



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

[REDACTED]  
Beth G.,<sup>1</sup>  
Complainant,

v.

Bill Nelson,  
Administrator,  
National Aeronautics and Space Administration  
(Johnson Space Center),  
Agency.

Appeal No. 2020003205

Hearing No. 460-2019-00016X

Agency No. NCN-16-JSC-00040

**DECISION**

Complainant timely filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's March 27, 2020, final decision concerning her equal employment opportunity (EEO) complaint alleging 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. For the following reasons, the Commission VACATES the Agency's final order and REMANDS the matter for further processing.

**ISSUES PRESENTED**

The issue presented on appeal concerns whether the Administrative Judge properly dismissed the complaint based on the legal doctrine of collateral estoppel.

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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.

### BACKGROUND

At the time of events giving rise to this complaint, Complainant was employed by a private staffing company known as the Universities Space Research Association (USRA). Through USRA, Complainant worked as a contract Deputy Project Scientist at the Agency's Johnson Space Center in Houston, Texas. She was assigned to the Flight Analog Project (FAP).

On June 11, 2016, Complainant filed a formal EEO complaint alleging that the Agency discriminated against her on the bases of race (African-American) and sex (female) when starting on December 31, 2014, she assumed the duties of the former FAP Project Scientist, but not the job classification, title, and pay. Instead she retained the job title of FAP Deputy Scientist.

The Agency subsequently dismissed the complaint for failure to state a claim. In dismissing the complaint, the Agency reasoned that Complainant lacked standing to file an EEO complaint under the federal sector EEO complaint process, since she was "neither a NASA employee nor an applicant for employment" but simply an employee of USRA. The Agency noted that USRA had supervisory control over the means and manner of her work and provided her compensation. Complainant timely appealed the Agency's dismissal of her complaint to the Commission, which the Commission docketed as EEOC Appeal No. 0120171320.

During the pendency of her federal sector EEOC appeal, Complainant entered into a settlement agreement<sup>2</sup> with USRA to resolve her private sector EEOC charge of discrimination against the company based on the same facts and allegations. In settling the charge, USRA agreed to pay Complainant a confidential amount in order to "avoid...costly litigation."<sup>3</sup> According to Complainant, the settlement agreement expressly excluded the release and settlement of Complainant's federal sector EEO complaint against the Agency (*i.e.*, the instant appeal). The Agency does not dispute that it was not a party to the agreement.

On July 18, 2017, the Commission issued its decision in EEOC Appeal No. 0120171320, which reversed the Agency's dismissal, finding that the Agency had sufficient control over Complainant's work to constitute a joint employer. See Bobbye C. v. Nat'l Aeronautics and Space Admin., EEOC Appeal No. 0120171320 (July 18, 2017), req. for recons. den. EEOC Request No. 0520180028 (Feb. 28, 2018).

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<sup>2</sup> Though the record is unclear as to when Complainant entered into the settlement agreement with USRA, based on the Agency's statement that Complainant signed the settlement agreement "almost 50 days" after filing her November 9, 2016, appeal regarding EEOC Appeal No. 0120171320, we deduce that Complainant entered into the settlement agreement with USRA on or around December 29, 2016.

<sup>3</sup> Complainant did not provide a copy of her settlement agreement with USRA due a confidentiality provision.

Consequently, the Commission remanded the matter to the Agency for further processing. In accordance with the Commission's order, the Agency investigated the merits of the complaint.

Following the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing. However, on August 22, 2019, the AJ assigned to the matter ordered Complainant to show cause as to why the complaint should not be dismissed "based on double recovery." Specifically, Complainant was required to respond in detail "with citations to relevant caselaw."

Complainant timely responded to the show cause order. Citing to a medical malpractice case from the U.S. Court of Appeals for the Fifth Circuit,<sup>4</sup> Complainant argued that the settlement agreement with USRA "does not constitute double recovery for the same injury under the same facts," as such a determination would allow the non-settling party to escape liability. Complainant further emphasized that both USRA and the Agency were not jointly and severally liable. The settlement agreement with USRA was not based on the merits, noted Complainant, but rather "to avoid costly litigation..." For these reasons, Complainant requested that she be allowed to prove the merits of her federal sector EEO complaint.

