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Office of Diversity and Equal Opportunity

Reply to Attn of:

TO: Directors, NASA Centers  
FROM: Associate Administrator for Diversity and Equal Opportunity/Ms. Manuel  
SUBJECT: Contingent Worker Desk Guide

In August 1999, in response to the Equal Employment Opportunity Commission's (EEOC) Enforcement Guidance Notice No. 915.002, Application of the Equal Employment Opportunity Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, this Agency issued Implementing Instructions aimed at creating Agency-wide standards for processing complaints of discrimination filed by contract employees.

Since that time, NASA has benefitted from its experience with Contingent Worker cases, as well as a myriad of EEOC case decisions, and interaction with other Federal agencies having similar issues and concerns. As a result of these experiences, and in an effort to more closely adhere to changes and clarifications reflected in EEOC case law, this Office has undertaken to incorporate those changes, clarifications and experiences into the attached Desk Guide. These materials are intended not only to adhere to law and policy, but are designed to create a uniform, streamlined and efficient method for processing informal contingent worker complaints at the Center level. Thus, this Contingent Worker Desk Guide effectively replaces and supersedes the 1999 Implementing Instructions.

This Contingent Worker Desk Guide was developed to provide EO Directors and their staff with a user-friendly step-by-step method for processing informal complaints of discrimination and retaliation initiated by contingent workers. Because NASA greatly depends on a significant contractor work-force, it is anticipated that this Desk Guide will become integral to the functioning of most every Center EO Office.

This effort could not have been completed without the close cooperation and collaboration with the Office of the General Counsel (OGC). I would like to thank OGC for its support in this endeavor, as well as the Center EO and legal communities that provided input and assistance.

A handwritten signature in black ink that reads "Brenda R. Manuel".

Brenda R. Manuel

Enclosures



# CONTINGENT WORKER DESK GUIDE



OFFICE OF DIVERSITY AND  
EQUAL OPPORTUNITY

September 2011

## TABLE OF CONTENTS

<b>I. INTRODUCTION</b>	<b>3</b>
A. Purpose and Scope	3
B. Background	4
1. “Contingent Worker” Defined	4
2. Determining Whether a Contingent Worker Qualifies as an “Employee”	4
3. Temporary Employment Agencies and Contract Firms	5
a. Temporary Employment Agencies	5
b. Contract Firms	5
<b>II. CONTINGENT WORKERS AND THE EEO COMPLAINTS PROCESS</b>	<b>5</b>
A. The Informal (Pre-Complaint) Stage	6
1. Roles and Responsibilities	6
2. Conducting the Contingent Worker Inquiry	6
a. Initial Interview	7
b. The 15 Factor Analysis	8
c. Necessary Documentation and Interviewee Inquiries	8
d. Summary of the EEO Counselor’s Role in Contingent Worker Analysis	9
B. The Formal Complaint Stage	10
1. ODEO Review of the Counselor’s Report and Recommendation	10
2. Complainant’s Appeal Rights	10
C. Center Posting Requirement	10
<b>III. CONTINGENT WORKER TOOLKIT</b>	<b>11</b>
Appendix A. Document Checklist	12
Appendix B. Fifteen Factor Analysis Checklist	13
Appendix C. Fact-Finding Tips	23

## CONTINGENT WORKER DESK GUIDE

### I. INTRODUCTION

NASA relies upon Federal civil service employees and a range of non-civil servants such as contractors, staffing agency personnel, paid student interns, independent contractors, and others, in order to accomplish its mission.<sup>1</sup> NASA considers these persons “contingent workers.” The U.S. Equal Employment Opportunity Commission (EEOC) defines contingent workers generally as persons who perform work for entities but are not direct employees of that entity. For NASA, contingent workers may include, but are not limited to, persons such as security guards, grounds and facilities maintenance workers, administrative support staff, Information Technology (IT) support, scientists and engineers. In some rare cases, these individuals may be able to avail themselves of the Federal Sector Equal Employment Opportunity (EEO) complaints process.<sup>2</sup> These individuals may qualify as “Federal employees” for purposes of the EEO complaints process only if they meet certain criteria showing that NASA exercises significant control over the means and manner of their performance.

#### A. Purpose and Scope

This Desk Guide is designed to assist Center Equal Opportunity (EO) Directors in implementing EEOC guidance regarding “contingent worker” discrimination complaints. More specifically, the Guide is intended to facilitate Centers’ efforts in:

1. Gathering and reporting the appropriate documentation for the Agency to make its jurisdictional determination on whether the contingent worker’s claim should be processed under the Federal Sector EEO complaints process.
2. Making a recommendation to the Agency Office of Diversity and Equal Opportunity (ODEO) as to whether a given contingent worker may proceed to the formal stage of the EEO complaints process.

The Center EO Director, in consultation with his or her Office of Chief Counsel (OCC), or at NASA Headquarters, the Office of the General Counsel (OGC), will conduct an inquiry necessary to make a jurisdictional recommendation. The information, references, and materials contained in this Guide are to be used as a tool by the EO Director in conducting the contingent worker jurisdictional analysis. This information, however, *is not to be used as a substitute for*

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<sup>1</sup> It is important that EEO Counselors distinguish between ‘paid student interns’ whose complaints would fall within purview of these contingent worker guidelines, and ‘volunteer student interns’ whose cases are to be analyzed under a separate legal standard. For more information and guidance about processing complaints of discrimination initiated by student interns, please contact your Center Chief Counsel’s Office, Office of the General Counsel, or the ODEO Complaints Management Division.

<sup>2</sup> Contingent workers may also be entitled to file a formal charge of discrimination against their private sector employers.

*legal advice.* As stated above, the EO Director must work with the legal office in conducting the inquiry and issuing the recommendation.

## **B. Background**

On December 3, 1997, EEOC issued enforcement guidance on the application of EEO laws to contingent workers placed by temporary employment agencies and other staffing firms.<sup>3</sup> In 1999, NASA issued its own Implementing Instructions on contingent worker analysis. This Desk Guide updates the Agency's 1999 guidance to reflect changes in the law and Agency policy regarding contingent worker determinations.

### ***1. "Contingent Worker" Defined***

EEOC defines "contingent workers" as "workers who are outside an employer's 'core' workforce, such as those whose jobs are structured to last only a limited period of time, are sporadic, or differ in any way from the norm of full-time, long-term employment."<sup>4</sup> The contingent workforce also includes individuals who are hired and paid by a "staffing firm," such as a temporary employment agency or contract firm (see Section II.B.3 below), but whose working conditions are controlled in whole or in part by the clients, e.g., Federal agency, to whom they are assigned.

### ***2. Determining Whether a Contingent Worker Qualifies as an "Employee"***

Contingent workers may, under certain circumstances, qualify as "Federal employees" within the meaning of the EEO laws. EEOC notes that the "threshold question" in determining whether a contingent worker qualifies as a Federal employee for purposes of the EEO laws "is whether a staffing firm worker is an 'employee' or an 'independent contractor.'"<sup>5</sup> In addition, EEOC has delineated certain factors to be considered in making the determination of whether a contingent worker qualifies as an employee.<sup>6</sup> (These factors are identified and addressed in detail in Sections II and III below.) Based on an analysis utilizing these factors, a contingent worker may be deemed to be a Federal employee for purposes of the EEO complaints process, and would have the same right as Federal employees to proceed under this process.

EEOC also has recognized that "joint employment" relationships may be created whereby both the Federal agency and a staffing or contract firm may both be considered the "employers" of the contingent worker.<sup>7</sup> A determination of joint employment requires an assessment of the

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<sup>3</sup> EEOC, Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC NOTICE, Number 915.002, December 3, 1997 (hereafter referred to as "EEOC 1997 Guidance") (This document is provided in the Contingent Worker Desk Guide Supplement at Tab 2).

<sup>4</sup> EEOC 1997 Guidance, Introduction. See also footnotes 3 and 4.

<sup>5</sup> *Id.*, "Coverage Issues."

<sup>6</sup> These factors derive from EEO enforcement guidance pertaining to contingent worker analysis. See EEOC 1997 Guidance, "Coverage Issues." EEOC has also used a "factor" approach in its contingent worker related case law. See, e.g., Ma v. Department of Health and Human Services, EEOC Appeal No. 0 1962390 (June 1, 1998) (citing Nationwide Mutual Insurance Co., et. al. v. Darden, 503 U.S. 318, 323-24 (1992)).

<sup>7</sup> EEOC 1997 Guidance, "Coverage Issues."

comparative amount and type of control the “staffing firm” and the agency each maintained over the individual’s work.<sup>8</sup> A Federal agency qualifies as a joint employer of an individual assigned to it if the agency has the requisite control over that worker, as established by an analysis of the factors. Hence, the Agency’s final determination in a contingent worker case may establish that an employment or “joint employment” relationship exists between the Agency and the contingent worker.

### ***3. Temporary Employment Agencies and Contract Firms***

The EEOC’s 1997 Guidance focuses primarily on a large subgroup of contingent workers; namely, those who are hired and paid by a “staffing firm,” such as a temporary employment agency or contract firm, but whose working conditions are partially or totally controlled by the client (e.g., a Federal agency such as NASA) to whom they are assigned.

#### *a. Temporary Employment Agencies*

Temporary employment agencies typically recruit, screen, hire and oftentimes train their employees and place these employees in temporary jobs at a client’s worksite. They set and pay salaries, withhold taxes and social security, and provide workers’ compensation coverage. The client is billed by the temporary agency for the services performed by its employees. During the worker’s assignment to the client’s worksite, the client routinely controls the working conditions, provides supervision, and determines the length of the assignment.

#### *b. Contract Firms*

Contract firm arrangements usually involve contracting with a client to provide certain services on a long-term basis and the placement of workers and supervisors in the client’s worksite to perform the services. As is the case with temporary employment agencies, contract firms routinely recruit, screen, hire and, in some instances, train their workers. Contract firms also set and pay salaries, withhold taxes and social security and provide workers’ compensation coverage. Typical examples of contract firm services include security, landscaping, and janitorial services. At NASA, contractors provide integral support to most NASA program offices on a wide range of functions critical to the Agency’s mission. Many of NASA’s contractors are in highly skilled positions such as Information Technology (IT), accounting, and scientific research, as well as travel, administrative and benefits support positions.

## **II. CONTINGENT WORKERS AND THE EEO COMPLAINTS PROCESS**

Consistent with EEOC’s 1997 Guidance, contingent workers must be notified that they may file complaints of discrimination pursuant to the private sector EEOC complaint process and/or with NASA (see Section II.C, below). Therefore, should a contingent worker seek EEO counseling, NASA must provide such services. Depending on the contingent worker’s particular circumstances, either the private employer and/or NASA may be liable for discrimination. If NASA is considered an employer or joint employer of a contingent worker and is found to have

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<sup>8</sup> Maynard v. Department of the Navy, EEOC Appeal No. 01A20699 (June 25, 2002).

discriminated, NASA will be liable for that discrimination *whether or not the individual is actually a Federal employee.*

## **A. The Informal (Pre-Complaint) Stage**

### ***1. Center Roles and Responsibilities***

NASA Center EO Directors are responsible for the overall administration of the informal process, including providing day-to-day guidance and assistance to EEO Counselors in conducting their counseling activities, preparation of the Center inquiry on the jurisdictional question in contingent worker cases, and coordination with the Center Offices of the Chief Counsel (OCC), or at NASA Headquarters, the Office of the General Counsel (OGC).<sup>9</sup>

Center EO Offices are responsible for providing EEO counseling to all aggrieved individuals who seek such counseling, regardless of whether they are NASA civil servants, contractors, or applicants for NASA employment.<sup>10</sup> In conducting counseling activities, EEO Counselors must carry out their responsibilities to these aggrieved individuals just as they do with all other NASA employees, subject to the EEOC Regulations at 29 CFR Part 1614, and Management Directive 110. This is a change from NASA's 1999 guidance that instructed counselors to provide counseling only if the individual was deemed to be a contingent worker entitled to EEO complaint processing. NASA's policy change is consistent with both recent EEOC case and other Federal agencies' policies. While counseling should be provided to all individuals, we recognize that remedies may be limited and settlement options constrained if NASA does not have jurisdiction over their aggrieved individual.

### ***2. Conducting the Contingent Worker Inquiry***

Regarding contingent workers, an essential aspect of counseling is to conduct an inquiry to determine whether the contingent worker is an employee or an independent contractor, with the ultimate issue being whether the contingent worker may be considered an "employee" of NASA for the purpose of filing a formal EEO complaint under 29 CFR Part 1614. This is a jurisdictional inquiry, the essence of which is examining whether the Agency *reserved for itself control over the means and manner of the contingent worker's employment.*<sup>11</sup> Contained in the inquiry must be a brief synopsis of findings and recommendation in regard to jurisdiction, based on the "15 factor analysis," discussed in detail below.

Deciding whether a "contingent worker" meets the legal definition of an "employee" requires fact-finding and assessment to address each of the 15 factors. For NASA, such fact-finding and

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<sup>9</sup> It is recognized that this is a departure from the 1999 Implementing Instructions. This is an effort to comport with current EEOC regulations and case law.

<sup>10</sup> As counseling is mandated in all cases, Center EO Offices shall adhere to the time constraints for EEO Counseling set forth in EEOC Federal Sector EEO regulations at 29 CFR § 1614.105.

<sup>11</sup> EEOC 1997 Guidance, "Coverage Issues."

assessment commences when a contingent worker initiates the EEO complaint process by contacting an EEO counselor.<sup>12</sup> *It is important to note EEOC guidance stating:*

“[N]o one factor is decisive, and it is not necessary even to satisfy a majority of factors. The determination of who qualifies as an employer of the worker cannot be based on simply counting the number of factors. Many factors may be wholly irrelevant to particular facts. Rather, all of the circumstances in the worker's relationship with each of the businesses should be considered to determine if either or both should be deemed his or her employer.”<sup>13</sup>

In conducting the inquiry, EO Officers must work closely with EEO Counselors and the OCC or OGC to obtain key information regarding whether NASA has ultimate jurisdiction over the aggrieved individual, i.e., whether the contingent worker is a “Federal employee” for purposes of the complaints process. Once that information is gathered, EO Officers also must work closely with these same partners in preparing the Center investigation report and recommendation on the jurisdictional question,

#### *a. Initial Interview*

When a contingent worker seeks pre-complaint counseling, the initial issue is to determine jurisdiction. The EEO Counselor will conduct the initial interview as follows:

- 1) Advise the contingent worker about the EEO complaint process under 29 C.F.R. Part 1614 and possible election requirements.
- 2) Advise the contingent worker about the right to file with EEOC against the private sector employer as well as with NASA.
- 3) Determine the issues and bases of the potential complaint.
- 4) Conduct EEO counseling-related inquiries.
- 5) Inform the contingent worker of the need to conduct an inquiry to gather information on the question of jurisdiction, which will be addressed at the formal stage.<sup>14</sup>
- 6) Request information and guidance from EO Officer and Office of Chief Counsel on the conduct of the inquiry; and
- 7) Issue a recommendation, in consultation with the OCC/OGC, on jurisdiction to the Agency ODEO, based on the 15 factor analysis (to be appended to the counseling report).

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<sup>12</sup> Like employees, these aggrieved individuals must initiate counseling within 45 days of the alleged discriminatory event.

<sup>13</sup> *Id.*

<sup>14</sup> It is recommended that counselors request extensions as early as possible if additional time is required to complete both the Counseling and Contingent worker inquiry.

