



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

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

v.

Pete Buttigieg,  
Secretary,  
Department of Transportation  
(Federal Motor Carriers Safety Administration),  
Agency.

Appeal No. 2022003399

Hearing No. 570-2020-01306X

Agency No. 2019-28611-FMCSA-02

**DECISION**

On June 2, 2022, Complainant, via her attorney, filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a May 5, 2022, final Agency decision (FAD) dismissing her complaint of 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., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

**BACKGROUND**

During the period at issue, Complainant was employed by a staffing firm serving the Agency as an Administrative Assistant II at the Agency's Deputy Administrator's Office in Washington, DC. Her duties were secretarial in nature.

On May 5, 2022, Complainant filed an equal employment opportunity (EEO) complaint, as amended, alleging that the Agency discriminated against her based on her age (55) and in reprisal for prior protected EEO activity under Title VII and the ADEA when she:

1. Was repeatedly denied the opportunity to compete to be hired for a position as a federal employee in the front office.

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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.

2. On or about July 16, 2019, she learned a younger contract employee was hired permanently without an announcement of the available position.
3. On or about August 13, 2019, she was terminated from her contract position.
4. On November 15, 2019, her job offer for the position of Executive Assistant [at another Agency] was rescinded.

Following an EEO investigation, Complainant requested a hearing before an EEOC Administrative Judge (AJ), but later withdrew this request. On August 31, 2020, the AJ ordered the Agency to issue a FAD. On May 9, 2022, the Agency dismissed the entire complaint for failure to state a claim concluding that, even under common law, Complainant was not an employee of the Agency.

The instant appeal followed.

### ANALYSIS AND FINDINGS

#### Complainant's request for default judgment as sanction for delayed FAD

Our regulations require agency action in a timely manner at many points in the EEO process. Tammy S. v. Defense, EEOC Appeal No. 0120084008 (June 6, 2014). Compliance with these timeframes is not optional. The Commission stated in Royal v. Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009), “the Commission has the inherent power to protect its administrative process from abuse by either party and must ensure that agencies, as well as complainants, abide by its regulations.” Because of the time it can take to process a federal sector EEO complaint, any delays in complying with the time frames in the regulations can impact the outcome of the complainant's claims. Id.

Here, the Agency failed to comply with the Commission's regulations. The Agency received the AJ's order to issue a FAD on August 31, 2020, and under our regulations it was required to do so within 60 days. 29 C.F.R. § 1614.110(b). The FAD was issued 617 days after receipt of the AJ's order. Agency counsel submits a declaration by an Associate Director within its EEO function that issues FADs attributing the delay to being critically understaffed, employee turnover, impact of the ongoing COVID-19 pandemic, and a backlog that had grown exponentially.

Although the Agency failed to timely issue a final decision as required by our regulations, it did not act in a manner to warrant the sanction of a default judgment against it. See e.g., Josefina L. v. Soc. Sec. Admin., 0120142023 (July 19, 2016) (AJ dismissed the complainant's hearing request and ordered the agency to issue a FAD within 60-days. The agency's 671 delay beyond this does not warrant sanctions as the complainant did not show she was prejudiced by the delay); Alaina P. v. Veterans Affairs, EEOC Appeal No. 2020003490 (Sept. 29, 2021) (following the complainant's hearing request withdrawal, an AJ ordered the agency to issue a FAD. It delayed 387 days beyond the 60-day regulatory time limit to do so. No sanctions warranted); April T. v. Army, EEOC

Appeal No. 2021002762 (Aug. 3, 2022) (after the complainant elected a FAD, the agency delayed 446 days beyond the 60-day regulatory time limit).

While we do not impose a sanction in the present case, we find the Agency's failure to abide by the AJ's order and our regulations reflects negatively on its support for the integrity of the EEO process. Beatrice B. v. Veterans Affairs, EEOC Appeal No. 2019001641 (Sept. 17, 2020) (no sanction where following a supplemental investigation, the Agency delayed issuing a final decision for over eight months). Accordingly, we will notify Federal Sector Programs (FSP), which monitors the federal agencies' EEO programs, of the Agency's failure to comply with the regulations on timely issuing FADs.