The AJ, however, was unpersuaded and concluded that Complainant failed to show good cause as to why the complaint should not be dismissed. In so finding, the AJ accepted the Agency's argument that Complainant was entitled to "only one satisfaction from joint employers" and that the doctrine of collateral estoppel barred Complainant from pursuing a later complaint based on the same allegations as a prior complaint. The AJ ultimately found that dismissal was warranted because "continued adjudication of this matter would constitute double recovery for the same injury under the same facts." The AJ dismissed the complaint as moot, pursuant to 29 C.F.R. § 1614.107(a)(5).

On March 27, 2020, the Agency issued a final order fully implementing the AJ's decision. The instant appeal followed.

### CONTENTIONS ON APPEAL

Through her attorney, Complainant contends that the AJ erred in dismissing her complaint on the grounds that allowing her to proceed would constitute double recovery. Complainant argues that the issue of double recovery is premature, as there has been no finding as to whether the Agency subjected her to discrimination as alleged. Moreover, she contends that, even following a finding of discrimination, the instant case would not result in a double recovery because the Agency is not entitled to offset any damages that may be assessed against it. Citing Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 98 (1981), Complainant emphasizes that "Title VII does not explicitly or implicitly permit an offset for joint tortfeasors who violate Title VII."

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<sup>4</sup> Krieser v. Hobbs, 166 F.3d 736, 745 (5<sup>th</sup> Cir. 1999).

Additionally, Complainant disputes the AJ's application of collateral estoppel to this case. Citing to Ashe v. Swenson, 397 U.S. 436, 443 (1970), Complainant asserts that the doctrine of collateral estoppel only applies when "an issue of ultimate fact" has been "determined by a valid and final judgment." Therefore, because the settlement with USRA was not based on the merits of her private sector EEOC charge, the AJ's application of collateral estoppel was inappropriate. Complainant emphasizes that "[b]ecause the OFO found joint employer liability<sup>5</sup> in her first appeal, [she] was within her legal right to settle her claim with USRA and proceed against NASA." Complainant contends that "[i]f this were not the case, the decision of joint employer liability would be meaningless."

Finally, Complainant maintains that USRA and the Agency are not jointly and severally liable, and the Agency has not cited any mandatory authority showing otherwise. Complainant emphasizes that "[u]ntil there is case law that joint employers under Title VII are joint[ly] and severally liable, no offset claim can prevail" and that "what USRA paid to [her] is not relevant and cannot be credit to NASA if she is successful in establishing race and/or gender discrimination . . . ."

In opposing the appeal, the Agency contends that Complainant's arguments lack merit. Regarding Northwest Airlines, Inc., *supra*, the Agency argues the case has no bearing on the instant matter, since neither NASA nor USRA is seeking contribution from the other. Moreover, contrary to Complainant's assertions, the Agency asserts that the Commission's enforcement guidance on the Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (Dec. 3, 1997), recognizes and supports joint and several liability among joint employers. In the Agency's view, the guidance provides that Complainant "can obtain the full amount of back pay, front pay, and compensatory damages from either one of the joint employers alone or from both combined" but that Complainant is "entitled to only *one satisfaction* from joint employers" (emphasis added).

Additionally, the Agency argues that the AJ properly applied the doctrine of collateral estoppel. Citing the Commission's decision in Montague v. Department of the Army, EEOC Request No. 05920231 (May 7, 1992), the Agency maintains that "final adjudication before an [AJ], as claimed by [Complainant], is not required," and that "an issue once adjudicated or settled between two parties – directly under *res judicata* and indirectly under collateral estoppel – may not be relitigated."

Finally, the Agency argues that the AJ properly dismissed the complaint as a sanction for Complainant's failure to comply with the AJ's order, to find and cite to relevant cases in responding to the order to show good cause.