*b. The 15 Factor Analysis*

The EEO Counselor, in consultation with the EO Director and OCC/OGC, addresses the jurisdictional issue involving a contingent worker by gathering key information concerning the contingent worker's relationship with NASA. In gathering this information, the EEO Counselor must address at least the following list of factors needed in order for the Agency ODEO to determine whether NASA exercises supervisory control over the means and manner of the worker's performance. The contingent worker jurisdictional analysis must determine whether:

- 1) NASA controls when, where, and how the worker performs the job.
- 2) The work requires a high level of skill or expertise.
- 3) NASA furnishes the tools, materials, and equipment.
- 4) The work is performed on the premises of NASA.
- 5) There is a continuing relationship between the worker and NASA.
- 6) NASA has the right to assign additional projects to the worker.
- 7) NASA sets the hours of work and the duration of the job.
- 8) The worker is paid by the hour, week, or month rather than for the agreed cost of performing a particular job.
- 9) The worker has a role in hiring and paying assistants.
- 10) The work performed by the worker is part of the regular business of NASA.
- 11) The worker is engaged in his or her own distinct occupation or business.
- 12) NASA provides the worker with benefits such as insurance, leave, or workers' compensation.
- 13) The worker is considered an employee of NASA for tax purposes (i.e., NASA withholds Federal, state, and Social Security taxes).
- 14) NASA can discharge the worker.
- 15) The worker and NASA believe that they are creating an employer-employee relationship.

*c. Necessary Documentation and Interviewee Inquiries*

This Guide provides a Contingent Worker “Toolkit” at Section III below. The Toolkit contains several documents designed to assist Center EO Offices and Counselors in preparing and finalizing the necessary work associated with contingent worker jurisdictional analysis. These include a Document Checklist, a “Fifteen Factor Analysis” Checklist, and Fact-Finding Tips. The Document Checklist (Appendix A) lists all relevant documents needed to conduct the analysis and develop the evidence to support it. The Analysis Checklist (Appendix B) contains a factor-by-factor listing of appropriate inquiries to determine whether the “contingent worker” may be considered an “employee.” The Fact-Finding Tips are provided as Appendix C.

*d. Summary of the EEO Counselor’s Role in Contingent Worker Analysis*

EEO Counselors will do everything they normally do at the counseling stage, in addition to conducting the 15 factor analysis. In summary, EEO Counselors are expected to do the following in contingent worker cases:

- 1) Conduct fact-finding on the issues presented.
- 2) Conduct a Contingent Worker inquiry.
- 3) Attempt resolution.
- 4) Document resolution.
- 5) Issue a Notice of Final Interview and Right to File a Formal Complaint with ODEO if resolution is not achieved.
- 6) Issue Report on Jurisdictional Inquiry and Recommendation based on the 15 factor Analysis.<sup>15</sup>
- 7) Prepare an EEO Counselor’s Report sufficient to document that the Counselor undertook the required counseling actions and to resolve any jurisdictional questions that arise:
  - a) pertinent documents gathered during the inquiry, including the underlying contractual documents;
  - b) a synopsis of the contingent worker inquiry and recommendation regarding jurisdiction;
  - c) an indication as to whether the contingent worker has filed the same matter in a different forum or against their private sector employer;
  - d) a precise description of the issues and the bases counseled;
  - e) specific information bearing on timeliness of the counseling contact;
  - f) interview summaries of party and witness interviews;

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<sup>15</sup> The Recommendation is not intended to be a final determination, but rather a concise assessment of the information received from the inquiry.

- g) if timeliness appears to be a factor, an explanation for the delay;
- h) the corrective action requested by the counselee and management's response to the requested corrective action; and
- i) the approximate amount of time spent on counseling activity and date of report.

## **B. The Formal Complaint Stage**

Once the contingent worker files a formal complaint, ODEO will assume authority over the case. The first issue that will be addressed by ODEO is that of jurisdiction. This determination will be based upon evidence derived from the jurisdictional inquiry conducted at the informal stage. If it is determined that the contingent worker is not entitled to processing as a NASA employee, the claim will be dismissed without regard to the merits of the complaint. Alternatively, if it is determined that NASA was either the employer (or joint employer) the complaint will be processed as if the contingent worker were a NASA employee.<sup>16</sup>

### ***1. ODEO Review of the Counselor's Report and Recommendation***

If the contingent worker files a formal complaint, ODEO will review the EO Counselor's report and will determine whether the underlying documentation and recommendation provided by the Center EO Office and OCC/OGC supports jurisdiction.

- a. If ODEO finds that jurisdiction exists, and there are no other regulatory grounds for dismissal, the complaint will be forwarded for formal complaint processing, including investigation, pursuant to 29 C.F.R. Part 1614 *et seq.*
- b. If ODEO finds no jurisdiction, ODEO will dismiss the formal complaint for lack of jurisdiction and advise the contingent worker of applicable appeal rights to EEOC.

### ***2. Complainant's Appeal Rights***

The complainant will have the right to file an appeal with the EEOC Office of Federal Operations.

## **C. Center Posting Requirement**

EEO posters on the complaints process must include the following statement:

“Under limited circumstances, contingent workers may have access to NASA's Discrimination Complaint process. If you feel that you have been subjected to unlawful discrimination on the part of a NASA civil servant, you must initiate EEO counseling within 45 days of the date of the alleged discriminatory action.”

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<sup>16</sup> Contingent workers may also be entitled to file a formal charge of discrimination against their private sector employers pursuant to EEOC private sector regulations, or other local jurisdictions.

### **III. CONTINGENT WORKER TOOLKIT**

In the Appendices that follow, the Guide provides a “Toolkit” for preparing and finalizing the contingent worker analysis, including the jurisdictional recommendation. The aim is to create a standard methodology that will assist Centers in the production of legally sufficient and consistent analyses for contingent worker recommendations.

## Appendix A. Document Checklist

For each of the 15 factors, the pertinent portion of the contract that sets forth the terms and conditions of the contingent worker's duties is required information.<sup>17</sup> The contract, as well as information contained in other documents, may also be required in order to evaluate several of the indicated factors, as those factors specifically relate to the contingent worker. Some of the documents listed in this checklist should be obtained only if necessary. Note: This process is not intended to be lengthy or amount to a full-blown Investigative Report-type investigation. The following documents should be obtained:

Document	Provided?
1. The contract between the firm, prime contractor, subcontractor and NASA.	_____
2. A copy of the contingent worker's signed contract of employment with the firm and/or NASA, if any.	_____
3. Any and all statements of work regarding the duties and responsibilities of the contingent worker and NASA.	_____
4. All addendums and changes to any of the above documents, if relevant to the case.	_____
5. E-mails and memoranda from any NASA official to the contingent worker and/or to the contingent worker's supervisor about assignments or work.	_____
6. Copies of ID cards and badges issued to the contingent worker in connection with the work performed for NASA.	_____
7. Contingent worker should provide his/her work schedule, time and payroll Records.	_____
8. Proof of the contingent worker's status for tax purposes, if he or she is an independent contractor.	_____
9. Copies of any and all Performance Appraisals issued to the contingent worker during the period in question if pertinent to the allegations.	_____
10. Copies of all relevant time cards and leave requests of the contingent worker.	_____
11. A copy of written notice to the contingent worker and all related paperwork and prior "notices," if the contingent worker is discharged.	_____

<sup>17</sup> The EEO Counselor conducting the inquiry should work with the Contracting Officer and/or Contract Office Technical Representative (COTR) and OCC to assess whether the entire contract and subsequent addendums and changes are needed or whether it may be more appropriate to provide a task order, mission forecast, or modified Statement of Work (SOW).

## Appendix B. Fifteen Factor Analysis Checklist

To assess the “contingent worker” factors, both documents and witness interviews are necessary. The document and witness sources may vary depending on the factors assessed. Not all factors are applicable to every situation and the EEOC has determined that not one factor is determinative. These cases are all fact-dependent and depend on the exercise of the control, if any by NASA, over the “means and manner of the worker’s performance.” The jurisdictional determination is based on a weighing of all of the 15 factors. As noted, at NASA, there are a range of non-civil servants assisting NASA in its mission not limited to student interns, scientists, IT specialists, and maintenance support. While these factors originated mostly in the context of contractors, the same test is used for all contingent worker jurisdictional analyses.

Listed below is the information you should obtain for each factor assessment. Note that this list is not exhaustive. For each factor, the Checklist provides notes to further delineate the purpose and meaning of the specific factor within the overall analysis, as well as the inquiries and documentation relevant for that factor. It is important that the analysis not contain merely conclusory or yes/no answers but be fully supported by the information obtained. In some cases, you may need to conduct witness interviews for those not specifically listed in the Factors below.

### **Factor 1**

**Did the firm (or NASA) have the right to control when, where, and how the contingent worker performed the job, or did the aggrieved individual have the right?**

This factor can help to determine the extent of NASA’s right to control the means and manner of the aggrieved individual performance. Additionally, this factor is aimed at determining if the aggrieved worker is an independent contractor. The more control NASA has the more likely it is that the aggrieved contingent worker may be considered an “employee” of NASA for the purpose of being able to file a formal discrimination complaint against NASA.

#### *a. Interview Questions*

1. Please state your name, position title and work location.
2. Did NASA have any role in pre-approving your resume before you were hired?
3. Specify when you were assigned to your work location and how you were assigned.
4. What are your responsibilities and did you receive a description of work that you were required to perform? If so, from whom?
5. Did you sign a contract of employment? If so, with whom?
6. Identify your direct supervisor by name, position title and by whom he/she is employed.
7. What interaction, if any, do you have with your direct supervisor?
8. Who designates your daily work schedule?

9. Who processes and approves/denies your leave requests?
10. Who processes your time and attendance?
11. Who issues your pay?
12. Do you receive a benefits package and, if so, through which company?

*b. Relevant Documents and Statements*

1. Contract/Statement of Work
2. Statements from NASA Contract Office's Technical Representative (COTR) and site supervisor(s)
3. Time cards and leave requests
4. Performance Appraisals

**Factor 2**

**Does the work require a high level of expertise?**

This factor is to determine the aggrieved individual's occupation and whether he/she works under the supervision of others or is a specialist operating as an independent contractor. The greater the skill level needed to perform the work, the more independence the person performing the work is believed to have. The greater the worker's independence, the more likely it will be that the worker will be found to be an independent contractor. To assess this factor for the worker (aggrieved employee), obtain answers to the following questions about the requirements needed to perform the work.

*a. Interviewee Questions*

1. Specify your job duties and responsibilities.
2. Provide a description of your work order or position.
3. Are you required to issue reports or presentations of any type?
4. Have you presented any information on behalf of either your company or the Agency?
5. Who supervises your daily work product, such as review, monitor, assign workload, and provide advice? If the individual says that a NASA employee supervises their work, ask for more detail and ask about their interaction with their contractor employer.
6. Do your job duties require a professional degree or high-level training?
7. Do you hold a professional degree or certification?
8. Have you received training since you have been in this position and, if so, who provided the training? What type of training was provided? Who else was provided this training? Were other contractors also provided this training? Who paid for the training: NASA or your employer?<sup>18</sup>

<sup>18</sup> Please note that it is appropriate for on-site contractors who have access to IT resources to have annual IT security training through SATERN and other NASA-specific training.

*b. Relevant Documents and Statements*

1. Contract/Statement of Work
2. Offer letter or Affidavit from Contractor
3. Statements from NASA COTR and site supervisor(s)
4. Statements from Employer Human Resources manager
5. Time cards and leave requests
6. Performance Appraisals

**Factor 3**

**Which entity furnishes the tools, materials, and equipment (is it the firm, NASA, or the contract worker)?**

This factor is to determine the specific assistance provided by the firm, NASA, or the contract worker that is required in performance of contracted services. The more tools, materials, and equipment NASA supplies the more control NASA may exercise over the worker. To assess this factor, inquire as to the following.

*a. Interview Questions*

1. Do your duties require any tools, materials, or specialized equipment? If so, please specify the required instrumentation and how it is to be used.
2. Identify which entity supplies the necessary tools, materials, or equipment.

*b. Relevant Documents and Statements*

1. Contract/Statement of Work
2. Statements from NASA COTR and site supervisor(s)
3. Statement from contract worker
4. E-mails and other relevant documents
5. Purchase Orders for tools, materials or equipment.

**Factor 4**

**Was the work performed on the premises of the firm or NASA?**

This factor is to determine who furnishes the place of work for the employee. The greater extent to which NASA owns, operates, or controls the premises where the work is performed

the more control NASA will have over the worker. If the aggrieved individual does not work on a NASA-site, this is a potential determining factor that NASA has less control over the aggrieved individual.

*a. Interview Question*

Please provide the location of your employer. If different from your work location, please specify the location where you perform the duties.

*b. Relevant Documents and Statements*

1. Contract/Statement of Work
2. Statements from NASA COTR and site supervisor(s)
3. Contract of employment signed by employee and firm or NASA; and
4. Badge designation (Contractor vs. Civil Servant).

**Factor 5**

**Was there a continuing [employer-employee] relationship between the contract worker and the firm or was such relationship with NASA? Did the contract worker previously work for NASA?**

This factor is to determine the length and extent of the aggrieved individual's work relationship with NASA. The more closely aligned the worker is with NASA the more the worker will appear to be an employee. To assess this factor, obtain all dates when the aggrieved contingent worker performed work for NASA through a contract or as a civil service employee noting the following.

*a. Interview Questions*

1. How long have you worked in your present job?
2. Have you held any other positions at the Center or with NASA? If so, where was that position located?
3. Are you a former NASA civil servant?
4. Upon completion of your immediate duties, have you continued to work for your employer?
5. Upon completion of your immediate duties, who assigns your next task?
6. Upon completion of your immediate duties, do you continue to receive pay and/or benefits? If so, by whom?
7. Do you work side by side, or on the same team as NASA employees? If so, please explain in detail the relationship between you and the NASA employees.

*b. Relevant Documents and Statements:*

1. Contract of employment signed by employee and firm or NASA;
2. Statements from NASA COTR and site supervisor(s);
3. Copy of employee's W-4; and
4. Badge designation (Contractor vs. Civil Servant).

**Factor 6**

**Does the firm (or NASA) have the right to assign additional projects to the contract worker? What does the contract say about the assignment of work?**

The more authority NASA or the firm has in assigning additional projects, the less likely that the aggrieved individual is an independent contractor. Also, this factor is helpful to determine who controls the means and manner of assigning work to the contract worker. The more autonomy NASA has in being able to assign projects to the worker, the more control it has over the worker. To assess this factor, find out about the process used for assigning additional projects or work to the Complainant. Obtain the required information by asking the following questions. These same questions should also be asked of the employee's employer and NASA employees.

*a. Interview Questions*

1. Specify who was primarily responsible for assigning your duties. What is their position and with whom do they work? Give examples of duties you believed were assigned to you?
2. With respect to special circumstances, who assigns you to additional projects, or emergency tasking?
3. Were change orders created that specified the scope of the additional duties or change in task?
4. Is your paycheck issued by the U.S. Treasury? If not, who pays your salary?
5. Have you ever been transitioned to another position, and another employee of your firm moved into a position you formerly occupied? Please explain.

*b. Relevant Documents and Statements*

1. Contract of employment signed by employee and firm or NASA
2. Statements from NASA COTR and site supervisor(s)
3. Statement from Employer Human Resources manager
4. Badge designation (Contractor vs. Civil Servant)
5. SOW, task orders, contract

**Factor 7****Did the firm or NASA set the hours of work and the duration of the job?**

The more control a contract employee has over his or her own work hours, the more likely that individual can be viewed as an independent contractor. The more control NASA has over an individual's work hours the more the worker is likely to be found to be an employee of NASA. Job duration is considered in this assessment for similar reasons - employees have indefinite or longer job duration periods, which are not tied to completion of a project. To assess this factor identify what triggers the end of the job (e.g. end of contract, completion of project, NASA determines work no longer needed) and ask the following:

*a. Interview Questions*

1. Are you currently working at the Center for NASA? If so, please explain the nature of your work responsibilities.
2. Who sets your hours of work and duration of assignments?
3. Who approves your leave? If NASA employee, why do you think they are able to approve your leave? Give examples.
4. Are the specified hours and duration identified in writing?
5. Are the specified hours and duration of job contained in the contract between the firm and you, the firm and NASA or NASA and you? If none of the above, in your work description. If so, please provide a copy.