*Dismissal of Complaint by Agency – Complainant's Employment Status*

Our jurisdiction is limited to employees and applicants for employment in covered departments, agencies and units. 29 C.F.R. § 1614.103(c).

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.

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 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. 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.

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), 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). 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, 2012 WL 5818075 (Nov. 8, 2012). 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. 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 (4<sup>th</sup> Cir. 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 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.

Here, Complainant has argued that the Agency is her joint employer for the purpose of establishing standing to use the 29 C.F.R. Part 1614 EEO complaint process.

Complainant relayed to the EEO counselor that she received her assignments from the Task Manager, who she stated was an Agency employee. Report of Investigation (ROI), Exhs. B1, at 4, Bates No. 52; F10, Bates No. 239. An Agency Senior Advisor to the Administrator stated that during the week of August 12, 2019, her team asked Complainant to make UPS shipping labels for sending equipment and materials ahead for use by the Administrator and several other Agency executives at a conference and checked with her throughout the day on this. Id. (means same as previous cite) at F10, Bates No. 282.

Another Agency Senior Advisor to the Administrator, who according to Complainant led the Administrator and Deputy Administrator's front office ("Front Office Lead"), stated "If anyone had an issue with the Complainant, there was a Task Master, a COOR [meaning Agency COR] and a project manager [presumably Complainant's staffing firm supervisor] on site at DOT who oversaw the Complainant. Id., at F2, at ¶ 5, Bates No. 170. This indicates the Task Manager had some oversight over Complainant.

In reply to Complainant's appeal, the Agency does not dispute the above.<sup>2</sup> Rather, it cites to language in the contract between the staffing firm and Agency that the staffing firm was required to provide total supervision of its staff, government personnel were not authorized or permitted to do so, and that it was a "non-personal services contract". It argues that under federal government contract regulations, this term means the contractor and its employees are not subject to the supervision and control usually prevailing in relationships between government and its employees. Based on the above, the Agency argues that it did not control or have the right to control Complainant's work performance. This argument is not persuasive. The Commission looks at what actually occurs in the workplace, even if it is inconsistent with language in the contract between the staffing firm and the agency. Baker. We find that the Agency gave Complainant at least some of her assignments and had some oversight of her performance. This points to joint employment.

Complainant worked on Agency premises using Agency equipment to perform her duties. While employed by five different staffing firms Complainant served the Agency one month shy of 17 years. This points to joint employment.

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<sup>2</sup> On appeal, Complainant argues that the Agency's reply brief was untimely filed. We disagree. This office gave the Agency an extension in writing, which was copied to Complainant's counsel, until November 23, 2022, to file its reply brief. It was filed on November 22, 2022.

The staffing firm acted on Complainant's leave requests. Front Office Lead stated the Administrator decided there should be coverage in the front office until 5:30 PM, this was included as a condition in the most recent contract, and Complainant was required to stay until 5:30 PM, even though she wanted an earlier departure schedule. In an Order for Supplies and Services dated March 21, 2019, signed by the Agency Contracting Officer, with no signature line for the staffing firm, the Agency ordered "Support Services Hours are required from 8:30 a.m. – 5:30 p.m." We find both the staffing firm and the Agency had control over Complainant's schedule, which points to joint employment.

On August 12, 2019, Front Office Lead emailed the Agency COR, referring to Complainant without mentioning her name, that she had performance and conduct problems. She wrote this included two separate critical deliveries not being made because Complainant did not appreciate the significance of tasks assigned from the Office of the Administrator. One was a reference to the above-mentioned UPS labels. She wrote another example was an untrue accusation that the front office used "under the table" hiring practices. This referred to an accusation by Complainant. The Front Office Lead continued "we cannot afford to have any semblance of favoritism or discrimination coming out of this Administration."

