements of the position in question if she teleworked more than two days a week. The staffing firm's refusal to accept the Agency's demand that it was not responsible to pay for telework labor beyond two days a week, but the staffing firm could, does not undermine this.

Because this is a hiring case, control over hiring is an especially significant factor in making a determination on joint employment. We find that control over hiring was shared by the staffing firm and the Agency. The Agency set the detailed qualifications for the position. While the staffing firm recruited Complainant and decided to present her as a candidate to the Agency, prior to Complainant being offered the position, Agency personnel reviewed her resume, interviewed her in May 2018, approved her coming on board, and required her to pass a background check conducted by the Agency.

Based on the legal standards and criteria set forth in our previous decisions and guidance, we find that Complainant was a common law applicant for employment and the Agency possessed sufficient control over the position in question to be a common law joint employer for the purpose of the 29 C.F.R. Part 1614 EEO complaint process.

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Because the Agency did not investigate Complainant's merits claim (that she was discriminated against by the Agency regarding the withdrawal of the offer for her to be hired by the staffing firm serving the Agency), we agree with the Agency's argument on appeal that if joint employment was found, Complainant's merit claims should be remanded for investigation in accordance with 29 C.F.R. § 1614.108 et seq.

The Agency's dismissal of the complaint is REVERSED, and the matter is REMANDED to the Agency for compliance with the Order set forth below.

### ORDER

The Agency is ordered to resume processing the remanded complaint, starting with an investigation on the merits of the discrimination claims in accordance with 29 C.F.R. § 1614.108 et seq. 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.<sup>4</sup> 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, a copy of complainant's request for a FAD, or a statement from the agency that it did not receive a response from complainant by the end of the election period.

### 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.

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<sup>4</sup> According to the FAD, following its initial investigation, the Agency gave Complainant the right to request a hearing before an EEOC Administrative Judge (AJ), and she requested an immediate FAD. Because the Agency only investigated whether Complainant had standing and not the substance of her EEO complaint, we find that her prior FAD request did not waive her right to later request a hearing on the merits of her complaint.

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 (M0620)

The Commission may, in its discretion, reconsider this appellate decision if the 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 his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>.

Alternatively, complainant can submit his or her 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, 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 his or her 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(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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

April 14, 2021  
Date