*b. Relevant Documents and Statements*

1. Contract of employment signed by employee and firm or NASA
2. Statements from NASA COTR and site supervisor(s)
3. Copy of aggrieved employee's W-4
4. Badge designation (Contractor vs. Civil Servant)

**Factor 8****Is the worker paid by the hour, week, or month rather than for the agreed cost of performing of a particular job?**

This factor is to determine whether the contract employee is a salaried employee of the firm or an independent contractor. Employees are normally paid in set time periods with bonuses based on level of performance. Independent contractors more frequently receive remuneration based on task or assignment completion rather than at specified time periods. Documents and statements should be obtained from officials responsible for paying the aggrieved employee and the following questions should be addressed.

*a. Interview Questions*

1. How often do you receive/issue payment?
2. Do you receive/issue payment on a regular basis and if so, how often (weekly/biweekly/monthly)?
3. Do you receive/issue payment based on each individual assignment or do you receive regular pay regardless of your current assignment?

*b. Relevant Documents and Statements:*

1. Contract of employment signed by employee and firm or NASA
2. Statements from NASA COTR and site supervisor(s)
3. Badge designation (Contractor vs. Civil Servant)

**Factor 9****Does the contract worker have a role in hiring and paying assistants?**

This factor is to determine who has the right to control the hiring, retention and termination of support staff. Those having greater rights to hire, retain, and terminate are more likely to be viewed as independent contractors. The greater the authority the worker has to directly hire and pay those needed to perform the tasks for which the worker is responsible, the less likely it is that the worker will be found to be an employee of NASA. For assessing this factor, identify the numbers and types of workers needed to perform the work for which the Complainant is responsible for or in-charge of. Thereafter for each worker the following questions are in need of responses.

*a. Interview Questions*

1. What role, if any, do you have in paying other employees?
2. What role, if any, do you have in selecting support staff for your duties?
3. Who pays compensation given to any support staff that you have hired/selected?

*b. Relevant Documents and Statements*

1. Contract of employment signed by employee and firm or NASA
2. Statements from NASA COTR and site supervisor(s)
3. Badge designation (Contractor vs. Civil Servant)
4. Statement from Employer's Human Resources director/manager

**Factor 10****Is the contract worker's duties part of the regular business of the firm or NASA?**

This factor is to determine whether the complainant's work is normally done by a civil servant as an "integral part" of NASA's business. The more integral an individual's work assignment is to the mission of the organization, the more likely that person will be considered an employee of NASA for discrimination complaint processing. Most employers use employees for work to be performed on a regular basis. Independent contractors more frequently fill temporary or specialized needs, which often are not part of the regular business of the employer. To assess this factor obtain statements and records, as well as asking the aggrieved the following questions.

*a. Interview Questions*

1. Are your duties mission critical to the firm (to their contractor employer)?
2. Are your duties mission critical to NASA?
3. Provide an explanation of how your duties relate to the mission of the firm or NASA.
4. Are your duties part of the regular business of the firm?
5. Are your duties part of the regular business of NASA?
6. Provide an explanation of how your duties relate to the regular business of the firm or NASA?

*b. Relevant Documents and Statements*

1. Contract/Statement of Work
2. Statements from NASA COTR and site supervisor(s)
3. Statement from Employer Human Resources manager
4. Statements from NASA manager

**Factor 11****Is the contract worker engaged in his/her own distinct occupation or business?**

This factor will aid in determining whether the aggrieved is an independent contractor as opposed to an employee of the firm or NASA. By obtaining information regarding whether NASA, the firm, or the employee pays for his/her salary, benefits and taxes will aid in clarifying whether the employee is an independent contractor. This factor will also aid in determining who controls the means and manner of work of the employee. Workers who perform work for NASA and others as part of their own occupation or business are less likely to be considered employees

of NASA. Therefore, in order to assess this factor, obtain this information by asking the following questions of the aggrieved.

*a. Interview Questions*

1. Have you entered into a contract directly with NASA or the firm?
2. Are you an independent contractor?
3. Are you a subcontractor of the firm?
4. For tax purposes, are you considered an employee of the firm or NASA (the entity withholds federal, state, and Social Security taxes)

*b. Relevant Documents and Statements*

1. Contract of employment signed by employee and firm or NASA
2. Statements from NASA COTR and site supervisors
3. Badge designation (Contractor vs. Civil Servant)
4. Statement from Employer Human Resources manager

**Factor 12**

**Does the employer provide the worker with benefits such as insurance, leave, or workers' compensation?**

This factor will aid in determining whether the individual is an independent contractor or an employee of NASA and/or the firm. The greater extent to which NASA or the firm may pay the worker's benefits, it is more likely than not, that worker will be considered an employee of NASA. To assess this factor, one should utilize the documents and statements obtained, as well as responses to the following questions:

*a. Interview Questions*

1. Is there a benefit package that you received as part of your compensation for working at the firms or NASA?
2. Identify and describe the benefits that are paid on your behalf by you, NASA, or the firm.

*b. Relevant Documents and Statements*

1. Copies of policies of insurance (life, disability, and workers' compensation)
2. Copies of any benefits provided to the worker
3. Copies of the worker's leave requests and approvals
4. Statements from the worker and the firm's Human Resources Manager

**Factor 13**

**Is the worker considered an employee of the employer for tax purposes (i.e., the employer withholds federal, state and Social Security taxes)?**

This factor will aid in determining the worker is being treated as an employee of the firm or NASA.

*a. Interview Questions*

1. For tax purposes, are you considered an employee of the firm or the agency (the entity withholds federal, state, and Social Security taxes)?
2. Does NASA or the firm withhold Federal, state, and Social Security taxes?

*b. Relevant Documents and Statements*

1. Contract of employment signed by employee and firm or NASA
2. Statements from NASA COTR and site supervisor(s)
3. Badge designation (Contractor vs. Civil Servant)
4. Statement from Employer Human Resources manager

**Factor 14**

**Who can discharge the contract worker (the firm or the agency)?**

This factor will aid in determining the extent of the employer's right to discipline or terminate the aggrieved individual or otherwise control the means and manner of employment. In addition, the more right an employer has to terminate, the more likely the individual is an employee and not an independent contractor. The ability to discharge a worker is closely related to the degree of control an entity exercises over the worker. If NASA may directly compel the worker's termination this indicates that the worker is more like an employee. On the other hand, if NASA may only request that the worker no longer be used in the assignment or at a NASA facility, this suggests less control over the worker. To assess this factor find out whether NASA may directly terminate the worker. Responses to the following questions are to be obtained.

*a. Interview Questions*

1. Who reviews your work and provides appraisals?
2. If disciplinary action was taken against you, who issued it?
3. If disciplinary action was taken against you, how was it issued?
4. If you were terminated, what was the procedure by which you were terminated?
5. If you were terminated, who would be responsible for effecting termination?
6. Why do you think NASA had any role in your termination?

*b. Relevant Documents and Statements*

1. Contract/Statement of Work
2. Contract of employment signed by employee and firm or NASA
3. Statements from NASA COTR and site supervisor(s)
4. Statement from contract worker
5. Badge designation (Contractor vs. Civil Servant)
6. Statement from Employer Human Resources manager

**Factor 15****Does the firm or NASA believe that they created an employer-employee relationship?**

This factor is to determine the existence of tangible evidence of an employer-employee relationship between the employer or NASA, and the aggrieved individual. If the worker and NASA believe or act in a manner that demonstrates that the contract they entered creates an employee-employer relationship, then the worker will likely be found to be an employee entitled to file a discrimination complaint. To assess, this obtain records and statements from the involved parties and responses to the following.

*a. Interview Questions*

1. Were you awarded bonuses, acknowledgements, time-off awards, etc., during the duration of the position in question? Who provided those awards?
2. Were you provided any benefit packages?
3. Was there a written understanding that an employer-employee relationship existed or established?
4. Were there any verbal or written communications wherein you were led to believe that an employer-employee relationship existed between you and your employer or NASA?

*b. Relevant Documents and Statements*

1. Contract/Statement of Work
2. Contract of employment signed by employee and firm or NASA
3. Statements from NASA COTR and site supervisor(s)
4. Affidavit from contract worker
5. Badge designation (Contractor vs. Civil Servant);
6. Statement from Employer Human Resources manager
7. Statements from NASA managers

## Appendix C. Fact-Finding Tips

- ✓ The starting point for fact-finding in a contingent worker analysis is to identify all necessary parties. These parties may include, but are not limited to the following:
  - The aggrieved individual
  - Agency Contracting Officer/Agency Contracting Office's Technical Representative
  - Contractor Site Supervisor
  - NASA Manager onsite (Note: A NASA civil servant should not be supervising the contractor if he or she is not the contractor's site supervisor, program manager, or team lead)
  - Relevant co-workers of the aggrieved individual, both civil servant and contractor co-workers.<sup>19</sup>
  
- ✓ Refer to the EEOC 1997 Guidance (provided at Tab 1 of the Contingent Worker Desk Guide Supplemental Materials) and NASA's Contingent Worker Desk Guide for assistance on specific points and to refresh your memory as needed.
  
- ✓ Utilize the "15 Factor Checklist" and the "Document Checklist" as a guide and cross reference for your analysis.
  
- ✓ The document and witness sources may vary depending on the factors assessed. The number of sources necessary to obtain information will vary for each factor based primarily on whether there is a genuine dispute between the aggrieved contingent worker's claims and the terms of the contract. *The ultimate objective is for the counselor to obtain sufficient documentation for a sound jurisdictional determination.*
  
- ✓ Remember: The first phase of this inquiry requires the fact-finder to establish whether the contingent worker is an "employee" or an "independent contractor". If the contingent worker is found to be an independent contractor, the inquiry ceases. As a general rule, an independent contractor is not entitled to have a formal complaint of discrimination processed under the Federal Sector EEO administrative process. If deemed an "employee" the second phase requires further analysis to determine whether NASA controls the means or manner of the contingent worker's employment. The person conducting the inquiry should record and make a summary of discussions held with the various individuals.
  
- ✓ If there is a dispute between the contract terms and the aggrieved contingent worker's statement in regard to a particular factor, then additional information is required. For example, Factor 7 asks: Does NASA set the hours of work, the duration of the job, or pay? The contract may indicate that the contractor provides the set hours of work, job duration, and pay. The

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<sup>19</sup> The person conducting the inquiry should ensure proper coordination with the CO/COTR so that they can jointly work with the contractor. Depending on the particular case, a contractor may decide not to offer NASA the opportunity to interview its employees. NASA has no control over the contractor but this particular fact should be included in the inquiry.

aggrieved contract worker may dispute this, claiming that NASA officials set work hours, approve overtime, and determine pay raises received. Therefore, for this factor, one should interview the involved NASA official(s) and ask for pertinent documents such as work schedules, pay increase recommendations, and leave approval records.



# CONTINGENT WORKER DESK GUIDE

## SUPPLEMENT



OFFICE OF DIVERSITY AND  
EQUAL OPPORTUNITY

September 2011

**INDEX OF TABS**

	<b>TAB</b>
Introduction	1
U.S. Equal Employment Opportunity Commission (EEOC), Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC NOTICE Number 915.002, December 3, 1997	2
Leading Contingent Worker Cases	3
Cases Related to Agency Contingent Worker Inquiries	4
Select Contingent Worker Cases with Factor-by-Factor Matrix	5
Contingent Worker Case Studies Utilizing Factor Assessments	6
Sample ODEO Contingent Worker Determinations	7
Factor-by-Factor Case Citations	8

**TAB 1**

## INTRODUCTION

This Supplement is provided for those within the NASA EO community who wish to gain a broader understanding of the law and guidance associated with contingent worker jurisdictional analyses. The supplemental materials provided include a host of information and resources, such as EEOC's 1997 Guidance on contingent workers, case studies, sample contingent worker determinations, and case law citations relevant for each of the factors.

It should be noted at the outset that the cases and materials in this Supplement are not intended, nor should they be utilized, in lieu of legal advice regarding contingent worker analyses. Such advice should always be sought from the Offices of the Chief Counsel at the NASA Centers and the Office of the General Counsel at NASA Headquarters. Rather, the materials are intended to provide further insight into contingent worker analyses.

It is also important to note the differences in precedential value accorded to EEOC decisions. Commission decisions accepted on appeal from EEOC's Office of Federal Operations (OFO) are legal precedent.<sup>1</sup> Decisions of EEOC Administrative Judges or OFO appeals decisions serve as guidance for agencies.

The materials include case law and case law summaries pertinent to Federal contingent worker analysis. This includes EEOC case law in which the contingent worker was deemed to be an employee of the agency for the purpose of accessing whether he or she may participate in the EEO formal complaint process. Also included are EEOC cases remanded to agencies for additional information. As discussed in the Desk Guide, where it was determined that an agency was an employer or "joint employer" of the contingent worker, the worker had a right to access the Federal complaint processing system like any other Federal civil service employee. The materials also include factor-by-factor case citations, should you wish to review the relevant case law for a given factor.

The Office of Diversity and Equal Opportunity Complaints Management Division stands ready to provide any further technical assistance you may require regarding these materials. We will continue to add new materials to the Supplement, such as future cases and guidance relevant in the contingent worker context.

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<sup>1</sup> Either the complainant or the agency may file with the Commission a request to reopen and reconsider any decision of the OFO. A request for reconsideration is purely discretionary and must meet specific criteria set out by the Commission.

**TAB 2**

*The U.S. Equal Employment Opportunity Commission*

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EEOC NOTICE  
Number 915. 002

Date 12/03/97

1. SUBJECT: Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms.
  
2. PURPOSE: This document provides guidance regarding the application of the anti-discrimination statutes to temporary, contract, and other contingent employees.
  
3. EFFECTIVE DATE: Upon receipt.
  
4. EXPIRATION DATE: As an exception to EEOC Order 205. 001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.
  
5. ORIGINATOR: Title VII/EPA/ADEA Division, Office of Legal Counsel.
  
6. INSTRUCTIONS: File after Section 605 of Volume II of the Compliance Manual.

12/3/97

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Date

Gilbert F. Casellas  
Chairman

## **EXECUTIVE SUMMARY**

This Guidance addresses the application of the federal employment discrimination statutes to individuals placed in job assignments by temporary employment agencies, contract firms, and other firms that hire workers and place them in job assignments with the firms' clients. The term "staffing firm" is used in this document to refer to these types of firms.

Staffing firm workers are generally covered under the anti-discrimination statutes. This is because they typically qualify as "employees" of the staffing firm, the client to whom they are assigned, or both. Thus, staffing firms and the clients to whom they assign workers may not discriminate against the workers on the basis of race, color, religion, sex, national origin, age, or disability. The guidance makes clear that a staffing firm must hire and make job assignments in a non-discriminatory manner. It also makes clear that the client must treat the staffing firm worker assigned to it in a non-discriminatory manner, and that the staffing firm must take immediate and appropriate corrective action if it learns that the client has discriminated against one of the staffing firm workers. The document also explains that staffing firms and their clients are responsible for ensuring that the staffing firm workers are paid wages on a non-discriminatory basis. Finally, the guidance describes how remedies are allocated between a staffing firm and its client when the EEOC finds that both have engaged in unlawful discrimination.