On the same day, the COR invited Complainant's staffing firm supervisor to a meeting attended by him, the COR, and the Agency Director of Human Resources. The staffing firm supervisor stated that because of the above UPS labels and a prior similar incident, the Agency advised they could not trust Complainant to accomplish simple tasks, and she was no longer "a good fit" for the position. He stated that before this, he did not know Complainant had any performance problems. ROI, Exhs. F9 at Bates No. 219; F10 at Bates Nos. 351 – 354.

The Staffing Firm supervisor issued a termination notice dated On August 13, 2019, to Complainant writing "Based on feedback received from the client regarding timeliness and quality of your work, we are removing you from the contract effective immediately.... As there is no other position available on this contract across other [staffing firm] contracts, this will result in the termination of your employment with [staffing firm] effective immediately." He reiterated this in his EEO investigatory statement.

In reply to Complainant's appeal, the Agency argues that the staffing firm "exercised control as [Complainant's] employer and made an independent decision to terminate her from its company." Only the staffing firm had authority to terminate Complainant from its employment. But the Agency's argument is unpersuasive because of referenced caselaw that when 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. The staffing firm immediately removed Complainant from the contract because the Agency advised it did not want her services and immediately terminated her because the staffing firm had no other jobs available.

The staffing firm paid all of Complainant's wages and benefits, and her work was not part of the Agency's mission. But the Agency had sufficient control to be Complainant's joint employer under common law, and we so find.

#### Issue 4

After Complainant was terminated, a second staffing firm presented her as a candidate for the position of Executive Assistant to the Department of Transportation's Federal Railroad Administration (FRA). After her second round of meet and greets with FRA on November 8, 2019, the FRA COR emailed the second staffing firm that Complainant was a good fit and requested the clearance process start. As part of this process, the second staffing firm requested Complainant go to the Department of Transportation and get fingerprinted.

On November 14, 2019, the COR emailed the second staffing firm that the FRA Deputy Administrator spoke directly with some of his colleagues at the Federal Motor Carrier Safety Administration, got negative feedback, and no longer wanted to bring Complainant on board.

In reply to Complainant's appeal, the Agency argues that unless it is ruled to be Complainant's joint employer, it has no liability for the second staffing firm not hiring Complainant to serve the FRA under the "third-party interferer" theory. We need not address this matter because we have ruled Complainant was jointly employed by the Agency.

#### Issues 1, 2 and 4

In reply to Complainant's appeal, the Agency argues that issues 1, 2 and 4 fail to state a claim for another reason. It cites the language in EEOC's Equal Employment Management Directive for 29 C.F.R. Part 1614, at 5-18 (REV. Aug. 5, 2015), that:

a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the complainant cannot prove a set of facts in support of the claim which would entitle the complainant to relief; the trier of fact must consider all of the alleged harassing incidents and remarks and, considering them together in the light most favorable to the complainant, determine whether they are sufficient to state a claim.

The Agency specifically argues how this applies to each of issues 1, 2 and 4. We disagree that it appears beyond doubt that Complainant cannot prove a set of facts in support of a claim which would entitle her to relief.

#### Issue 3

Regarding issue 3, the Agency argues that Complainant did not prove discrimination. This matter is not before us because the Agency has not issued a FAD on the merits.

### CONCLUSION

The FAD is REVERSED. In light of the fact that the Agency has already completed its investigation of the complaint and Complainant has waived her right to a hearing, the complaint is REMANDED to the Agency for the issuance of a FAD on the merits of Complainant's claims pursuant to the following Order.

### ORDER

**Within sixty (60) calendar days** of the date of this decision was issued, the Agency is ordered to issue a FAD on the merits of Complainant's complaint appealable to EEOC.

### 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).

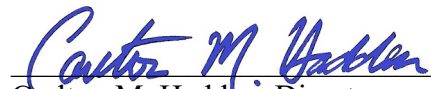
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

January 4, 2023  
Date