



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

[REDACTED]  
Robin H.,<sup>1</sup>  
Complainant,

v.

Michael S. Regan,  
Administrator,  
Environmental Protection Agency (EPA),  
Agency.

Appeal No. 2021001514

Agency No. 2019-0147-HQ

**DECISION**

On January 5, 2021, Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a December 11, 2020 final agency decision (FAD) dismissing his complaint alleging 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.

**BACKGROUND**

Complainant worked for a staffing firm serving the Agency as a Software Engineer at its EPA Research Triangle Park, EPA Human Studies Facility in Chapel Hill, North Carolina.

The Facility studied the human health effects of air pollution, including the operation of exposure chambers where human volunteers were exposed to precise amounts of air pollutants. Operating the exposure chambers involved complex software controls for pollutant introduction and measurement, human response measurement, and associated record-keeping. Complainant developed and maintained the complex software systems needed to do this.

Complainant related that he worked in a multistory building occupied by Agency, University of North Carolina (UNC) employees, and others in his staffing firm in EPA laboratories operated by his staffing firm.

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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.

On November 2, 2019, Complainant filed an equal employment opportunity (EEO) complaint alleging that the Agency subjected him to a hostile work environment based on his race/color (Black), national origin (British), and reprisal for prior protected EEO activity under Title VII when:

1. He was harassed by Agency and UNC employees and visitors from January 2017 – August 2019; and
2. On September 9, 2019, he was issued an order by EPA-RTP [Research Triangle Park] barring him from EPA facilities, resulting in his termination.

Regarding claim 1 Complainant contended that more than 20 people perpetrated the hostile work environment, and there were over 138 incidents. Complainant contended the harassment occurred outside the building near parking areas, the building entrance vestibule, the lobby, lobby toilet, stairwells, elevators, corridor outside the staffing firm area on the ground floor, the staffing firm areas, and fourth and fifth floors. Among his allegations were that perpetrators hostilely bared their teeth at him, looked at him as if he smelled like bad sour milk, and with “doll eyes” (as if the person saw nothing and he was nothing), made hand gestures for him to get out of the way, people walked into him, a woman who believed he did not open a door for her in a corridor called him a “horrible man”, he was blocked from entering doorways, and someone jumped “at him” in a corridor.

On or about September 5, 2019, an Agency Local Crisis Management Advisory Team (LCMAT), comprised of three Agency managers decided to bar Complainant from Agency premises. On or about September 6, 2019, an Agency Contracting Officer issued a letter to the staffing firm that EPA decided Complainant was a security threat and was barred from EPA property and information systems. It explained that Complainant previously raised allegations of a hostile work environment that were unsubstantiated, and the nature of the allegations recently escalated to the point that they were viewed as a security threat by the LCMAT.

On September 9, 2019, the local Agency Director of the Office of Administration and Resources Management issued an order to Complainant barring him from entering EPA facilities, and warning if he attempted to do so he could be arrested.

The staffing firm gave Complainant a separation agreement effective October 8, 2019, because of “lack of work due to client [the Agency] not allowing you on work premises.” While Complainant refused to sign off, the staffing firm terminated him that date.

The Agency dismissed Complainant’s EEO complaint for failure to state a claim because under common law it did not jointly employ Complainant. Thereafter, Complainant appealed.

In EEOC Appeal No. 2020003051 (Oct. 7, 2020), the Commission vacated the dismissal because the record evidence was insufficient to make an independent determination on joint employment.

It directed the Agency to gather this evidence and then accept Complainant's complaint for investigation or issue a new FAD dismissing his complaint.

The Agency gathered additional evidence,<sup>2</sup> and then issued another FAD dismissing Complainant's complaint for the same reason it did before. The instant appeal followed.

On appeal, Complainant argues that under common law the Agency was his joint employer. In reply, the Agency argues that the FAD should be affirmed.

### ANALYSIS AND FINDINGS

The matter before us is whether the Agency properly dismissed Complainant's complaint for failure to state a claim because he 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 therewith.

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) OLC Control No. EEOC-CVG-2000-2 (May 12, 2000) (Compliance Manual); EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms OLC Control No. EEOC-CVG-1998-2 (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.

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 (6<sup>th</sup> Cir. 2013) ("Entities are joint employers if they 'share or co-determine

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<sup>2</sup> Complainant argues on appeal that the Agency gathered insufficient evidence. We disagree.

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.

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), req. to reconsider 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). 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). 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. 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.

The Agency Program Manager over Complainant’s area stated the staffing firm’s onsite Project Manager - Complainant’s supervisor - was responsible for his workload, schedule, and work performance. He stated he discussed what needed to be done with the staffing firm Project Manager, who would direct Complainant to do the task. As an example, he wrote the staffing firm’s Project Manager submitted a request to upgrade the Pollutant Control System Software, a plan developed by Complainant, and he would approve contract purchase requests for reimbursable items over \$250 per the contract.

The staffing firm's Project Manager stated she handled Complainant's workload and no Agency employee supervised or assigned Complainant work. She stated the same thing regarding the \$250, and that the Agency Program Manager gave her technical direction to support new studies and on non-routine activities.

Complainant stated he proposed projects to add new information technology for Pollutant studies like virtualization VMware, network backups, and network expansion, and constantly upgraded information technology infrastructure, software and programs. He contended that since most of these projects cost over \$250, the Agency's Program Manager was in effect one of his supervisors in that he decided whether to approve payment - and hence his projects. Complainant stated he would explain to the staffing firm's Project Manager what needed to be done technically, then do the same with the Agency Program Manager. He related that he communicated directly with the Agency Program Manager on projects to get them financed so he would understand why financing was needed. He contended that by controlling finances, the Agency Program Manager controlled his schedule, and by barring him from its facility the Agency controlled the outcome of his 2019 staffing firm performance evaluation.

The Agency found that it did not control when, where, or how Complainant performed his job, did not set his work schedule, oversee his time and attendance, assign or supervise his work, or give him performance appraisals, and he was supervised by his staffing firm.

On remand, Complainant decided to submit the statement he made in his private sector EEO case against the staffing firm. He related that with some support of his predecessor, who was semi-retired and worked on a part-time as needed basis for the staffing firm, he could have performed all his work from home. He stated after being barred from Agency premises, he had a very productive development month working remotely from home. Pointing to this, the Agency found Complainant claimed that although he could still do his job serving the Agency, the staffing firm terminated him. His statement was in response to the staffing firm's position that it terminated him because he could only do a small percentage of his work from home.

On appeal, Complainant argues that the Agency's conclusion that it did not jointly employ him turned on finding he could work remotely. He counters that the Agency's September 2019 bar included taking back equipment needed to work remotely, like a USB virtualization key that enabled virtualization software so he could program and test the Pollutant Control System remotely. We find this argument contradicts Complainant's earlier statement that after being barred he had a very productive development month working remotely. As found by the Agency, this statement points away from joint employment.

Complainant's position that the Agency controlled his work by deciding whether to pay for projects he proposed does not support joint employment. Rather, it shows Complainant and his staffing firm largely controlled what work Complainant did by, in essence, selling projects to the Agency and then implementing them. The Agency deciding whether to fund these proposed projects is not equivalent to assigning and managing Complainant's work.

In sum, we find that the Agency did not exercise sufficient control over Complainant's employment to be his common law joint employer.

The FAD is AFFIRMED.

STATEMENT OF RIGHTS - ON APPEAL  
RECONSIDERATION (M0920)

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 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, 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 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 (S0610)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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. If you file a request to reconsider and also file a civil action, **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

June 28, 2021

Date