## **TABLE OF CONTENTS**

### **INTRODUCTION**

### **STAFFING SERVICE WORK ARRANGEMENTS**

### **COVERAGE ISSUES**

### **DISCRIMINATORY ASSIGNMENT PRACTICES**

### **DISCRIMINATION AT WORK SITE**

### **DISCRIMINATORY WAGE PRACTICES**

### **ALLOCATION OF REMEDIES**

### **CHARGE PROCESSING INSTRUCTIONS**

## **Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms**

### **INTRODUCTION**

This Guidance addresses the application of Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and the Equal Pay Act (EPA) to individuals placed in job assignments by temporary employment agencies and other staffing firms, i. e., "contingent workers." The term "contingent workers" generally refers to workers who are outside an employer's "core" work force, such as those whose jobs are structured to last only a limited period of time, are sporadic, or differ in any way from the norm of full-time, long-term employment.

This guidance focuses on a large subgroup of the contingent work force -- those who are hired and paid by a "staffing firm," such as a temporary employment agency or contract firm, but whose working conditions are controlled in whole or in part by the clients to whom they are assigned.

Recent statistics compiled by the National Association of Temporary and Staffing Services (NATSS) show that the temporary help industry currently employs more than 2.3 million individuals. That number represents a 100% increase since 1991, when 1.15 million individuals were employed in temporary help jobs. NATSS statistics also show that the professional segment of the temporary help industry (including occupations in accounting, law, sales, and management) has risen significantly.

A 1995 survey by the Bureau of Labor Statistics (BLS) showed that workers paid by temporary employment agencies were more likely to be female and African American than workers in traditional job arrangements, while workers provided by contract firms were disproportionately male. BLS found that workers paid by temporary help agencies were heavily concentrated in administrative support and laborer occupations and earned 60 percent of the traditional worker wage. The largest proportion of contract workers was employed in the services industry, and female contract workers earned slightly less than traditional workers while male contract workers earned more. BLS also found that contract and temporary workers had lower rates of health insurance and pension coverage than traditional workers, and that the majority of temporary workers would have preferred traditional work arrangements.

Staffing firms may assume that they are not responsible for any discrimination or harassment that their workers confront at the clients' work sites. Similarly, some clients of staffing firms may assume that they are not the employers of temporary or contract workers assigned to them, and that they therefore have no EEO obligations toward these workers. However, as this guidance explains, both staffing firms and their clients share EEO responsibilities toward these workers.

The Commission has addressed in previous guidance several of the coverage issues discussed in this document. <sup>5</sup> However, because use of contingent workers is increasing, it is important to set out an updated and unified policy that more specifically explains how the anti-discrimination laws apply to this segment of the workforce.

This document provides guidance concerning the following issues:

coverage under the EEO laws, including coverage of workers assigned to federal agencies; liability of staffing firms and/or clients for discriminatory hiring, assignment, or wage practices; liability of staffing firms and/or clients for unlawful discrimination or harassment at the assigned work site; and allocation of damages where both the staffing firm and its client violate EEO laws.

### **STAFFING SERVICE WORK ARRANGEMENTS**

The activities of the following types of staffing firms are addressed in this guidance<sup>6</sup>:  
Temporary Employment Agencies

Unlike a standard employment agency, a temporary employment agency employs the individuals that it places in temporary jobs at its clients' work sites. The agency recruits, screens, hires, and sometimes trains its employees. It sets and pays the wages when the worker is placed in a job assignment, withholds taxes and social security, and provides workers' compensation coverage. The agency bills the client for the services performed.

While the worker is on a temporary job assignment, the client typically controls the individual's working conditions, supervises the individual, and determines the length of the assignment.

#### Contract Firms

Under a variety of arrangements, a firm may contract with a client to perform a certain service on a long-term basis and place its own employees, including supervisors, at the client's work site to carry out the service. Examples of contract firm services include security, landscaping, janitorial, data processing, and cafeteria services.

Like a temporary employment agency, a contract firm typically recruits, screens, hires, and sometimes trains its workers. It sets and pays the wages when the worker is placed in a job assignment, withholds taxes and social security, and provides workers' compensation coverage.

The primary difference between a temporary agency and a contract firm is that a contract firm takes on full operational responsibility for performing an ongoing service and supervises its workers at the client's work site.

#### Other Types of Staffing Firms

There are many variants on the staffing firm/ client model. For example, "facilities staffing" is an arrangement in which a staffing firm provides one or more workers to staff a particular client operation on an ongoing basis, but does not manage the operation.

Under another model, a client of a staffing firm puts its workers on the firm's payroll, and the firm leases the workers back to the client. The purpose of this arrangement is to transfer responsibility for administering payroll and benefits from the client to the staffing firm. A staffing firm that offers this service does not recruit, screen, or train the workers.

The term "staffing firm" is used in this document to describe generically these types of firms, although more specific terms are used where necessary for purposes of clarity.

## **COVERAGE ISSUES**

This section sets forth criteria for determining whether a staffing firm worker qualifies as an "employee" within the meaning of the anti-discrimination statutes or an independent contractor; whether the staffing firm and/or its client qualifies as the worker's employer(s); and whether the staffing firm or its client can be liable for discriminating against the worker even if it does not qualify as the worker's employer. This section also discusses coverage of staffing firm workers assigned to jobs in the Federal Government and coverage of workers assigned to jobs in connection with welfare programs.

Finally, this section explains the method for counting workers of a staffing firm or its client to determine whether either entity has the minimum number of employees to be covered under the applicable anti-discrimination statute.

### **1. Are staffing firm workers "employees" within the meaning of the federal employment discrimination laws?**

Yes, in the great majority of circumstances. <sup>7</sup> The threshold question is whether a staffing firm worker is an "employee" or an "independent contractor." The worker is a covered employee under the anti-discrimination statutes if the right to control the means and manner of her work performance rests with the firm and/or its client rather than with the worker herself. The label used to describe the worker in the employment contract is not determinative. One must consider all aspects of the worker's relationship with the firm and the firm's client. <sup>8</sup> As the Supreme Court has emphasized, there is "no shorthand formula or magic phrase that can be applied to find the answer, ...all incidents of the relationship must be assessed with no one factor being decisive." <sup>9</sup> Factors that indicate that the worker is a covered employee include:<sup>10</sup>

- a) the firm or the client has the right to control when, where, and how the worker performs the job;
- b) the work does not require a high level of skill or expertise;
- c) the firm or the client rather than the worker furnishes the tools, materials, and equipment;

- d) the work is performed on the premises of the firm or the client;
- e) there is a continuing relationship between the worker and the firm or the client;
- f) the firm or the client has the right to assign additional projects to the worker;
- g) the firm or the client sets the hours of work and the duration of the job;
- h) the worker is paid by the hour, week, or month rather than for the agreed cost of performing a particular job;
- i) the worker has no role in hiring and paying assistants;
- j) the work performed by the worker is part of the regular business of the firm or the client;
- k) the firm or the client is itself in business;
- l) the worker is not engaged in his or her own distinct occupation or business;
- m) the firm or the client provides the worker with benefits such as insurance, leave, or workers' compensation;
- n) the worker is considered an employee of the firm or the client for tax purposes (i. e. , the entity withholds federal, state, and Social Security taxes);
- o) the firm or the client can discharge the worker; and
- p) the worker and the firm or client believe that they are creating an employer-employee relationship.

This list is not exhaustive. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met. Rather, the fact-finder must make an assessment based on all of the circumstances in the relationship between the parties.

Example 1: A temporary employment agency hires a worker and assigns him to serve as a computer programmer for one of the agency's clients. The agency pays the worker a salary based on the number of hours worked as reported by the client. The agency also withholds social security and taxes and provides workers' compensation coverage. The client establishes the hours of work and oversees the individual's work. The individual uses the client's equipment and supplies and works on the client's premises. The agency reviews the individual's work based on reports by the client. The agency can terminate the worker if his or her services are unacceptable to the client. Moreover, the worker can terminate the relationship without incurring a penalty. In these circumstances, the worker is an "employee. "

2. Is a staffing firm worker who is assigned to a client an employee of the firm, its client, or both?

Once it is determined that a staffing firm worker is an "employee," the second question is who is the worker's employer. The staffing firm and/or its client will qualify as the worker's employer(s) if, under the factors described in Question 1, one or both businesses have the right to exercise control over the worker's employment. As noted above, no one factor is decisive, and it is not necessary even to satisfy a majority of factors. The determination of who qualifies as an employer of the worker cannot be based on simply

counting the number of factors. Many factors may be wholly irrelevant to particular facts. Rather, all of the circumstances in the worker's relationship with each of the businesses should be considered to determine if either or both should be deemed his or her employer. If either entity qualifies as the worker's employer, and if that entity has the statutory minimum number of employees (see Question 6), then it can be held liable for unlawful discriminatory conduct against the worker. If both the staffing firm and its client have the right to control the worker, and each has the statutory minimum number of employees, they are covered as "joint employers." <sup>11</sup>

a. Staffing Firm:

The relationship between a staffing firm and each of its workers generally qualifies as an employer-employee relationship because the firm typically hires the worker, determines when and where the worker should report to work, pays the wages, is itself in business, withholds taxes and social security, provides workers' compensation coverage, and has the right to discharge the worker. The worker generally receives wages by the hour or week rather than by the job and often has a continuing relationship with the staffing firm. Furthermore, the intent of the parties typically is to establish an employer-employee relationship. <sup>12</sup> In limited circumstances, a staffing firm might not qualify as an employer of the workers that it assigns to a client. For example, in some circumstances, a client puts its employees on the staffing firm's payroll solely in order to transfer the responsibility of administering wages and insurance benefits. This is often referred to as employee leasing. If the firm does not have the right to exercise any control over these workers, it would not be considered their "employer." <sup>13</sup>

b. Client:

A client of a temporary employment agency typically qualifies as an employer of the temporary worker during the job assignment, along with the agency. This is because the client usually exercises significant supervisory control over the worker. <sup>14</sup>

Example 2: Under the facts of Example 1, above, the temporary employment agency and its client qualify as joint employers of the worker because both have the right to exercise control over the worker's employment.

Example 3: A staffing firm hires charging party (CP) and sends her to perform a long term accounting project for a client. Her contract with the staffing firm states that she is an independent contractor. CP retains the right to work for others, but spends substantially all of her work time performing services for the client, on the client's premises. The client supervises CP, sets her work schedule, provides the necessary equipment and supplies, and specifies how the work is to be accomplished. CP reports the number of hours she has worked to the staffing firm. The firm pays her and bills the client for the time worked. It reviews her work based on reports by the client and has the

right to terminate her if she is failing to perform the requested services. The staffing firm will replace her with another worker if her work is unacceptable to the client.

In these circumstances, despite the statement in the contract that she is an independent contractor, both the staffing firm and the client are joint employers of CP. 15

Clients of contract firms and other types of staffing firms also qualify as employers of the workers assigned to them if the clients have sufficient control over the workers, under the standards set forth in Question 1, above. 16 For example, the client is an employer of the worker if it supplies the work space, equipment, and supplies, and if it has the right to control the details of the work to be performed, to make or change assignments, and to terminate the relationship. On the other hand, the client would not qualify as an employer if the staffing firm furnishes the job equipment and has the exclusive right, through on-site managers, to control the details of the work, to make or change assignments, and to terminate the workers.

Example 4: A staffing firm provides janitorial services for its clients. It hires the workers and places them on each client's premises under the supervision of the contract firm's own managerial employees. The firm's manager sets the work schedules, assigns tasks to the janitors, provides the equipment they need to do the job, and supervises their work performance. The client has no role in controlling the details of the work, making assignments, or setting the hours or duration of the work. Nor does the client have authority to discharge the worker. In these circumstances, the staffing firm is the worker's exclusive employer; its client is not a joint employer.

Example 5: A staffing firm provides landscaping services for clients on an ongoing basis. The staffing firm selects and pays the workers, provides health insurance and withholds taxes. The firm provides the equipment and supplies necessary to do the work. It also supervises the workers on the clients' premises. Client A reserves the right to direct the staffing firm workers to perform particular tasks at particular times or in a specified manner, although it does not generally exercise that authority. Client A evaluates the quality of the workers' performance and regularly reports its findings to the firm. It can require the firm to remove the worker from the job assignment if it is dissatisfied. The firm and the Client A are joint employers.

### 3. Can a staffing firm or its client be liable for unlawfully discriminating against a staffing firm worker even if it does not qualify as the worker's employer?

An entity that has enough employees to qualify as an employer under the applicable EEO statute can be held liable for discriminating against an individual who is not its employee. The anti-discrimination statutes not only prohibit an employer from discriminating against its own employees, but also prohibit an employer from interfering with an individual's employment opportunities with another employer. 17 Thus, a staffing firm that discriminates against its client's employee or a client that discriminates

against a staffing firm's employee is liable for unlawfully interfering in the individual's employment opportunities. 18

Example 6: A staffing firm assigned one of its employees to maintain and repair a client's computers. The firm supplied all the tools and direction for the repairs. The technician was on the client's premises only sporadically over a three to four week period and worked independently while there. The client did not report to the firm about the number of hours worked or about the quality of the work. The client had no authority to make assignments or require work to be done at particular times. After a few visits, the client asked the contract firm to assign someone else, stating that it was not satisfied with the worker's computer repair skills. However, the worker believes that the true reason for the client's action was racial bias.

The client does not qualify as a joint employer of the worker because it had no ongoing relationship with the worker, did not pay the worker or firm based on the hours worked, and had no authority over hours, assignments, or other aspects of the means or manner by which the work was achieved. However, if the client's request to replace the worker was due to racial bias, and if the client had fifteen or more employees, it would be liable for interfering in the worker's employment opportunities with the staffing firm.

Example 7: A company puts its employees on the payroll of a staffing firm solely in order to transfer the responsibility of administering wages and insurance benefits for the company's workers. The staffing firm administers a health insurance policy for its client's workers that does not cover AIDS-related illness. Two workers file ADA charges against the staffing firm and the client. The staffing firm claims that it is not an employer of the workers and therefore falls outside ADA coverage.

The staffing firm does not qualify as a joint employer of the workers because it does not have the requisite degree of control -- it did not hire the workers; establish their wage rates or hours; control the conditions of work; manage personnel disputes; or have the right to fire the workers. Nevertheless, the firm shares liability with its client for the discriminatory health insurance plan if it has fifteen or more employees of its own to fall under the coverage of the ADA. 19 This is because the firm's administration of the insurance plan interferes in the workers' access to employment opportunities or benefits. 20

4. Do the same coverage principles apply when a staffing firm assigns a worker to a federal agency?

The principles regarding joint employer coverage are the same. Thus, a federal agency qualifies as a joint employer of an individual assigned to it if it has the requisite control over that worker, as discussed in Questions 1 and 2. If so, and if the agency discriminates against the individual, it is liable whether or not the individual is on the federal payroll. 21

In contrast to private employers, a federal agency that does not qualify as a joint employer of the worker assigned to it cannot be found liable for discrimination under a "third party interference" theory. This is because Title VII, the ADEA, and Section 501 of the Rehabilitation Act only permit claims against the federal government by "employees or applicants for employment." <sup>22</sup>

5. Are workers participating in work-related activities in connection with welfare programs protected by the federal employment discrimination laws? If so, who is the employer of such a worker? What types of claims might arise?

a. Employee Status

Welfare recipients participating in work-related activities<sup>23</sup> are protected by the federal anti-discrimination statutes if they are "employees" within the meaning of the federal employment discrimination laws. <sup>24</sup> See Question 1. The simple fact of participation in one of these activities is not dispositive of the question of whether the federal employment discrimination laws apply. Rather, the same analysis applies which is used to determine whether any other worker is covered by the federal employment discrimination laws. Under the criteria that have been set out, welfare recipients would likely be considered employees in most of the work activities described in the new welfare law, including unsubsidized and subsidized public and private sector employment, work experience, and on-the-job training programs. <sup>25</sup> On the other hand, individuals engaged in activities such as vocational education, job search assistance, and secondary school attendance would probably not be covered. <sup>26</sup>

b. Employer Status

While some workers participating in these programs will have a single employer, others may have joint employers. For example, a state or local welfare agency may function as a staffing firm and the "direct" employer may function as the client. In some cases, a state or local welfare agency may contract with a temporary employment agency to place the welfare recipients in job assignments. The determination of whether any or all of these entities are employers of the worker is based on the same criteria set forth in answer to Questions 1 and 2 that apply to any other employment situation. The fact that an entity does not pay the worker a salary does not, by itself, defeat a finding of an employment relationship. Moreover, even if an entity is not the worker's employer, it can be found liable under the employment discrimination laws based on the interference theory explained in the answer to Question 3.

c. Types of Claims

Types of claims which may arise include, for example, harassment, discriminatory assignments, discriminatory termination, failure to provide reasonable accommodation to persons covered under the Americans with Disabilities Act, and retaliation.

