



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

[REDACTED]
Britany N.,¹
Complainant,

v.

Frank Kendall,
Secretary,
Department of the Air Force,
Agency.

Appeal No. 2021003831

Agency No. 8L1M2000719

DECISION

On June 23, 2021, Complainant, via counsel, filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a May 23, 2021 final Agency decision (FAD) dismissing her complaint of employment discrimination alleging violations of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

Complainant was hired by a staffing firm to serve the Agency as a Weather Forecaster III at various Agency locations for the Nevada Testing Range, in or around the Las Vegas, Nevada region. The same staffing firm supplies the Agency and the Department of the Navy engineering and technical support for multiple western test ranges.

On June 1, 2020, Complainant filed an equal employment opportunity (EEO) complaint that the Agency discriminated against her based on her disability (PTSD) when, from April 29, 2019 onward, it did not give her an effective reasonable accommodation so her service animal (dog) could accompany her on Agency transportation that she uses to get to her workstations.²

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.

² On appeal, Complainant clarifies that the Agency does not prohibit her service animal at her work locations. Rather, it prohibits her service animal on Agency transportation she uses to get to them.

In July 2020, the Agency dismissed Complainant's complaint for failure to state a claim asserting she had no standing to file a federal sector EEO complaint because she was not its employee. She appealed. In EEOC Appeal No. 2020004556 (January 6, 2021), the Commission found the record lacked the information needed to decide this issue, and remanded the complaint to the Agency to gather the necessary information and then either accept the complaint for investigation or dismiss it with new appeal rights to the Commission.

On remand, the Agency gathered additional facts and issued a new FAD again dismissing the complaint, finding that under common law it did not jointly employ Complainant with her staffing firm. The instant appeal followed.

ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. § 1614.103(a) requires that complaints of employment discrimination be processed per Part 1614 of EEOC regulations. EEOC Regulation 29 C.F.R. § 1614.103(c) states that within the covered departments, agencies and units, Part 1614 applies to all employees and applicants for employment.

In Serita B. v. Department of the Army, EEOC Appeal No. 0120150846 (Nov. 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)³; 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.

The term "joint employer" refers to two or more employers that each exercises 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, among other things, 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

³ The EEOC Compliance Manual and other guidance documents, as well as federal-sector appellate decisions, are available online at www.eeoc.gov.

'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.

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). Similarly, 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. Complainants v. Dep't of Justice, EEOC Appeal Nos. 0120141963 & 0120141762 (Jan. 28, 2015). 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 decisive and emphasizes that it is not necessary to satisfy a majority of the factors. 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.

Complainant's appeal brief includes a declaration by her. She states her staffing firm has nine weather forecasters onsite, and one onsite staffing firm supervisor (S1) who handles office policy and human resource issues. Complainant states an Agency Functional Evaluator oversees the contract weather forecasters, and supervises the weather office and other Agency workstations where she forecasts weather. There are two contract forecasters on each shift.

Complainant concedes that staffing firm leadership makes all individual work assignments and generally the Agency does not direct a specific person to complete a task.⁴ But she states the Agency decides what weather forecasts include, their format, and timing.

The Agency Functional Evaluator stated the staffing firm determines all individual contractor work assignments. A staffing firm manager (Manager 1) above S1 in Complainant's chain of command provided a statement that affirmed that the Agency does not assign Complainant work directly or through S1. Rather S1 assigns work to her and the other contract weather forecasters. While dissemination times are determined by the Agency and Federal Aviation Administration regulations, the practical, day-to-day implementation and delivery of forecasts is delegated to the staffing firm. For example, the Agency requires terminal aerodrome forecasts every 8 hours. The staffing firm directs its personnel to meet this requirement. Based on the evidence, we find that the Agency does not control the assignment of tasks to Complainant, either directly or indirectly.

Complainant states that her performance appraisal is done by the staffing firm, but the Agency Functional Evaluator creates metrics that play an important role in her appraisals. She states he reviews forecasts daily to ensure quality standards, and monthly compiles a report on the accuracy of each forecast by all contract forecasters, including hers. Complainant also stated that the Agency representative frequently gives feedback on the work of specific contract weather forecasters, such as minor corrections. She did not give any specific examples of this or state it happened to her. The Agency Functional Evaluator countered that the Agency evaluates overall contract performance each month and submits this to the staffing firm, and does not evaluate or make comments on any individual contract weather forecaster. Likewise, Manager 1 indicated the Agency does not give feedback on Complainant's performance, rather her work product is reviewed and monitored by S1. Based on this evidence, we again conclude the Agency does not have full or partial control over Complainant's appraisals.

Complainant states that the Agency sets its scheduling demands based on weather forecasting requirements in the Performance Work Statement, e.g., doing forecasts on a one-time-need day like a holiday, and the staffing firm determines how to meet the scheduling demands. The Agency Functional Evaluator gave a similar account, elaborating that individual contractor schedules are decided by the staffing firm. He stated the staffing firm submits the schedule in advance to him, which he reviews to ensure all shift requirements are fulfilled. Manager 1 added the staffing firm decided to use an eight week rotation schedule for ease of scheduling and to best suit its employees. The record shows that the staffing firm acts on Complainant's leave requests without input by the Agency or Complainant consulting the Agency. We find that the Agency has control over when work needs to be done, but no direct or indirect control over Complainant's individual schedule. On balance, we find the Agency's control over Complainant's schedule is less than the staffing firm.

⁴ Complainant states that if there is only one weather forecaster on a shift, an Agency agent can and does direct that forecaster to do a task if it is time sensitive. She did not give any specific examples of this or state it happened to her.

Complainant worked on Agency premises using Agency equipment, which points toward Agency control of her employment. The staffing firm paid Complainant's salary and benefits, which points to its control.

Complainant is required to have a security clearance to serve the Agency. She argues that if the Agency revoked it, this would result in her separation because she could no longer do her job, so the Agency has effective power to terminate her if the staffing firm did not keep her in another paid position. However, here we note there is no allegation that the Agency has indicated any issues with Complainant's clearance or desire to stop her services.

To get to work, Complainant drives to a parking lot where she and others get on Agency transportation to work. Because of a nondisclosure agreement, Complainant cannot give details of this "commute" transportation. Complainant states that as an accommodation, the staffing firm offered her free worksite housing and the opportunity to drive her personal vehicle to her remote workstations, which she accepted. But Complainant contends this accommodation is not effective for reasons not relevant to this discussion. The fact that the staffing firm offered Complainant free worksite housing strongly points in the direction of it having control over Complainant's employment.

In sum, we find that the Agency did not exercise sufficient control over Complainant's employment to be her common law joint employer.⁵

The FAD is AFFIRMED.

⁵ On appeal, Complainant argues for the Agency paying the attorney fees she incurred appealing both dismissals of her EEO complaint as sanction for not complying with the Commission's order in EEOC Appeal No. 2020004556 (Jan. 6, 2021) to gather sufficient information to make a determination on common law employment, and to accept or dismiss her complaint by March 22, 2021. We find no sanction is warranted. The Agency gathered sufficient information on remand in compliance with our order. While the FAD was not done until May 23, 2021, we find this delay alone does not warrant a sanction.

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

April 4, 2022
Date