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<sup>5</sup> Complainant erroneously describes our previous decision as finding "joint employer *liability*" (emphasis added), rather than a determination that the Agency held the *status* of a joint employer. Our previous decision found that Complainant was entitled to proceed with her federal sector EEO complaint against the Agency. It did not conduct an analysis of the merits of the complaint.

In this regard, the Agency points out that Complainant only cited a “a single, unpersuasive Fifth Circuit case which interpreted only Mississippi and Arizona law.” As such, the Agency contends that the AJ “was well within her right to dismiss the case in favor of NASA.”

### STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency’s decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review “requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker,” and that EEOC “review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission’s own assessment of the record and its interpretation of the law”).

### ANALYSIS AND FINDINGS

We find that the AJ erred in dismissing the complaint on the grounds that Complainant was collaterally estopped from pursuing her claims against the Agency, and possibly obtaining a double recovery, due to a settlement agreement she entered with USRA based on the same facts.

In this case, the Commission previously determined that the Agency exerted sufficient control over Complainant’s employment to be considered her joint employer for purposes of the EEO process. See EEOC Appeal No. 0120171320 (July 18, 2017). When an agency qualifies as a common-law joint employer, it is liable for the discrimination on the same basis that it would be liable for discriminating against any of its other employees. See Nicki B. v. Dep’t of Educ., EEOC Appeal No. 0120172829 (Nov. 28, 2018), citing EEOC’s Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, Questions 8 and 9 (Dec. 3, 1997). Where the combined discriminatory actions of a staffing firm and its client (i.e., the agency), result in harm to the worker, both the staffing firm and the agency are jointly and severally liable for back-pay, front pay, and compensatory damages. This means that the complainant can obtain the full amount of back-pay, front pay, and compensatory damages from either one of the employers alone or from them combined. *Id.* at Allocation of Remedies Section. Even where there is joint liability, neither the charging party nor the Commission is obligated to pursue a claim against both entities; nor does one party have a right to bring the other into the proceeding, or right of contribution from the other. *Id.* at n. 42.

Therefore, we find that the settlement executed by Complainant and USRA<sup>6</sup>, resolving her private sector complaint, does not preclude Complainant from continuing her federal sector EEO

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<sup>6</sup> As discussed above, the settlement agreement excluded Complainant’s federal sector EEO complaint. The Agency was not part of the settlement agreement.

complaint against the Agency. As previously noted, complainants are afforded the option of pursuing a discrimination claim against either or both joint employers.

As for Complainant's reference to Northwest Airlines, Inc., *supra*, we find her arguments to be premature, as no finding of discrimination against the Agency has yet been made. In the event that Complainant prevails on her claim against the Agency, the remedy awarded may be adjusted in consideration of what Complainant has already received from USRA to avoid possible double recovery.

Lastly, as to the Agency's assertion that dismissal was an appropriate sanction, we find the argument to be misplaced because the AJ did not impose any sanctions. As discussed above, the AJ ordered Complainant to show cause to why her complaint should not be dismissed based on double recovery. The show-cause order directed Complainant to cite to relevant case law, which she did by referencing caselaw from the Fifth Circuit. The AJ ultimately was not persuaded and concluded that Complainant did not demonstrate good cause to avoid dismissal. The AJ's disagreement with Complainant's legal analysis, however, is not equivalent to failing to comply with the AJ's order. The AJ dismissal was not issued as a sanction.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we VACATE the Agency's final order and REMAND the matter to the Agency in accordance with the ORDER below.

### ORDER

Within fifteen (15) calendar days of the date this decision is issued, the Agency shall submit a copy of the entire complaint file, to include this decision, to the Hearings Unit of the EEOC Houston District Office. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted. Thereafter, the Administrative Judge shall issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109, and the Agency shall issue a final decision in accordance with 29 C.F.R. § 1614.110.

### 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 (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 (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.**

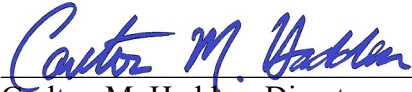
#### RIGHT TO REQUEST COUNSEL (Z0815)

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

September 23, 2021

Date