



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

[REDACTED]  
Stetson D.,<sup>1</sup>  
Complainant,

v.

Alejandro N. Mayorkas,  
Secretary,  
Department of Homeland Security  
(Federal Emergency Management Agency),  
Agency.

Appeal No. 2023000323

Hearing No. 510-2020-00352X

Agency No. HS-FEMA-00911-2020

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated August 31, 2022, dismissing his 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. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. Upon review, the Commission finds that Complainant's complaint was properly dismissed pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim.

**BACKGROUND**

During the period at issue, beginning in July 2018 until June 2019, Complainant served the Agency as a Consultant, providing Lean Sigma Six (LSS) certification training for its Continuous Improvement Process (CIP) program in Guaynabo, Puerto Rico.

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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.

The record shows that Complainant was hired into this position in July 2018 by private entities holding a contract (the “LSS contract”) with the Agency identified as A Total Consulting Service (ATCS) PLC, and its subcontractor, Novaces, LLC. According to Complainant, Novaces paid Complainant and “treated him as a W-2 employee on the contract.”<sup>2</sup>

On April 7, 2020, Complainant filed a formal EEO complaint alleging that the Agency subjected him to discrimination on the bases of race (Caucasian), color (White), sex (male) and age (over 40 years) when:

1. From August 1, 2018, until April 2019, Agency management delayed Complainant’s team in piloting the Digital Site Inspection Tool (“DSI”);
2. From August 2018, until May 2019, management thwarted Complainant’s team in their attempts to correct the Statement of Work (“SOW”);
3. On two occasions between September 15, 2018, and October 15, 2018, the CIP Manager told Complainant’s team they were being paid too much;
4. On September 19, 2018, “M1” repeatedly directed Complainant’s team to re-enter their Objectives and Key Results (OKRs) into MAX TRAX on four separate occasions;
5. On September 30, 2018, “M1” reprimanded Complainant and his team for not providing a list of the people that had attended the Lean Six Sigma (LSS) Awareness Training to the Training Directorate;
6. In September 2018 through June 2019, management provided Complainant and his team with ambiguous guidance regarding reporting requirements and format;
7. From September 2018 through November 2018, FEMA management failed to supply Complainant and his team with the required software to complete their mission;
8. In October 2018, “M1” and a Program Analyst, Continuous Improvement Process (CIP) (“M2”) reprimanded Complainant’s team for acting without explicit approval;
9. In October 2018, Complainant and his team were reprimanded for providing a Champions’ Training attendee list that was out of date;

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<sup>2</sup> Complainant is an owner and principal consultant of Cyberricade, Inc., the entity made a subcontractor of Novaces. Complainant argues that, as a subcontractor of Novaces, employees of Cyberricade under the LSS contract, including himself, had an employer/employee relationship with Novaces.

10. From October 1, 2018, through March 30, 2019, Complainant and his team were required to make over a dozen minor/insignificant modifications to reporting requirements for CIP and FEMA leadership;
11. From October 7, 2018 to October 15, 2018, "M1" failed to notify Complainant and his team members of issues with documentation and instead brought the issues directly to the attention of FEMA management and the prime contracting company;
12. On October 9, 2018, "M1" made a sarcastic comment just prior to one of Complainant's teammates joining the team, when he remarked how lucky FEMA was to bring on an LSS contractor from a failing company;
13. On October 12, 2018, "M1" informed Complainant's team that they were off track and not meeting his expectations regarding the Integrated Work Status Database project;
14. On October 12, 2018, "M1" informed Complainant's team that it was not in their best interest to utilize the Federal Coordinating Officer's (FCO) open-door policy and that all information would need to be filtered through him;
15. On October 15, 2018, and other unspecified dates, "M1" ordered other employees to spy on Complainant's team and document and report minor infractions;
16. 16. On October 15, 2018, Complainant's team was reprimanded during a meeting for not having an updated call down list;
17. On October 21, 2018, and other unspecified dates, "M1" and "M2" precluded Complainant and his team from forming an LSS Steering Committee;
18. On October 28, 2018, "M1" wrote a report chastising Complainant's team and threatened to terminate their contract if the delivery of training materials and corrective actions were not completed within a month;
19. On November 1, 2018, and other unspecified dates, "M1" made several derogatory remarks about Complainant's team;
20. On April 1, 2019, "M2" reprimanded Complainant and his team and reported them to the COTR for not having a member from CIP present when interacting with leadership;
21. On April 8, 2019, the FCO's Executive Assistant failed to deliver a private letter written by Complainant and his team members to the FCO;
22. On April 22, 2019, "M2" ordered Complainant and his team not to use the Puerto Rican Call Center (PRCC) for team meetings because she wanted to see them at their

workspace;

23. On May 1, 2019, Complainant and his team were informed that “M2” had made multiple disparaging remarks about them while speaking Spanish;
24. On several occasions, including May 15, 2019, Complainant and his team were informed that “M2” repeatedly referred to them as “the old white guys;” and
25. On June 15, 2019, management terminated Complainant’s contract.<sup>3</sup>

Complainant stated that he had served as technical lead of a team that included himself and the six other independent LSS consultants. According to Complainant, he and the other independent LSS consultants identified themselves as Caucasian men who were all over 50 years in age.

On October 22, 2022, the Agency procedurally dismissed Complainant’s formal Complaint for failure to state a claim pursuant to 29 C.F.R. 1614.107(a)(1). The Agency reasoned that Complainant had been a subcontractor as opposed to an Agency employee.

The instant appeal followed. On appeal and through Counsel, Complainant maintained that the Agency had acted as a joint employer throughout Complainant’s work on the LSS contract because Agency employees controlled, supervised, and ultimately decided to terminate his employment on the LSS contract.