6. Which workers are counted when determining whether a staffing firm or its client is covered under Title VII, the ADEA, or the ADA?

The staffing firm and the client each must count every worker with whom it has an employment relationship. 27 Although a worker assigned by a staffing firm to a client may not appear on the client's payroll, (s)he must be counted as an employee of both entities if they qualify as joint employers. 28 Questions 1 and 2, above, set forth the legal standards for determining whether a worker has an employment relationship with either the staffing firm or its client, or both.

The Supreme Court has made clear that a respondent must count each employee from the day that the employment relationship begins until the day that it ends, regardless of whether the employee is present at work or on leave on each working day during that period. 29 Thus, a client of a staffing firm must count each worker assigned to it from the first day of the job assignment until the last day. The staffing firm also must count the worker as its employee during every period in which the worker is sent on a job assignment.

Staffing firms are typically covered under the anti-discrimination statutes, because their permanent staff plus the workers that they send to clients generally exceeds the minimum statutory threshold. Clients may or may not be covered, depending on their size.

In cases where questions are raised regarding coverage, the investigator should ask the respondent to name and provide records regarding every individual who performed work for it, including all individuals assigned by staffing firms and any temporary, seasonal, or other contingent workers hired directly by the respondent. If the investigator has questions about the documents produced and cannot otherwise obtain the necessary information, he or she may consider deposing the respondent. The investigator should then determine which of the named individuals qualified as employees of the respondent rather than independent contractors, according to the standards set forth in Questions 1 and 2, above.

## **DISCRIMINATORY ASSIGNMENT PRACTICES**

A staffing firm is obligated, as an employer, to make job assignments in a nondiscriminatory manner. 30 It also is obligated as an employment agency to make job referrals in a nondiscriminatory manner. The staffing firm's client is liable if it sets discriminatory criteria for the assignment of workers. The following question and answer explore these issues in detail.

7. If a worker is denied a job assignment by a staffing firm because its client refuses to accept the worker for discriminatory reasons, is the staffing firm liable? Is the client?

a. Staffing Firm

The staffing firm is liable for its discriminatory assignment decisions. Liability can be found on any of the following bases: 1) as an employer of the workers assigned to clients

(for discriminatory job assignments); 2) as a third party interferer (for discriminatory interference in the workers' employment opportunities with the firm's client); and/or 3) as an employment agency for (discriminatory job referrals). 31

The fact that a staffing firm's discriminatory assignment practice is based on its client's requirement is no defense. Thus, a staffing firm is liable if it honors a client's discriminatory assignment request or if it knows that its client has rejected workers in a protected class for discriminatory reasons and for that reason refuses to assign individuals in that protected class to that client. Furthermore, the staffing firm is liable if it administers on behalf of its client a test or other selection requirement that has an adverse impact on a protected class and is not job-related for the position in question and consistent with business necessity. 42 U.S.C. § 2000e-2(k).

b. Client

A client that rejects workers for discriminatory reasons is liable either as a joint employer or third party interferer if it has the requisite number of employees to be covered under the applicable anti-discrimination statute.

Example 8: A staffing firm that provides job placements for nurses receives a job order from an individual client for a white nurse to provide her with home-based nursing care. The firm agrees to refer only white nurses for the job. The firm is violating Title VII, both as an employment agency for its discriminatory referral practice and as an employer for the discriminatory job assignment. The client is not covered by Title VII because she does not have fifteen or more employees.

Example 9: A temporary employment agency receives a job order for a temporary receptionist. The client requires that the individual assigned to it speak English fluently because a large part of the job entails communication with English-speaking persons who call the client or who come to the client's work place. The agency assigns an Asian American individual who speaks English fluently, but with an accent. The client insists that the agency replace her with someone who can speak unaccented English. The agency complies with that request and sends an individual who speaks English fluently with no accent.

The Asian American individual files a charge with the EEOC. The investigator determines that English fluency was necessary for the job. However, he further determines that CP's accent does not interfere with her ability to communicate and that she has effectively performed similar jobs. The investigator properly concludes that both the client and the staffing firm are liable for terminating CP on the basis of her national origin.

Example 10: A staffing firm provides machine operators to its clients. One of its clients requires that all workers assigned to it pass a certain paper and pencil test. The firm administers the test to its available workers and refers only those who pass the test. An

African American individual who is denied an assignment with the client files charges against both the staffing firm and its client, alleging that administration of the test results in the disproportionate exclusion of African Americans. An investigation shows that the test does have an adverse impact on African Americans and does not accurately measure the skills that are necessary for job performance. Therefore, both the staffing firm and its client are in violation of Title VII.

## **DISCRIMINATION AT WORK SITE**

A client of a staffing firm is obligated to treat the workers assigned to it in a nondiscriminatory manner. Where the client fails to fulfill this obligation, and the staffing firm knows or should know of the client's discrimination, the firm must take corrective action within its control. 32 The following questions and answers explore these issues in detail.

### 8. If a client discriminates against a worker assigned by a staffing firm, who is liable?

**Client:** If the client qualifies as an employer of the worker (see Questions 1 and 2), it is liable for discriminating against the worker on the same basis that it would be liable for discriminating against any of its other employees.

Even if the client does not qualify as an employer of the worker, it is liable for discriminating against that individual if the client's misconduct interferes with the worker's employment opportunities with the staffing firm, and if the client has the minimum number of employees to be covered under the applicable discrimination statute. See Question 3.

**Staffing Firm:** The firm is liable if it participates in the client's discrimination. For example, if the firm honors its client's request to remove a worker from a job assignment for a discriminatory reason and replace him or her with an individual outside the worker's protected class, the firm is liable for the discriminatory discharge. The firm also is liable if it knew or should have known about the client's discrimination and failed to undertake prompt corrective measures within its control. 33

The adequacy of corrective measures taken by a staffing firm depends on the particular facts. Corrective measures may include, but are not limited to: 1) ensuring that the client is aware of the alleged misconduct; 2) asserting the firm's commitment to protect its workers from unlawful harassment and other forms of prohibited discrimination; 3) insisting that prompt investigative and corrective measures be undertaken; and 4) affording the worker an opportunity, if (s)he so desires, to take a different job assignment at the same rate of pay. The staffing firm should not assign other workers to that work site unless the client has undertaken the necessary corrective and preventive measures to ensure that the discrimination will not recur. Otherwise, the staffing firm will be liable along with the client if a worker later assigned to that client is subjected to similar misconduct. 34

Example 11: A temporary receptionist placed by a temporary employment agency is subjected to severe and pervasive unwelcome sexual comments and advances by her supervisor at the assigned work site. She complains to the agency, and the agency informs its client of the allegation. The client refuses to investigate the matter, and instead asks the agency to replace the worker with one who is not a "troublemaker." The agency tells the worker that it cannot force the client to take corrective action, finds the worker a different job assignment, and sends another worker to complete the original job assignment.

The client is liable as an employer of the worker for harassment and for retaliatory discharge.

The temporary employment agency also is liable for the harassment and retaliatory discharge because it knew of the misconduct and failed to undertake adequate corrective action. Informing the client of the harassment complaint was not sufficient -- the agency should have insisted that the client investigate the allegation of harassment and take immediate and appropriate corrective action. The agency should also have asserted the right of its workers to be free from unlawful discrimination and harassment, and declined to assign any other workers until the client undertook the necessary corrective and preventive measures. The agency unlawfully participated in its client's discriminatory misconduct when it acceded to the client's request to replace the worker with one who was not a "troublemaker." If the replacement worker is subjected to similar harassment, the agency and the client will be subject to additional liability.

Example 12: A staffing firm provides computer services for a company that has more than 15 employees. The staffing firm assigns an individual to work on-site for that client. When the client discovers that the worker has AIDS, it tells the staffing firm to replace him because the client's employees fear infection. The staffing firm alerts the client that they are both prohibited from discriminating against the worker, and that such a discharge would violate the ADA. The client nevertheless continues to insist that the firm remove the worker from the work assignment and replace him with someone else. The staffing firm has no choice but to remove the worker. However, it declines to replace him with another worker to complete the assignment because to do so would constitute acquiescence in the discrimination. Furthermore, the firm offers the worker a different job assignment at the same rate of pay. The client is liable for the discriminatory discharge, either as an employer or third party interferer. The staffing firm is not liable because it took immediate and appropriate corrective action within its control.

9. If a staffing firm sends its employee on a job assignment with a federal agency and the individual is subjected to discrimination while on the assignment, is the federal agency liable? Is the staffing firm? What procedures should the individual follow in filing a complaint?

The federal agency is liable for discriminating against the worker if it qualifies as an employer of the worker. If the federal agency does not qualify as an employer of the

staffing firm worker under the criteria in Questions 1 and 2, it will not be liable for discriminating against that worker under the statutes enforced by the EEOC. A federal agency is liable for employment discrimination under these statutes only where it has sufficient control to be deemed an employer of the worker. See Question 4.

The staffing firm is liable if it participated in the federal agency's discrimination or if it knew or should have known of the discrimination and failed to intervene, under the principles discussed in Question 8, above.

If the staffing firm worker seeks to pursue a complaint against the federal agency as his or her employer, (s)he should contact an EEO Counselor at the federal agency within 45 days of the date of the alleged discrimination. If the individual also seeks to pursue a claim against the staffing firm, (s)he should file a separate charge with an EEOC field office. In such circumstances, the EEOC investigator should alert the individual as to the different time frames and procedures in the federal and private sectors. 35 The investigator should also contact the EEO office of the federal agency once the individual files the federal sector complaint in order to coordinate the federal and private sector investigations. 36

## **DISCRIMINATORY WAGE PRACTICES**

A staffing firm may not discriminate in the payment of wages on the basis of race, sex, religion, national origin, age, or disability. Its clients share that obligation.

10. If a staffing firm assigns a male and female to a client to perform substantially equal work, and the female is paid a lower wage than the male, would the firm and/or the client be subject to Equal Pay Act or Title VII liability?

Under the EPA, men and women must receive equal pay for equal work. 37 The jobs need not be identical, but they must be substantially equal. It is job content, not job titles, that determines whether jobs are substantially equal. Specifically, a sex-based wage disparity violates the EPA if the jobs are in the same establishment, require substantially equal skill, effort, and responsibility, are performed under similar working conditions, and if no statutory defense applies. Wage differences that are not based on sex, but on bona fide distinctions between temporary and permanent workers, can be justified under the EPA as based on a "factor other than sex." 38 Both the staffing firm and its client are liable for a violation of the Equal Pay Act if they both qualify as "employers" of the worker bringing the complaint. 39

A violation of the EPA also constitutes a violation of Title VII as long as there is Title VII coverage. 40 Furthermore, a sex-based wage disparity violates Title VII even if the jobs are not substantially equal under EPA standards, if there is other evidence of wage discrimination. 41 Moreover, an entity with fifteen or more employees is liable under Title VII for wage discrimination even if it does not qualify as an employer of the worker

assigned to it, if the wage discrimination interferes in the worker's employment opportunities.

Example 13: A temporary employment agency assigned CP (female) to a temporary job as a hospital aide. CP discovered that the agency had also assigned a male to a temporary job as an "orderly" at the same hospital at a higher wage. CP files charges against the agency and the hospital, alleging that her job and that of the male orderly were substantially equal, and that the wage disparity violated the Equal Pay Act and Title VII. CP's charge against the hospital also challenges a disparity between her wages and those of permanent male aides and orderlies at the hospital.

The investigator determines that the temporary employment agency and the hospital were joint employers of CP and that both entities had control over the rates of pay for the hospital aide and orderly jobs. The investigator also determines that the temporary aide and orderly jobs were substantially equal under EPA standards, and that no defense applies. Therefore, he finds that the agency and the hospital are both liable under the EPA and Title VII on the claim that the temporary aide and orderly should have received the same wage. The investigator further determines that the wage differential between the temporary and permanent aide and orderly jobs was based on a factor other than sex, since the hospital paid all its temporary workers less than permanent workers filling the same jobs, regardless of sex. Therefore, "no cause" is found on this latter claim.

## **ALLOCATION OF REMEDIES**

11. If the Commission finds reasonable cause to believe that both a staffing firm and its client have engaged in unlawful discrimination, how are back wages and damages allocated between the respondents?

Where the combined discriminatory actions of a staffing firm and its client result in harm to the worker, the two respondents are jointly and severally liable for back pay, front pay, and compensatory damages. This means that the complainant can obtain the full amount of back pay, front pay, and compensatory damages from either one of the respondents alone or from both respondents combined. <sup>42</sup> Punitive damages under Title VII and the ADA,<sup>43</sup> and liquidated damages under the ADEA,<sup>44</sup> are individually assessed against and borne by each respondent in accordance with its respective degree of malicious or reckless misconduct. <sup>45</sup> This is because punitive damages are designed not to compensate the victim for his or her harm, but to punish the respondent. <sup>46</sup> Of course, no respondent can be required to pay a sum of future pecuniary damages, damages for emotional distress, and punitive damages, in excess of its applicable statutory cap. The investigator should contact the legal unit in his or her office for advice in determining how to allocate damages between the parties.

### ***Computation of Monetary Relief***

The first step is to compute lost wages (including back and front pay); compensatory damages for both pecuniary loss and emotional distress; and punitive damages. 47 This computation should be made without regard to the statutory caps on damages,48 and, except for punitive damages, without regard to either respondent's ability to pay. 49 This initial computation will establish the charging party's total wage and other compensable losses, as well as the full calculation of punitive damages.

### ***Back Pay, Front Pay, and Past Pecuniary Damages***

The next step is to determine the allocation between the respondents of back and front pay and past pecuniary damages. The charging party can obtain the full amount of these remedies because they are not subject to the statutory caps. The Commission can pursue the entire amount from either the staffing firm or the client, or from both combined. 50 However, the total amount actually paid cannot exceed the sum of back and front wages and past pecuniary damages owed to the worker.

### ***Application of the Statutory Cap on Damages***

The final step is to determine each respondent's liability for compensatory and punitive damages subject to the statutory caps. The total amount paid by a respondent for compensatory damages for emotional distress and future pecuniary harm, and for punitive damages, cannot exceed its statutory cap. Thus, while the initial determination of the appropriate amount of compensatory and/or punitive damages is made without regard to the caps, the caps may affect the allocation of damages between two respondents as well as the total damages paid to the charging party. In applying the caps to the actual allocation of damages, the following principles apply:

For compensatory damages subject to the caps, each respondent is responsible for any portion of the total damages up to its cap.

