



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

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Azucena A.,<sup>1</sup>  
Complainant,

v.

Carlos Del Toro,  
Secretary,  
Department of the Navy,  
Agency.

Appeal No. 2021001212

Hearing No. 430-2018-00340X

Agency No. DON-16-00027-03749

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from an EEOC Administrative Judge's (AJ's) decision, dismissing a formal 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.

**BACKGROUND**

During the period at issue, Complainant worked as the Project Manager, Data Housing and Reporting Tool (DHART) for the Marine Corps Civilian Law Enforcement Program, through a contract Homeland Security Solutions, Inc. (HSSI) entered with the Agency. While the position was located at Camp Johnson/Camp Lejeune in North Carolina, Complainant teleworked from home and "traveled to client sites on as-needed basis."

In November 2015, Complainant, in support of a co-worker, raised claims of sexual harassment by an Agency official (A1). A1 was the Program Manager for the Marine Corps Civilian Law Enforcement Program. The Agency conducted an investigation but found no harassment was established. Shortly thereafter, according to Complainant, A1 directed that her position be moved to California.

---

<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.

Complainant asserts that she was given 30 days to relocate to California at her own expense. Based on the foregoing, Complainant alleged that she was forced to resign and the Agency's actions constituted a discriminatory and retaliatory constructive discharge.

On January 4, 2017, Complainant filed a formal EEO complaint claiming discrimination based on sex (female) and unlawful retaliation for engaging in protected activity (allegations of sexual harassment by an Agency official). On February 2, 2017, the Agency issued a final decision dismissing the complaint. The Agency determined that Complainant's complaint was comprised of the following claims:

1. On September 9, 2016, [Complainant] was subjected to constructive discharge and resigned from her position as the DHART Project Manager for the MCLEP as a contract for HSSI.
2. On or about December 16, 2016, [Complainant] received two hang up calls on her personal cell phone from [A1].

The Agency dismissed the formal complaint for failure to state a claim reasoning that Complainant was not an Agency employee and therefore lacked standing to file a complaint.

Complainant appealed the dismissal. However, in EEOC Appeal No. 0120171386 (Aug. 9, 2017), we reversed the Agency's dismissal and remanded the matter to the Agency for further processing. Specifically, the appellate decision reasoned, "[the Agency] has failed to provide any supporting evidence. The record, for example, does not contain a copy of the Agency's contract with HSSI. The Agency has not proffered any affidavits...the record does not support the Agency's claim that it did not exert sufficient control over her to be considered a joint employer for the purposes of the EEO process."

Upon completion of the investigation following the remand, Complainant requested a hearing before an EEOC AJ. On August 17, 2018, the Agency filed a Motion to Dismiss, arguing that the report of investigation now properly addressed the issue of whether Complainant was an employee of the Agency for EEO purposes. The Agency noted that due to contract changes HSSI made personnel changes and shifted responsibility due to limited funding. The Agency asserted that Complainant second-level HSSI supervisor (S2) made the decision to eliminate her position and move the duties associated with it to other positions and determined that these individuals would work in California.

On September 4, 2020, the AJ issued a decision granting the Agency's motion and dismissing the complaint, reasoning that Complainant satisfied nearly none of the requirements that would support a finding that the Agency was her joint employer. The AJ found that HSSI directed Complainant's work and the means and the manner in which she performed her duties. The AJ further found that the "Agency could not and did not discharge Complainant."

The record does not reflect that the Agency issued a final action subsequent to the AJ's dismissal and it became the final decision by operation of 29 C.F.R. § 1614.109(i).

Complainant appealed the AJ's decision. On appeal, Complainant, through her attorney, asserts that she has established that the Agency was her joint employer and, as such, she has standing to pursue her EEO complaint under 29 C.F.R. Part 1614. Complainant reiterates that it was the Agency (through A1) who directed that her position be moved to California.

### ANALYSIS AND FINDINGS

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. 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; Ma v. Dep't of Health and Human Servs., EEOC Appeal Nos. 01962389 & 01962390 (May 29, 1998). We reiterate the analysis set forth in those decisions and guidance documents in this decision.

Agencies often conclude that an individual is not an employee based solely on the fact that the individual performs work pursuant to a contract between the federal government and an outside organization and the outside organization, not the federal government, controls the pay and benefits of that individual. See, e.g., Helen G. v. Dep't of the Army, EEOC Appeal No. 0120150262 (Feb. 11, 2016); Nicki B. v. Dep't of Educ., EEOC Appeal No. 0120151697 (Feb. 9, 2016). These elements are, 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. 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 (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).