### ANALYSIS AND FINDINGS

Under the Commission regulations at 29 C.F.R. §§ 1614.103, 1614.106(a), the Agency must accept a justiciable claim that an aggrieved employee or applicant for employment has been subjected to discrimination based on EEO-protected characteristics or because of EEO-protected activities.

In Serita B. v. Dep’t of the Army, EEOC Appeal No. 0120150846 (Nov. 10, 2016), EEOC reaffirmed its long-standing position on “joint employers;” it is supported by numerous sources including: EEOC Compliance Manual, “Threshold Issues,” OLC Control No. EEOC-CVG-2000-2 (May 12, 2000) (Compliance Manual) at § 2-III(B)(1)(a)(iii)(b), EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, “Coverage Issues,” OLC Control No. EEOCCVG-1998-2

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<sup>3</sup> Initially, as the agent representing a class consisting of himself and the other independent LSS consultants, Complainant filed a class complaint in April 2020. However, on April 9, 2021, an EEOC Administrative Judge from the Miami District Office granted Complainant’s motion to withdraw the class complaint and remanded the case to the Agency to individually process the former class members individual EEO complaints. Thereafter, Complainant filed the present individual formal EEO complaint.

(Dec. 3, 1997) (Enforcement Guidance) at Question 2; Ma v. Dep't of Health and Human Servs., EEOC Appeal Nos. 01962389 and 01962390 (May 29, 1998). We reiterate the analysis set forth in those decisions and guidance documents in this decision.

On the factor of the right to control when, where, and how a 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), reconsideration denied, EEOC Request No. 0520150430 (Mar. 11, 2016) (when a staffing firm issued a complainant's appraisal with input from the agency, this pointed toward joint employment). Likewise, where both the agency and staffing firm provided logistical resources to perform the job, this pointed to joint employment. Elkin v. Dep't of the Army, EEOC Appeal No. 0120122211 (Nov. 8, 2012). Similarly, if a staffing firm terminates a worker because an agency communicates it no longer wants that worker, then this supports that the agency has joint and de facto authority to discharge the worker. Complainants v. Dep't of Justice, EEOC Appeal Nos. 0120141963 and 0120141762 (Jan. 28, 2015). EEOC considers relevant each entity's right to control terms and conditions of employment, whether or not it exercises joint employer authority. Enforcement Guidance at Question 2, Example 5 (where an entity reserves the right to direct the means and manner of a worker's labor, 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 factor to be decisive and emphasizes that it is unnecessary to satisfy a majority of the factors. The fact that a worker 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, all of the circumstances in the worker's relationship with the agency should be considered to determine if the agency should be deemed the worker's joint employer. Enforcement Guidance at Question 1. In sum, the Agency will qualify as a joint employer if it has the right to control the means and manner of Complainant's work, regardless of whether he was paid by an outside organization or is on the federal payroll. Enforcement Guidance at Question 2.

In the instant case, the record reflects that Complainant was a subcontractor of Novaces. It is undisputed that the Agency provided equipment and working space to Complainant. Complainant also dealt with the Agency employees who were designated its Contracting Officer Representative (COR) on a regular basis, including his objecting to tasks that he believed exceeded the prime contract's statement of work. We also observed that Complainant attended staff meetings with Chief of Staff for the Agency's Puerto Rico recovery effort.

Nevertheless, we find that primary control of Complainant's work was exercised by the prime contractors in this case. The Agency did not pay or provide benefits to Complainant and did not track or monitor his time and attendance. The Agency also did not provide Complainant with

performance evaluations. While the Agency negotiated the Statement of Work with ATCS/Novaces and assigned projects and guidelines, Complainant, as a skilled consultant, performed his day-to-day work without direct supervision from any Agency official. In fact, Complainant explicitly stated that his team, “both led and executed their own LSS projects and trained local hires . . . FEMA [the Agency] management . . . did not monitor the program . . .”. Complaint File at 97, 103. Complainant’s supervisor of record was a Program Manager of the prime contractor.

The strongest evidence supporting the conclusion that the Agency was not his joint employer came from Complainant’s recounting of conversations with the prime contractor’s representative relating why he was being terminated. The prime contractor’s representative told Complainant that it had made the decision to terminate their contractual arrangement because of “out-of-control” burn rates. Complainant accused the prime contractor of inflating his burn rate in order to overbill the Agency for work performed by Complainant and the other LSS consultants. In other words, the prime contractor stated that it had made the business decision that Complainant’s work had proved too expensive. Other LSS consultants had offered to resign so the prime contractor would not have to cancel Complainant’s work, but it was ultimately the prime contractor who made the critical decision to discontinue Complainant’s services because his invoicing was diminishing the prime contractor’s return on its contract with the Agency.

### CONCLUSION

Accordingly, we find that the Agency's properly dismissed the Complainant's formal EEO complaint for failure to state a claim in accordance with 29 C.F.R. § 1614.107(a)(1). Therefore, this Commission hereby AFFIRMS the final Agency decision.

### 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. 29 C.F.R. § 1614.405; EEO Management Directive for 29 C.F.R. Part 1614 at Ch. 9 § VII.B (Aug. 5, 2015).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit his request and arguments to the Director, OFO, EEOC, via regular mail addressed to P.O. Box 77960, Washington DC 20013, or by certified mail addressed to 131 M St. 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. 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). 29 C.F.R. § 1614.403(g). Either party's request 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. 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:



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Carlton M. Hadden, Director  
Office of Federal Operations

January 31, 2023  
Date