For punitive damages, each respondent is only responsible for the damages which have been assessed against it and only up to its applicable statutory cap.

After the fact-finder has determined the amount of compensatory damages for emotional distress and future pecuniary harm, and the amount of punitive damages for which either or both respondents are liable, these amounts should be allocated between the two respondents in order to yield the maximum payable relief for the charging party.

If the total compensatory damages are within the sum of the two respondents' caps, the damages should be allocated to assure that the full amount is paid.

If one or both respondents are liable for punitive damages as well as compensatory damages, and the total sum of damages is within the applicable caps, the damages should

be allocated, both between the respondents, and between compensatory and punitive damages for each respondent, to assure full payment. Thus, each respondent should pay the full amount of punitive damages for which it is liable, and any portion of the compensatory damages up to its statutory cap.

If the sum of damages exceeds the sum of the applicable caps, the damages should be allocated, both between the respondents and between compensatory and punitive damages for each respondent, to maximize the payment to the charging party.

Example 14: CP was assigned by Staff Serve to work as a security guard at a store called Value, U. S. A. ("Value"). CP was subjected to persistent and egregious racial epithets by two supervisory employees of the store. CP complained several times to both a higher level manager at Value and to a supervisor at Staff Serve, but neither took any action to address the problem. After being subjected to egregious racial epithets that involved his family, CP informed the manager at Value and the supervisor at Staff Serve that the situation was intolerable. These individuals told CP to stop complaining and to live with these epithets as the price of holding the job. CP stopped reporting to work and asked Staff Serve to assign him elsewhere, but the firm failed to do so. CP was unable to find work for eight months.

CP files a charge against Staff Serve and Value. The investigator determines that both are liable for the racial harassment and constructive discharge. The investigator further determines that CP is due \$40,000 in back pay and \$60,000 in damages for emotional distress and that Staff Serve and Value are jointly and severally liable for these amounts. Although Value's conduct was at least as egregious as Staff Serve's, the investigator determines that Value's financial position is relatively weak, and that a punitive damage award of \$30,000 against Value is appropriate, as compared to \$50,000 for Staff Serve.

Staff Serve employs 137 employees (counting its regular staff people and the workers it has sent on assignment), and is subject to the \$100,000 damages cap. Value employs 45 workers and is subject to the \$50,000 cap on damages.

In conciliation, the investigator determines that Staff Serve and Value should work out a division of the \$40,000 in back pay, for which they are jointly and severally liable. The investigator further determines that the damages should be allocated as follows: Staff Serve should pay \$40,000 and Value \$20,000 in compensatory damages, and Staff Serve should pay \$50,000 and Value \$30,000 in punitive damages. CP can thus obtain the full amount of damages due him, with neither respondent's liability exceeding its cap.

Example 15: Same facts as in Example 14, but CP only names Staff Serve as a respondent because Value has gone bankrupt. The sum of compensatory and punitive damages assessed by the Commission is \$110,000 (\$60,000 for emotional distress and \$50,000 in punitive damages assessed against Staff Serve). The Commission pursues \$100,000 in combined damages due to Staff Serve's statutory cap. The Commission and Staff Serve may agree to deduct the \$10,000 in excess of the caps from either the

emotional distress or the punitive damages. The Commission also pursues the full \$40,000 in back pay from Staff Serve, which is not subject to the cap.

Example 16: Same facts as Example 14, except that both Staff Serve and Value are subject to the \$50,000 cap. CP could obtain only a total of \$100,000 in damages, even though the sum of compensatory and punitive damages was \$140,000. The investigator works with CP and the respondents to determine how to allocate the damages between compensatory and punitive damages. The full amount of back-pay remains payable since it is not subject to the caps.

## **CHARGE PROCESSING INSTRUCTIONS**

When a charge is filed by a worker who was hired by a temporary agency, contract firm, or other staffing firm and who alleges discrimination by the staffing firm or the firm's client, consider the following questions (refer to the questions and answers in the guidance for detailed information):

### ***I. Coverage***

1. Is the charging party (CP) an employee or an independent contractor? (Q&A 1)

- Determine whether the right to control the means and manner of CP's work performance rested with the staffing firm and/or the client or with the worker herself. Consider the factors listed in Question and Answer 1 of this guidance and all other aspects of CP's relationship to the firm and its client.

If CP is an independent contractor, dismiss the charge for lack of jurisdiction. If CP is an employee, determine who qualifies as his or her employer. It is possible that both the staffing firm and its client qualify as joint employers. In that regard consider the following:

2. Is CP an employee of the staffing firm? (Q&A 2(a))

- Consider the factors listed in Question 1 as they apply to the relationship between CP and the staffing firm.

3. Is CP an employee of the firm's client? (Q&A 2(b)) - Consider the factors listed in Question 1 as they apply to the relationship between CP and the client.

Even if the client does not qualify as CP's employer, it is still covered under the applicable anti-discrimination statute if it interfered on a discriminatory basis with CP's employment opportunities with the staffing firm and has the requisite number of employees. (Q&A 3) The same is true if the staffing firm does not qualify as CP's employer. However, a federal agency can only be held liable as an employer, not as a third-party interferer. (Q&A 4)

If CP is a welfare recipient alleging discrimination in a work-related activity connected with a welfare program, the above considerations apply to determine coverage. (Q&A 5) In such circumstances, the state or local welfare agency may function as a staffing firm and the employer for whom CP performed work as the client.

4. If there is a question about coverage, does the staffing firm and/or the client have the minimum number of employees to be covered under the applicable anti-discrimination statute? (Q&A 6)

- Ask the respondent to name and provide records regarding each individual who performed work for it during the applicable time period, including individuals assigned by staffing firms and any temporary, seasonal, or other contingent workers hired directly by the respondent. Determine which of these individuals qualified as employees rather than independent contractors.

## ***II. Assignment Practices (Q&A 7)***

If CP alleges that a staffing firm declined to assign him or her to its client for discriminatory reasons, consider the following questions:

1. Does the evidence show that the staffing firm denied CP a job assignment for discriminatory reasons?

- If so, the staffing firm is liable as an employer of CP for its discriminatory assignment practice, as a third party interferer, and/or as an employment agency for its discriminatory referral practice.

2. Does the evidence show that the client set discriminatory criteria for assignments by the staffing firm?

- If so, the client is liable either as a joint employer of CP or a third party interferer.

## ***III. Discrimination at Work Site (Q&A 8, 9)***

If CP alleges that (s)he was subjected to discrimination while performing a job assignment for the staffing firm's client, consider the following questions:

1. Client: Does the evidence show that the client discriminated against CP?

- If so, the client is liable as CP's employer or as a third party interferer. However, if the client is a federal agency it can only be held liable as an employer.

2. Staffing firm:

- a. Does the evidence show that the staffing firm participated in its client's discrimination, e.g. , by honoring the client's discriminatory request to replace CP with someone outside his or her protected class?
- b. Does the evidence show that the staffing firm knew or should have known of its client's discrimination and failed to take immediate and appropriate corrective measures within its control?

If the answer to (a) or (b) is "yes," the staffing firm is liable for its discrimination.

***IV. Discriminatory Wage Practices (Q&A 10)*** If CP alleges that the staffing firm paid discriminatory wages for his or her work for the firm's client, consider the following:

1. Is there an Equal Pay Act violation?
  - Did the staffing firm assign a person of the opposite sex to the same client to perform substantially equal work and pay that individual a higher wage?

If so, the staffing firm is liable for the EPA violation. The client also can be found liable if it qualified as CP's joint employer.

2. Is there a violation of Title VII, the ADEA, or the ADA?
  - A violation of the EPA also constitutes a violation of Title VII as long as there is Title VII coverage.
  - A sex-based wage disparity violates Title VII even if the jobs are not substantially equal under EPA standards, if there is other evidence of wage discrimination. Title VII also prohibits wage discrimination based on race, national origin, and religion.

If the respondent committed wage discrimination in violation of Title VII, the ADEA, or the ADA it is liable as CP's employer or as a third-party interferer.

***V. Allocation of Remedies (Q&A 11)***

If both the staffing firm and its client have unlawfully discriminated against CP, remedies can be allocated as follows:

1. CP can obtain the full amount of back pay, front pay, and compensatory damages from either respondent, or from both combined.
2. Punitive damages under Title VII and the ADA, and liquidated damages under the ADEA, are individually assessed against each respondent according to its degree of malicious or reckless misconduct.

3. The total amount paid by a respondent for future pecuniary damages, damages for emotional distress, and punitive damages cannot exceed its statutory cap.

Damages should be allocated between the respondents in a way that maximizes the payable relief to CP. Contact the legal unit for advice in determining the allocation.

### FOOTNOTES

1 June 18, 1997 News Release of the National Association of Temporary and Staffing Services.

2 Seasonal and temporary foreign employees performing work for companies in this country form another category of the contingent workforce. The Commission intends to address at a future date particular issues regarding coverage of these workers.

3 Bureau of Labor Statistics, U.S. Dept. of Labor, Report 900, Contingent and Alternative Employment Arrangements (August 1995).

4 For a discussion of wage data for contingent workers, see Steven Hipple and Jay Stewart, Earnings and benefits of workers in alternative work arrangements, Monthly Labor Review 46 (October 1996).

5 See Policy Statement on control by third parties over the employment relationship between an individual and his/her direct employer, Compliance Manual Section 605, Appendix F (BNA) 605:0087 (5/20/87); Policy Statement on the concepts of integrated enterprise and joint employer, Compliance Manual Section 605, Appendix G (BNA) 605:0095 (5/6/87); Policy Statement on Title VII Coverage of Independent Contractors, Compliance Manual Section 605, Appendix H (BNA) 605:0105 (9/4/87); and Policy Statement: What constitutes an employment agency under Title VII, how should charges against employment agencies be investigated, and what remedies can be obtained for employment agency violations of the Act, Compliance Manual (BNA) N:3935 (9/20/91).

The above-referenced policy documents set forth some general principles regarding coverage under the anti-discrimination statutes, and they remain in effect. The current guidance explains more specifically how the coverage principles apply to workers who are hired by staffing firms and placed in job assignments with the firms' clients.

6 For a detailed explanation of the various types of staffing service work arrangements, see Edward A. Lenz, Co-Employment - A Review of Customer Liability Issues in the Staffing Services Industry, 10 The Labor Lawyer 195, 196-99 (1994).

7 See, *infra*, cases cited in notes 12, 14, and 15.

8 The coverage principles set forth here apply not only to workers who are hired by staffing firms and assigned to the firms' clients, but also to temporary, seasonal, part-time, and other contingent workers who are hired directly by employers.

9 *Nationwide Mutual Insurance Co. v. Darden*, 503 U. S. 318, 324 (1992) (quoting *NLRB v. United Ins. Co. of America*, 390 U. S. 254, 258 (1968)) (emphasis added).

10 The listed factors are drawn from *Darden*, 503 U. S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U. S. 730, 751-752 (1989)); Rev Ruling 87-41, 1987-1 Cum. Bull. 296 (cited in *Darden*, 503 U. S. at 325); and Restatement (Second) of Agency § 220(2) (1958) (cited in *Darden*, 503 U. S. at 325). The Court in *Darden* held that the "common law" test governs who qualifies as an "employee" under the Employee Retirement Income Security Act of 1974 (ERISA). That test, as described by the Court, is indistinguishable from the "hybrid test" for determining an employment relationship adopted by the EEOC in the Policy Statement on Title VII Coverage of Independent Contractors, Compliance Manual Section 605, Appendix G (BNA) 605:0105 (9/4/87). Although the Supreme Court has not had occasion to address the standards that govern who is an "employee" under Title VII, the ADEA, and the ADA, the rationale in *Darden* should apply. This is because the ERISA definition of "employee" that the Court interpreted in *Darden* is identical to the definition of "employee" in Title VII, the ADEA, and the ADA.

Courts have stated that the definition of "employee" is broader under the Fair Labor Standards Act (FLSA), of which the Equal Pay Act is a part, than under the other EEO statutes. However, there is no significant functional difference between the tests. Under the FLSA, employees are those who, as a matter of economic reality, are dependent upon the business to which they render service. See 29 C. F. R. § 1620. 8 (1996); *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F. 2d 235 (5th Cir. ) (under FLSA's "economic realities" test, fruit and vegetable company qualified as joint employer of harvest workers supplied by crew leaders), reh'g denied, 472 F. 2d 1405 (5th Cir.), cert. denied, 414 U. S. 819 (1973). All three tests (common law, hybrid, and economic realities) consider similar factors and often result in the same conclusions as to "employee" status.

11 For additional guidance on criteria for determining whether two or more entities are joint employers of a charging party, see EEOC's Policy Statement on the concepts of integrated enterprise and joint employer, Compliance Manual Section 605, Appendix G (BNA) 605:0095 (5/6/87).

12 For cases holding that a staffing firm is an "employer" of the workers it sends on job assignments, see *Magnuson v. Peak Technical Services, Inc.*, 808 F. Supp. 500, 508 (E.D. Va. 1992) (personnel firm that provided employees to clients pursuant to service contracts and the worker that it assigned to one of its clients "clearly had the type of direct employer-employee relationship that is typically the subject of Title VII lawsuits"), aff'd mem., 40 F.3d 1244 (4th Cir. 1994); *Amarnare v. Merrill, Lynch, Pierce, Fenner & Smith*, 611 F. Supp. 344, 349 (D. C. N. Y. 1984) (worker paid by "Mature Temps" employment agency and assigned to Merrill Lynch for temporary job assignment was employee of both Mature Temps and Merrill Lynch during period of assignment), aff'd mem., 770 F. 2d 157 (2d Cir. 1985). Cf. *NLRB v.*

Western Temporary Services, Inc. , 821 F. 2d 1258, 1266-67 (7th Cir. 1987) (NLRB correctly determined that temporary employment service and its client were joint employers of temporary worker); *Maynard v. Kenova Chemical Company*, 626 F. 2d 359, 362 (4th Cir. 1980) (temporary employee injured while working on defendant's premises could not sue defendant in tort because he was employee of both defendant and temp agency, and workers' compensation provided sole remedy).

The Commission disagrees with the rulings of the District Court of Delaware in *Williams v. Caruso*, 966 F. Supp. 287 (D. Del.1997), and *Kellam v. Snelling Personnel Services*, 866 F. Supp. 812 (D.Del. 1994), *aff'd mem.* , 65 F. 3d 162 (3d Cir. 1996). In *Williams*, the court ruled that a temporary employment agency was not a Title VII employer of a temporary worker whom it hired and placed in a job assignment. The court followed its earlier reasoning in *Kellam*, in which it declined to count the workers assigned by a temporary employment agency as its employees on the ground that the agency did not supervise the workers on a day-to-day basis. In the Commission's view, the court in both cases placed undue emphasis on daily supervision of job tasks and underestimated the significance of other factors indicating an employment relationship.

13 See, e.g., *Astrowsky v. First Portland Mortgage Corp.* , 887 F. Supp. 332 (D. Me. 1995) (holding that employee leasing firm was not a joint employer of workers that it leased back to original employer; firm only processed pay checks and made tax withholdings but did not exercise any control over employees; original employer remained exclusive employer of the workers for purposes of EEO coverage).

14 See *Reynolds v. CSX Transportation, Inc.* , 115 F. 3d 860 (11th Cir. 1997) (finding that temporary employment agency's client qualified as employer of worker assigned to it and upholding jury award for retaliation by client); *King v. Booz-Allen & Hamilton, Inc.* , No. 83 Civ. 7420 (MJL), 1987 WL 11546, n. 3 (S. D. N. Y. May 21, 1987) (finding that plaintiff who was paid by temporary employment agency and assigned to work at Booz-Allen was an employee of Booz-Allen); *Amarnare*, 611 F. Supp. at 349 (finding that temporary employment agency's client qualified as joint employer of worker assigned to it).

