



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

[REDACTED]  
Judi S.,<sup>1</sup>  
Complainant,

v.

Thomas J. Vilsack,  
Secretary,  
Department of Agriculture  
(Forest Service),  
Agency.

Appeal No. 2022004964

Agency No. FS-2022-00364

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision (FAD) dated August 31, 2022, dismissing her 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**

At the time of events giving rise to this complaint, Complainant was an employee of the San Juan Mountain Association (SJMA). Pursuant to SJMA's contract with the Agency, Complainant was working as a Visitor Information Specialist at the Agency's Rio Grande National Forest facility in Monte Vista, Colorado.

On July 16, 2022, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the bases of national origin (Hispanic), sex (female), and reprisal (opposition to unlawful discrimination and filing a Harassment Review Assessment Team complaint) when:

1. On March 29, 2022, management terminated her from the San Juan Mountains Association (SJMA) contracting 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.

2. She was subjected to ongoing harassment, including, but not limited to:
  - a. On February 14, 2022, her Agency supervisor failed to assist her, discouraged her and prevented her from seeking assistance from other Agency employees.
  - b. On or about February 21, 2022, her Agency supervisor:
    - i. Was asked if he spoke Spanish and replied, “No, I don’t, Why would I?” I live here, this is America.”
    - ii. Said Complainant would never be permitted to go to lunch before him.
    - iii. Repeated his statement that Complainant’s front desk work was “women’s work, as well as another female employee’s work.”
    - iv. On or about February 21 or 28, 2022, her contracting supervisor ignored her concerns regarding her Agency supervisor’s hostile attitude and said, “Yeah that doesn’t really have anything to do with me;”
  - c. Or about February 28, 2022, her Agency supervisor made derogatory comments towards Hispanics, Native Americans and the renaming of Squaw Lake.
  - d. On or about March 14, 2022, her Agency supervisor chided her regarding her knowledge of Mexican-Catholic relations and the Mexican-Catholic motif of the Virgin Mary.
  - e. On March 29, 2022, her Agency supervisor used a sexual undertone while commenting to her, “get off.”
  - f. On March 29, 2022, her Agency supervisor reported her to the contracting Director when he learned of her accusations against him.
  - g. On unspecified dates, her Agency supervisor refused to communicate with her.
  - h. On unspecified dates, her Agency supervisor repeatedly expressed his superiority over her because of his male status.

The Agency dismissed these claims pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim, reasoning that Complainant was not an applicant or employee of the Agency and, therefore, lack standing to file an EEO complaint. Citing Ma v. Dep’t of Health and Human Services, EEOC Appeal No. 01962390 (May 29, 1998) and applying the numerous factors, the Agency concluded that Complainant was an employee of SJMA and not a joint employee of both SJMA and the Agency. The instant appeal followed.

On appeal, Complainant contends her complaint was improperly dismissed by the Agency because the circumstances of the relationship she had with the Agency favor the existence of a joint employment relationship.

In support of this, Complainant states that during her time at the Agency, “the entirety of [her] workload, work schedule, and direct supervision was performed by [FS Supervisor] of the US Forest Service.” She contends that both the Agency and SJMA referred to Agency Supervisor as Complainant’s supervisor, and Agency Supervisor himself assumed a supervisory role over Complainant. Complainant also noted that her SJMA Supervisor referred to Agency Supervisor as Complainant’s supervisor. Complainant further states that Deputy Forest Supervisor acknowledged Agency Supervisor was Complainant’s supervisor. Complainant also contends SJMA terminated her at the request of Agency Supervisor.

The Agency contends on appeal that the FAD properly dismissed the complaint for failure to state a claim because Complainant was a contractor and not a federal employee. In support of this, the Agency states it appropriately developed the record and correctly applied the factors set forth by the Commission in Ma v. Dep’t of Health and Human Servs., EEOC Appeal Nos. 01962389 & 01962390 (May 29, 1998). Based on the holistic view of the factors, the Agency found Complainant was solely an employee of SJMA. The Agency further argued that, in the alternative, Complainant failed to assert incidents which were pervasive or severe or that would alter the work environment as a matter of law.

### ANALYSIS AND FINDINGS

#### *Failure to State a Claim – Standing/Joint Employment*

The matter before us is whether the Agency properly dismissed Complainant’s complaint for failure to state a claim on the basis that she was not an employee of the Agency. 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) (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 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 outside organization 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, 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 (4th 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.

While the Agency's dismissal decision did undertake some analysis of the joint employment factors in reaching their conclusion, they did not provide any evidence to support the facts upon which they relied in that analysis. The Agency did not provide any sworn declarations to support these facts, and they did not provide a copy of the contract between the Agency and SJMA, or Complainant's offer letter, both of which were referenced as supporting documentation in the Agency's dismissal decision.