Significant to the instant case, where a staffing firm terminates a worker after an agency communicates it no longer wants the worker's services, this supports a finding that the agency has joint or de facto power to discharge the worker. See, e.g., Complainants v. Dep't of Justice, EEOC Appeal Nos. 0120141963 & 0120141762 (Jan. 28, 2015); see also Skanska USA Bldg., Inc., 550 Fed. App'x at 254, 256 (where defendant removed staffing firm's workers from job site without challenge from staffing firm, and after such removals staffing firm generally fired worker, this pointed to joint employment); Butler v. Drive Auto. Indus. of America, Inc., 793 F.3d 404, 414-15 (4th Cir. 2015).

In the instant matter, Complainant is alleging that the Agency, through the actions of A1, subjected her to constructive discharge when Complainant was informed that her position was being moved to California and that she would need to relocate within 30 days, at her own expense. Thus, the circumstances surrounding the relocation of her position to California is significant to the analysis of whether the Agency is a joint employer of Complainant for purpose of establishing standing to use the EEO complaint process.

The record now contains a lengthy report of investigation. The report of investigation contains some evidence indicating that the Agency was not responsible for the relocation of Complainant's position.

In a declaration under penalty of perjury from A1, he asserts that he was not responsible for the relocation to California. Report of Investigation (ROI) at 2576. He asserts that due to changes in the contract, “[HSSI] recommended and executed the reduction of several positions and combined several requirements under a single contract support position. One of these efficiencies involved DHART...[the Program Manager for HSSI]<sup>2</sup> thought that “it would be [efficient] to make a position at the academy [in California] dual purpose by having the data entry of DHART be combined with an instructor or academy admin support position.” ROI at 2581.

The record, however, also contains evidence indicating that Agency had a role in Complainant’s position being relocated to California. Complainant, in a declaration under penalty of perjury, asserted that in August 2016 her HSSI first and second-level supervisors (S1 and S2) contacted her by phone and told her that A1 informed them that her DHART position was being moved to California. ROI at 2545. In a statement dated September 2, 2016, Complainant stated that during this phone call, she was told that this decision was being directed by A1. ROI at 74. Complainant also asserted that various attempts were made, but no one could convince A1 to change his mind.

The record also contains a declaration under penalty of perjury from the President/CEO of HSSI. Therein, the President of the contracting firm said A1 made the decision to transfer Complainant’s position to California. ROI at 2550. The President of HSSI stated that he was told this by Complainant’s second-level supervisor (S2). He said he directed S2 to ask A1 to reconsider. Id.

S2, in a declaration under penalty of perjury, asserts that there were contract changes which resulted in changes to DHART support and the location. ROI at 2556. However, the EEO Investigator did not expressly ask S2 what A1’s role was (if any) in the change of location of Complainant’s position. In addition, the EEO Investigator did not ask S2 if he called Complainant in August 2016, and told her the decision for the relocation of her position came from A1. Furthermore, the EEO Investigator did not expressly ask S2 if he told the President, HSSI that A1 was responsible for the location change of Complainant’s position.

In her statement dated September 2, 2016, Complainant further asserted that a named government employee (G1) confirmed the relocation decision was influenced by A1 and that this was “blatant retaliation.” ROI at 75. In her declaration, Complainant asserted that G1, among others, confirmed that A1 was behind the decision regarding the relocation of her position. ROI at 2545. The record reflects that the EEO investigator attempted to obtain a declaration from G1 but G1 did not respond. ROI at 2619. Complainant asserts that G1 was a key witness and as a government employee should have been compelled by the Agency to provide testimony. We agree.

---

<sup>2</sup> The Program Manager for HSSI was Complainant’s second-level supervisor (S2).

Based on the foregoing, we find that the AJ improperly dismissed Complainant's complaint on the grounds that the Agency could not be considered Complainant's joint employer for the purpose of continued processing of her EEO complaint at issue. To the contrary, we find there is sufficient evidence to suggest that A1 played a role in the decision to move Complainant's position, the basis of her discriminatory/retaliatory constructive discharge complaint. This evidence provides Complainant with adequate standing to proceed on her complaint.

Accordingly, we REVERSE the AJ's decision dismissing Complainant's complaint and we REMAND this matter for continued processing and a decision on the merits of Complainant's claim.<sup>3</sup>

### ORDER

Within 15 calendar days of the date this decision is issued, the Agency shall submit a renewed request for a hearing on Complainant's behalf, a copy of this appellate decision, and the complaint file to the Hearings Unit of the EEOC's Charlotte 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 to the Hearings Unit. Thereafter, the Administrative Judge shall issue a decision in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action 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.

---

<sup>3</sup> While we find the evidence is sufficient to conclude A1 had a sufficient role in the decision to relocate Complainant's position to establish standing for proceeding with her complaint, we make no determination on the extent of his role or the motivation for his involvement. Those determinations are left to the AJ on remand.

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:

  
\_\_\_\_\_  
Carlton M. Hadden, Director  
Office of Federal Operations

March 22, 2022  
Date