15 See Rev. Rul. 87-41, 1987-1 Cum. Bull. 296, 298-99, cited in *Nationwide Mutual Insurance Company v. Darden*, 503 U. S. 318, 324 (1992) (concluding on above facts that the staffing firm was the individual's employer, but not addressing the status of the client vis-a-vis the worker).

16 For examples of cases finding that a client of a staffing firm can qualify as a joint employer of the worker assigned to it, see *Poff v. Prudential Insurance Co. of America*, 882 F. Supp. 1534 (E. D. Pa. 1995) (where plaintiff was hired by computer services contractor and assigned to work on-site at insurance company, issue of fact existed as to whether insurance company exercised sufficient control over the manner and means by which plaintiff's work was accomplished to qualify as employer); *Magnuson*, 808 F. Supp. at 508-10 (where car company contracted with staffing firm for plaintiff's services and assigned her to work at its car dealership, genuine issue of fact was raised as to whether car company, dealership, and staffing firm all

qualified as her joint employers); *Guerra v. Tishman East Realty*, 52 Fair Empl. Prac. Cas. (BNA) 286 (S. D. N. Y. 1989) (security guard employed by management firm who worked in building owned by insurance company could seek to prove that insurance company exercised sufficient control over him to qualify as his "employer"); *EEOC v. Sage Realty*, 507 F. Supp. 599 (S. D. N. Y. 1981) (building management company that contracted with cleaning company for services of building lobby attendant qualified as joint employer of lobby attendant; contractor carried lobby attendant on its payroll but management company supervised her day-to-day work).

For examples of cases finding that the client did not qualify as a joint employer of the contract worker because the client did not have sufficient control over the worker, see *Rivas v. Federacion de Asociaciones Pecuarias*, 929 F. 2d 814 (1st Cir. 1991) (client of shipping services contractor was not a joint employer of workers who unloaded ships; although client set time for ship unloading, had some disciplinary authority over foremen, and directed order of unloading, contractor selected, scheduled, and supervised the workers and handled disciplinary matters); *King v. Dalton*, 895 F. Supp. 831 (E.D. Va. 1995) (Navy was not joint employer of worker assigned by contract firm to work on project due to insufficient direct supervisory control over the daily details of the plaintiff's work).

17 See 42 U. S. C. § 2000e-2(a) (Title VII), 29 U. S. C. § 623(a) (ADEA), and 42 U.S.C. § 12112(a) (ADA), which do not limit their protections to a covered employer's own employees, but rather protect an "individual" from discrimination. Section 503 of the ADA, 42 U.S.C. § 12203(b), additionally makes it unlawful to "interfere with any individual in the exercise or enjoyment of ...any right granted or protected by this chapter. " The EPA, 29 U.S.C. § 206, limits its protections to an employer's own employees, and therefore third party interference theory does not apply. For cases allowing staffing firm workers to bring claims against the firms' clients as third party interferers, see *King v. Chrysler Corp.*, 812 F. Supp. 151 (E. D. Mo. 1993) (cashier employed by company that operated cafeteria on automobile company's premises could sue automobile company for failing to take sufficient corrective action to remedy sexually hostile work environment; Title VII does not specify that employer committing an unlawful employment practice must employ the injured individual); *Fairman v. Saks Fifth Avenue*, 1988 U. S. Dist. LEXIS 13087 (W.D. Mo. 1988) (plaintiff who was employed by cleaning contractor to perform cleaning duties at store and who was allegedly discharged due to her race could proceed with Title VII action against store; store claimed that it was not plaintiff's employer because it did not pay her wages, supervise her or terminate her; however, even if the store was not plaintiff's employer, it could be sued for improperly interfering with her employment opportunities with the cleaning contractor); *Amarnare*, 611 F. Supp. at 349 (temporary employee assigned by "Mature Temps" to work for Merrill Lynch could challenge discrimination by Merrill Lynch either on basis that Merrill Lynch was her joint employer or that Merrill Lynch interfered with her employment opportunities with Mature Temps).

18 See Policy Statement on control by third parties over the employment relationship between an individual and his/her direct employer, Compliance Manual Section 605, Appendix F (BNA) 605:0087 (5/20/87).

19 While Title I of the ADA only applies to entities with fifteen or more employees, the Commission has not yet addressed the scope of the interference provision in Section 503, which applies to all titles of the ADA and does not contain a specific coverage limitation. See n. 17.

20 See *Carparts Distribution, Ctr. v. Automotive Wholesalers*, 37 F. 3d 12, 17-18 (1st Cir. 1994) (trade association and its administering trust for health benefit plan provided by plaintiff's employer was sued under Title I for limiting coverage of AIDS; court held that defendants were covered under Title I if they functioned as plaintiff's employer with respect to his health care coverage or if they affected plaintiff's access to employment opportunities); *Spirit v. Teachers Insurance and Annuity Ass'n*, 691 F. 2d 1054, 1063 (2d Cir. 1982) (association that managed retirement plans for college and university employees could be found liable for using sex-based mortality tables to calculate benefits; although association was not plaintiff's "employer" in any commonly understood sense, the term "employer" under Title VII encompasses any party who significantly affects worker's access to employment opportunities), vacated and remanded sub nom *Long Island University v. Spirt*, 463 U.S. 1223 (1983), reinstated on remand, 735 F. 2d 23 (2d Cir. ), cert. denied, 469 U. S. 883 (1984).

21 See *Mares v. Marsh*, 777 F. 2d 1066 (5th Cir. 1985) (in determining whether individual is a federal employee for purposes of Title VII coverage, key issue is extent to which government exercises control over that individual). For guidance on procedures in handling joint federal sector/private sector complaints, see Question 9.

22 42 U.S.C. § 20003-16(a) (Title VII); 29 U.S.C. § 633(a) (ADEA); 29 U.S.C. § 794a (Rehabilitation Act, incorporating remedies, procedures and rights set forth in 42 U.S.C. § 2000e-16). See *King v. Dalton*, 895 F. Supp. at 836 n. 7 (plain terms of § 2000e-16 require a plaintiff to be an employee of the defendant agency); *Spirides v. Reinhardt*, 613 F. 2d 826, 829 (D.C. Cir. 1979) (§ 2000e-16 "cover[s] only those individuals in a direct employment relationship with a government employer").

23 A variety of work and work-related activities may be required as a condition of receipt of welfare, food stamps, or other benefits. Under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P. L. 104-193, 110 Stat. 2105 (1996), for example, welfare recipients may be required to perform work activities which are defined to include unsubsidized employment, subsidized private or public sector employment, work experience, on-the-job training, job search and job readiness assistance, community service programs, vocational educational or job skills training, educational activities, or child care services. Section 103 of Welfare Reform Act, 110 Stat. 2133, amending Part A of Title IV of Social Security Act, 42 U. S. C. § 601, et seq. See also Section 824 of Welfare Reform Act, 110 Stat. 2323, amending Section 6 of Food Stamp Act of 1977, 7 U. S. C. § 2015.

24 The Balanced Budget Act of 1997, P. L. 105-33, 111 Stat. 251 (1997), requires each state that receives a grant from the Secretary of Labor as a "welfare-to-work state" to establish a procedure for handling complaints by participants in work activities who allege certain violations, including gender discrimination. The Act does not preempt application of Title VII,

the ADEA, the ADA, or the EPA. See *Morton v. Mancari*, 417, U.S. 535, 550 (1973). Therefore, welfare recipients who perform work activities and qualify as "employees" are covered under the anti-discrimination statutes enforced by the EEOC.

25 Title VII specifically makes it unlawful to discriminate in admission to or employment in any program established to provide apprenticeship or other training. 42 U.S.C. § 2000e-2(d). The ADA and the ADEA also prohibit discrimination in job training and apprenticeship programs. 42 U.S.C. § 12112(a); 29 C.F.R. § 1625. 21.

26 The Commission notes that other federal statutes prohibit discrimination in federally-assisted education and training programs. See, e. g. , Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, et seq. ; Title IX of the Education Amendments of 1972, 42 U. S. C. § 1681, et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Complaints about discrimination in education or other non-employment programs should be referred to the Offices for Civil Rights in the federal agencies that fund such programs.

27 Title VII and the ADA apply to any employer who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. 42 U.S.C. § 2000e(b). The ADEA applies to any employer who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. 29 U.S.C. § 630(b). Counting issues do not arise in EPA claims because that Act applies to any employer who has more than one employee engaged in commerce or in the production of goods for commerce, unless an exception applies. 29 C.F.R. § 1620. 1 - 1620. 7.

28 Cf. 29 C. F. R. § 825. 106(d) (1996) (under the Family and Medical Leave Act, employees jointly employed by two employers must be counted by both employers, whether or not they are maintained on both employers' payrolls, in determining employer coverage and employee eligibility).

29 EEOC & *Walters v. Metropolitan Educ. Enterprises*, 117 S. Ct. 660 (1997). For guidance on how to count employees when determining whether a respondent satisfies the jurisdictional prerequisite for coverage, see Enforcement Guidance on Equal Employment Opportunity Commission & *Walters v. Metropolitan Educational Enterprises*, 117 S. Ct. 660 (1997), Compliance Manual (BNA) N:2351 (5/2/97).

30 Staffing firms and their clients are subject to the same record preservation requirements as other employers that are covered by the anti-discrimination statutes. They therefore must preserve all personnel records that they have made relating to job assignments or any other aspect of a staffing firm worker's employment for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later. Personnel records relevant to a discrimination charge or an action brought by the EEOC or the U. S. Attorney General must be preserved until final disposition of the charge or action. 29 C. F. R. §§ 1602. 14, 1627. 3(b). The Commission can pursue an enforcement action where the

respondent fails to keep records pertaining to all its contingent and non-contingent employees and applicants for employment.

31 Section 701(c) of Title VII defines the term "employment agency" as "any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person. " For further guidance, see Policy Guidance: What constitutes an employment agency under Title VII, how should charges against employment agencies be investigated, and what remedies can be obtained for employment agency violations of the Act?, Compliance Manual (BNA) N:3935 (9/29/91).

32 The questions and answers in this section assume that the staffing firm is an "employer" of the worker.

33 See EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604. 11(3) (1996) (an employer is liable for harassment of its employee by a non-employee if it knew or should have known of the misconduct and failed to take immediate and appropriate corrective action within its control). See also *Caldwell v. ServiceMaster Corp. and Norrell Temporary Services*, 966 F. Supp. 33 (D.D.C. 1997) (joint employer temporary agency is liable for discrimination against temporary worker by agency's client if agency knew or should have known of the discrimination and failed to take corrective measures within its control); *Magnuson v. Peak Technical Servs.*, 808 F. Supp. 500, 511-14 (E.D. Va. 1992) (where plaintiff was subjected to sexual harassment by her supervisor during a job assignment, three entities could be found liable: staffing firm that paid her salary and benefits, automobile company that contracted for her services, and retail car dealership to which she was assigned; staffing firm and automobile company were held to standard for harassment by non-employees, under which an entity is liable if it had actual or constructive knowledge of the harassment and failed to take immediate and appropriate corrective action within its control); *EEOC v. Sage Realty*, 507 F. Supp. 599, 612-613 (S. D. N.Y. 1981) (cleaning contractor and joint employer building management company found jointly liable for sex discrimination against lobby attendant on contractor's payroll where management company required attendant to wear revealing costume that subjected her to harassment by passersby, and where plaintiff was discharged for refusing to continue wearing outfit; court rejected contractor's argument that management company was exclusively liable because it had set the costume requirement; contractor knew of plaintiff's complaints of harassment and there was no evidence that it was powerless to remedy the situation); cf. *Capitol EMI Music, Inc.*, 311 N.L.R.B. No. 103, 143 L.R.R.M. (BNA) 1331 (May 28, 1993) (in joint employer relationships in which one employer supplies employees to the other, National Labor Relations Board holds both joint employers liable for unlawful employee termination or other discriminatory discipline if the non-acting joint employer knew or should have known that the other employer acted against the employee for unlawful reasons and the former has acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist it).

34 Cf. *Paroline v. Unisys Corp.*, 879 F. 2d 100, 107 (4th Cir. 1989) (employer is liable where it anticipated or reasonably should have anticipated that plaintiff would be subjected to sexual

harassment yet failed to take action reasonably calculated to prevent it; "[a]n employer's knowledge that a male worker has previously harassed female employees other than the plaintiff will often prove highly relevant in deciding whether the employer should have anticipated that the plaintiff too would become a victim of the male employee's harassing conduct"), vacated in part on other grounds, 900 F. 2d 27 (4th Cir.1990).

35 If the federal agency refuses to accept the complaint based on a belief that the staffing firm worker is not its employee, the worker can file an appeal with the Commission's Office of Federal Operations.

36 If the federal agency does not wish to coordinate the investigations, then the EEOC office should proceed independently. If the federal agency refuses to provide documents or testimony requested by the EEOC investigator, the Commission can issue a subpoena to compel production of the evidence.

37 The EPA applies to any employer that has more than one employee engaged in commerce or in the production of goods for commerce, unless a statutory exception applies. 29 U.S.C. § 203(s).

38 See Compliance Manual Section 708. 5(3) (BNA) 708:0023. As that subsection explains, in determining whether a wage differential between temporary and permanent employees is based on a factor other than sex, the following issues should be considered: 1) whether the wage differential is applied uniformly to males and females; 2) whether the differential conforms with the nature and duration of the job; and 3) whether the differential conforms with a nondiscriminatory customary practice within the industry and establishment.

39 See 29 C.F.R. § 1620. 8 (1996) (two or more employers may be jointly or severally responsible for compliance with EPA requirements applicable to employment of a particular employee). For guidance on elements of an EPA claim, see Compliance Manual Sections 704 and 708 (BNA) 704:001 and 708:001, et seq. Cf., 29 C.F.R. § 791. 2 (1996) (regulations issued by Wage and Hour Division, Department of Labor, on Joint Employment Relationship under FLSA) (joint employers are individually and jointly responsible for compliance with FLSA, including overtime requirements).

The EPA, unlike Title VII, the ADA, and the ADEA, only permits claims by employees against their employers, not against third party interferers.

40 If the EEOC determines that the client had no involvement in or control over the wages paid to the worker, it may decline to pursue relief against the client.

41 For guidance on wage discrimination claims under Title VII, see Compliance Manual Section 633 (BNA) 633:001, et seq. Title VII prohibits wage discrimination on the basis of race, national origin, and religion, as well as sex.

42 However, even where there is joint liability, neither a charging party nor the Commission is obliged to pursue a claim against both entities; nor does one party have a right to bring the other into the proceeding, or a right of contribution from the other. See *Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U. S. 77, 91-95 (1981); *EEOC v. Gard Corp. v. Tall Services, Inc.*, 795 F. Supp. 1070, 1071-72 (D. Kan. 1992).

43 Punitive damages are not available against federal, state, and local government agencies.

44 Liquidated damages under the ADEA are punitive in nature. *Trans World Airlines v. Thurston*, 469 U. S. 111, 125 (1985). Therefore, each respondent individually bears a liquidated damages award under the ADEA.