The record does contain a May 12, 2022 "HART Inquiry Report" that looked into Complainant's allegations of ongoing harassment by Agency Supervisor since February 14, 2022. (ROI, pp. 103-187). This report contains sworn statements from Complainant and other RGNF and SJMA employees that tend to support Complainant's claim that she was a joint employee of SJMA and the Agency. Complainant stated that one of her interviewers was Agency Supervisor; Agency Supervisor informed her of the priority of task completion; and Agency Supervisor tasked her with filling three lobby bulletin boards with information on fire, recreation, and seasonal information. Agency Supervisor stated he provided "daily task supervision" for Complainant. Executive Director of SJMA also stated that Agency Supervisor oversaw Complainant's "day to day." Administrative Support Assistant (an Agency employee) stated she started the process to get Complainant a new computer, but because she was not Complainant's supervisor, she had to turn it over to Agency Supervisor. Executive Assistant to Forest Supervisor (an Agency employee) stated that Complainant "was supervised by [Agency Supervisor] for her day-to-day tasks because she worked for him in the Supervisor's office." While not dispositive, this report seems to indicate Agency Supervisor exercised daily control over Complainant's tasks.

Based on the foregoing, the instant record is insufficient to properly assess the day-to-day actions and level of control over Complainant's employment. We note that complete control by the Agency is not required. Consequently, we find that the Agency's brief analysis, and inadequate record, falls short of a holistic consideration of the nature of the employment relationship and is, therefore, insufficient to substantiate the dismissal of the complaint.

#### *Failure to State a Claim – Harassment*

We note that on appeal the Agency also argued Complainant's complaint fails to state a claim for harassment because it did not allege incidents which were pervasive or severe or that would alter the work environment as a matter of law. We have previously found that "[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the complainant can prove no set of facts in support of the claim which would entitle the complainant to relief. Thus, a claim of harassment...should not be dismissed for failure to state a claim where the complainant has made factual allegations which, when construed in the light most favorable to the complainant, i.e., when considered together and treated as true, are sufficient to state a claim." Cobb v. Dep't of the Treasury, EEOC Request No. 05970077 (Mar. 13, 1997).

Here, Complainant has alleged, among other things, that she was terminated in retaliation for reporting the harassing behavior of Agency Supervisor. Her formal complaint also alleges that in addition to making derogatory comments to her, Agency Supervisor refused to communicate verbally with her and he refused to help her or allow other employees to help her when she had questions. These are direct actions which affect Complainant's abilities to perform her duties. It was therefore an alleged harm related to a term, condition, or privilege of employment. When taken together with her termination allegation, Complainant has alleged conduct that is intimidating, humiliating, and unreasonably interferes with the ability to perform her duties, such that a reasonable person would find this environment to be hostile or abusive. Complainant has made factual allegations which, when considered together and treated as true, are sufficient to state a claim.

#### CONCLUSION

Accordingly, we VACATE the Agency's final decision dismissing the formal complaint and we REMAND this matter to the Agency for a supplemental investigation in accordance with the ORDER below.

Within sixty (60) calendar days from the date this decision is issued, the Agency is ORDERED to take the following actions:

1. Conduct a supplemental investigation to obtain evidence consistent with this decision and relevant to assessing whether the Agency is a joint employer for EEO purposes.

The inquiry shall focus on the factors set forth in the sources addressed herein, including 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; and Serita B. v. Dep’t of the Army, EEOC Appeal No. 0120150846 (Nov. 10, 2016). A written report of the inquiry shall be made part of the complaint file in this matter.

The supplemental investigation shall include, but is not limited to, sworn statements from Complainant, Agency officials with knowledge of Complainant’s work or the contract with the San Juan Mountain Association, and Complainant’s San Juan Mountain Association supervisors, as well as a copy of the contract or statement of work between the Agency and San Juan Mountain Association. The statements shall also include the circumstances surrounding Complainant’s termination.

2. The Agency shall either issue a new final decision either dismissing the complaint, with an appropriate analysis of the relevant factors and with appeal rights to the Commission, or a letter accepting Complainant's complaint for investigation.
3. A copy of the supplemental investigation and new dismissal or letter of acceptance shall be provided to the Compliance Officer as set forth below.

#### 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).

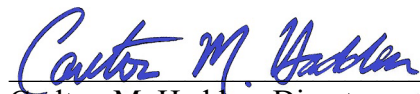
COMPLAINANT’S RIGHT TO FILE A CIVIL ACTION (R0610)

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

February 15, 2023

Date