45 See *Hafner v. Brown*, 983 F. 2d 570, 573 (4th Cir. 1992) (holding under 42 U. S. C. § 1983 that compensatory damages are joint and several but punitive damages are born by each defendant individually); *Erwin v. County of Manitowoc*, 872 F. 2d 1292, 1296 (7th Cir. 1989) (same); *Bosco v. Serhant*, 836 F. 2d 271, 280-81 (7th Cir. 1987) (tort principles require joint and several liability for compensatory damages but not punitive damages), cert. denied, 108 S. Ct. 2824 (1988); *Hurley v. Atlantic City Police Dept.*, 933 F. Supp. 396, 420-23 (D. N. J. 1996) (reaching same conclusion in a Title VII case).

46 The respondents are also jointly and severally liable for liquidated damages in EPA claims because such damages are compensatory in nature. *Laffey v. Northwest Airlines*, 740 F. 2d 1071, 1096 (D.C. Cir. 1984), cert. denied, 469 U. S. 1181 (1985); *Marshall v. Bruner*, 668 F. 2d 748, 753 (3d Cir. 1982).

47 Compensatory and punitive damages are available in Title VII and ADA cases, and in retaliation cases under the ADEA and the EPA. The ADEA and EPA damages, which are not subject to statutory caps, are available pursuant to a 1977 amendment to the Fair Labor Standards Act that authorizes both legal and equitable relief for retaliation claims. 29 U.S.C. § 216(b). See *Moskowitz v. Trustees of Purdue University*, 5 F. 3d 279, 283-84 (7th Cir. 1993) (FLSA amendment allows common law damages where plaintiff is retaliated against for exercising his rights under ADEA); *Soto v. Adams Elevator Equip. Co.*, 941 F. 2d 543, 551 (7th Cir. 1991) (FLSA amendment authorizes compensatory and punitive damages for retaliation claims under EPA, in addition to lost wages and liquidated damages).

48 42 U.S.C. § 1981a(c)(2).

49 The financial position of the respondent is a relevant factor in assessing punitive damages. *City of Newport v. Fact Concerts, Inc.*, 453 U. S. 47, 270 (1981).

For guidance on the various factors to consider in calculating compensatory and punitive damages, see *Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991*, Compliance Manual (BNA) N:6071 (7/14/92).

50 See EEOC v. Sage Realty, 507 F. Supp. 599, 612-13 (finding two joint employers responsible for harassment of worker and holding them jointly and severally liable for back pay).

**TAB 3**

## Leading Contingent Worker Cases

### FREQUENTLY CITED CASES:

Ma v. Department of Health and Human Services, EEOC Appeal No. 01962390 (June 29, 1998);

Zheng v. Department of Health and Human Services, EEOC Appeal No. 01962389 (June 29, 1998);

Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989);

Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318, 323-24 (1992); and

Baker v. Department of the Army, EEOC Appeal No. 01A45313 (March 16, 2006).

***Maryann Wenli Ma and Bill Wenling Zheng v. Shalala, Secretary, Department of Health and Human Services***

**98 FEOR 3226**

**Equal Employment Opportunity Commission**

**EEOC 01962389**

**EEOC 01962390**

**June 29, 1998**

**Decision**

The appellants, through their attorney, timely filed appeals with this Commission from final agency decisions, dated January 11, 1996, which the agency issued pursuant to EEOC Regulation 29 C.F.R. § 1614.107(a). The Commission accepts the appellants' appeals in accordance with EEOC Order No. 960, as amended, and consolidates the appeals pursuant to 29 C.F.R. § 1614.606 as they involve the same matter. For the reasons stated below, the Commission affirms the agency's dismissal of the appellants' complaints.

**Issue Presented**

Whether the agency properly dismissed the appellants' complaints based on a finding that the appellants, who performed scientific research at the agency under Visiting Fellowship awards, were not employees of the agency.

**Background**

On December 18, 1995, the appellants filed formal complaints of discrimination. Appellant 1 alleged that the agency discriminated against her based on her sex (pregnancy). Appellant 2, Appellant 1's husband, alleged that the agency discriminated against him based on his race (Asian) and national origin (Chinese).<sup>1</sup> The agency dismissed the appellants' complaints pursuant to 29 C.F.R. § 1614.107(a) on the ground that the appellants were not employees of the agency under the employee/independent contractor test enunciated in *Spirides v. Reinhardt*, 613 F.2d 826 (D.C.Cir. 1979) [79 FEOR 7007].

Many of the relevant facts in this case are undisputed. By letters dated February 14, 1994, the agency notified the appellants that they each had received awards as Visiting Fellows in the agency's National Institutes of Health (NIH) Visiting Program. The letters indicated that the awards would enable the appellants to gain biomedical research experience at the NIH under the sponsorship of Senior Research Investigator 1, Laboratory of Molecular Pharmacology (LMP), National Cancer Institute (NCI). The letters also indicated that the awards were for a period of two years, that Appellant 1 would receive a stipend of \$28,000 for the first year, that Appellant 2 would receive a stipend of \$30,000 for the first year, and that no travel reimbursement was authorized. The letters further indicated that continuation of the fellowships beyond the first year would be based on demonstrated progress and approval by the sponsor and the institute director.

The appellants began their research on August 16, 1994. On June 12, 1995, the appellants informed Senior Research Investigator 1 that Appellant 1 was pregnant. Allegedly, Senior Research Investigator 1 repeatedly encouraged the appellants to abort the pregnancy. Allegedly, Senior Research Investigator 1 began to inquire about Appellant 1's schedule almost every day and to closely monitor her activities. Allegedly, Senior Research Investigator 1 also pressured Appellant 1 not to submit a Declaration of Pregnancy form to the Radiation Safety Branch (RSB) that would have entitled her to heightened protection from radiation. On June 29, 1995, Appellant 2 detected that Appellant 1 was contaminated with radiation. According to the final agency decision, the Federal Bureau of Investigation, the Nuclear Regulatory Commission, and the NIH's Office of Security, were investigating Appellant 1's exposure to radiation and the events surrounding that exposure. The final agency decision indicated that the agency hoped that the criminal probe would conclude shortly and result in the prosecution of those responsible for placing the health and safety of the NIH community at risk.

By letters of July 10, 1995, after being informed that the appellants did not wish to work for Senior Research Investigator 1, the agency placed the appellants on administrative leave, effective immediately, with "full retention of pay and any benefits to which they were entitled." The agency informed the appellants that it was working with NCI staff to find other research opportunities for them to pursue. By letters of August 21, the agency informed the appellants of the agency's approval of their assumption of new duties in the National Institute of Deafness and Communication Disorders (NIDCD) under the direction of Senior Research Investigator 2. The letters informed the appellants that they may assume their new duties as soon as Senior Research Investigator 2 may direct. By letters of October 5, 1995, the agency notified the appellants officially of the transfer of their Visiting Fellow awards from the NCI to the NIDCD, effective September 25, 1995 through August 15, 1996, with stipends continued at the rates of \$29,500 and \$32,000. The notices indicated that the appellants' new sponsor was Senior Research Investigator 2, Laboratory of Neurochemistry.

According to the NIH Manual, the purpose of the Visiting Program is to provide opportunities for distinguished foreign scientists at all levels of their careers to work with senior NIH investigators on problems of mutual interest and, thereby, to advance knowledge in the health sciences, to enhance the NIH environment, and to influence the development of biomedical research and research resources internationally. Under the Visiting Program, there are two types of fellowships: Visiting Fellowships which are awarded to foreign scientists with 3 years or less of relevant postdoctoral research and Service Fellowships which are awarded to foreign scientists with at least 3 years of relevant postdoctoral research.

The NIH Manual identifies the following differences between the recipients of Visiting Fellowships and the recipients of Service Fellowships. The Manual indicates that the Visiting Fellowships offer advanced research experience and training but do not require the performance of services for the NIH. The Manual requires that

Visiting Fellows be physically present in the NIH research facilities, that they not be assigned elsewhere, and that they not engage in outside employment and/or teaching. According to the Manual, Visiting Fellows are not NIH employees and they do not count against an Institute's position ceiling. However, the number of Visiting Fellows in each institute is limited by the number of senior intramural staff investigators within each institute. According to the Manual, Visiting Fellow stipend levels are to be periodically reviewed for comparability with awards for other training fellowship programs.

In contrast, the Manual indicates that the Service Fellowships, which are awarded to Visiting Associates with at least 3 years of relevant postdoctoral research and to Visiting Scientists with at least 6 years of relevant postdoctoral research, require the performance of services for the NIH. The Manual indicates that Visiting Associates and Visiting Scientists are appointed to conduct basic and applied research studies and investigations related to health in the NIH intramural laboratories. According to the Manual, Visiting Associates and Visiting Scientists perform services for the NIH and are considered to be employees of the NIH. As employees, they are bound by the agency's Standards of Conduct on outside employment. The Manual indicates that Visiting Associates and Visiting Scientists count against an Institute's position ceiling. According to the Manual, initial Visiting Associate stipends should fall in the range of GS-9, step 1, to GS-12, step ten, as paid for professional scientific duties similar to those performed by professional NIH staff members in the Civil Service who are assigned to health research and investigation. Initial Visiting Scientist stipends should fall in the range of GS-12, step 1, to the maximum allowable salary of the General Schedule.

The NIH Manual identifies the following similarities between the recipients of Visiting Fellowships and the recipients of Service Fellowships. Each Institute sponsor is responsible for ensuring that the research conducted by Visiting Program participants is reviewed under the same procedures as other Institute research projects and that the participants receive appropriate instructions in safety procedures and the proper use and care of animals and equipment. Each Institute may, at its discretion, and subject to the availability of funds, authorize the payment of travel expenses for Visiting Fellows, Visiting Associates, and Visiting Scientists to scientific meetings or to present scientific papers during the award/appointment period. The publication and presentation of scientific discoveries by all Visiting Program participants are governed by the same policies as for other scientists involved in research at the NIH. The rights of the Government in and to inventions conceived or actually reduced to practice are governed by all provisions of Executive Order 10096, dated 23 January 1950, and any orders, rules, regulations, or the like issued there under. The sponsoring Institute must arrange for Visiting Fellows, Visiting Associates, and Visiting Scientists to have a medical examination as required by NIH Personnel Instructions 339-2 "Medical Evaluation for Assignment to NIH Positions."

The NIH Manual also describes benefits afforded to Visiting Fellows. The agency requires Visiting Fellows to obtain their own health insurance but reimburses Visiting

Fellows for low-option coverage. Visiting Fellows may use the Occupational Medical Service for injuries occurring in the laboratory and for emergency dental care, but are not covered by worker's compensation. Visiting Fellows do not earn leave but are excused on Federal holidays and, by their sponsors, for reasonable cause such as ill health, and for a reasonable period of time, e.g., two weeks, to allow for cultural exchange and relaxation. However, according to the Manual, stipends and health insurance continue only through excused leaves of absence. The Manual indicates that because a Visiting Fellowship is an award for research experience and training, the agency does not deduct Social Security (FICA) from stipends. Visiting Fellows must file quarterly estimated State and local income tax forms with his or her State of residence.

The agency's pre-arrival instructions informed the appellants that their Visiting Fellow stipends would not represent compensation for employment services, or remuneration for service subject to the direction or supervision of the NIH, but that if they terminated their fellowships early and received more stipend than they were due, they would be responsible for reimbursing the NIH. Upon arrival, the appellants signed acceptance notices indicating that their awards could be revoked in whole or in part at any time by the Director of the NIH, provided that the revocation shall not include any amount previously paid.

The agency's "Instructions for Visiting Fellows When Activating Award" indicate that if there exists a tax treaty which allows Visiting Fellows from a particular country to exclude their stipend from federal taxation, the NIH will not withhold any of their stipend for federal taxes. The instructions informed Visiting Fellows that because the agency does not withhold state taxes from stipend checks, they had to pay estimated state taxes quarterly.

The record, as supplemented on appeal by the parties, contains declarations from agency officials affirming the relationship between Visiting Fellows and the NIH described above. One agency official indicates that Visiting Fellows are required to adhere to the agency's standards of conduct and ethics (including clearance of manuscripts submitted for publication), laboratory safety requirements (including use of recombinant DNA, hazardous substances, and radioactive isotopes), and regulations covering animal or human subjects. Another agency official indicates that since stipends are obligated a year in advance for visiting Fellowships, the stipends for Visiting Fellows were not in jeopardy during the Government shutdown. The agency employee, who gave an orientation to the appellants upon their arrival at the agency, declares that she never told the appellants that they were Federal Government employees.

The record also contains declarations from the appellants, three other fellows, and Senior Research Investigator 1, and additional affidavits from the appellants. Senior Research Investigator 1 indicates that LMP is composed of several research groups and that he supervises the group that is informally known as the Biophysical Pharmacology Group (BPG), which includes Visiting Fellows and Intramural

Research Training Award Program (IRTA) fellows. Senior Research Investigator 1 represents that the fellows under his sponsorship have been free to choose among many possible projects within the scope of the research interest of the BPG, set their own working hours, decide what experiments to conduct and the order of the experiments, and to request any additional materials they need. Senior Research Investigator 1 represents that the fellows attend regular group meetings where they discuss the BPG's progress on various projects. However, according to Senior Research Investigator 1, the fellows are not required to, and do not, report their daily activities to him, or report to him on any "scheduled" basis to discuss the progress of their projects. Senior Research Investigator 1 indicates that the fellows are required to keep notebooks on their research, a standard practice in any scientific laboratory, but that there are no requirements as to format or style. Senior Research Investigator 1 represents that, as a matter of practice, he does not subject the notebooks to scrutiny or copy their contents without permission. According to Senior Research Investigator 1, he allows the fellows to take excused absences as requested and does not require the fellows to conduct research more than forty hours a week.

According to the appellants, Senior Research Investigator 1 recruited them to assist him in a molecular biology project aimed at developing a novel method, referred to as Restriction Display (RD-PCR), for displaying more efficiently the existence of expressed genes. The appellants represent that they were required to work in Senior Research Investigator 1's laboratory, that the NCI provided them with all the equipment and supplies that were necessary for their research, but that all requests for materials had to be approved by Senior Research Investigator 1 as the Principal Investigator. The appellants represent that when they began working on the project, Senior Research Investigator 1 proposed a particular research method which he expected them to use and that when this method proved ineffectual, they had to obtain Senior Research Investigator 1's approval before using their own protocol. According to the appellants, Senior Research Investigator 1 exerted control over the manner in which the appellants divided up their research, and that when another Principal Investigator at NCI expressed an interest in collaborating on the project, Senior Research Investigator 1 chose to decline the offer without consulting them. The appellants represent that Senior Research Investigator 1 set deadlines for their research, required them to work tirelessly on the project in his quest to patent the new procedure, and required that they meet with him on a regular basis to discuss the data they had accumulated and the overall results of their experiments. They also represent that Senior Research Investigator 1 required that they record their data in a certain manner, that he had access to the notebook and to the computer files in which they recorded their data and that on numerous occasions he accessed and copied their data without consulting them. Finally, the appellants represent that they considered themselves to be NIH employees and that no one had ever told them they were not NIH employees. The appellants submit a copy of an April 28, 1994 letter to them from Senior Research Investigator 1 wherein he informed them that the work at NCI had taken a surprising and very promising turn, that NCI now had a new, exciting lead for advanced therapy of both cancer and AIDS, and that their expertise in the molecular and cell biology was critical to the success of the project. Senior Research

Investigator 1 emphasized the extraordinary importance of the project and indicated that it was very important that the work go forward as fast as possible.

In response to the appellants' representations, Senior Research Investigator 1 indicated that he accorded the appellants the same level of independence, flexibility and respect as other Visiting Fellows and IRTA fellows. Senior Research Investigator 1 represented that he did not bring the appellants to the NIH with one specific project in mind; the appellants chose their own project; he did not control the details of the appellants' experiments or provide them with daily supervision; he did not exert control over the manner in which the appellants divided up their research; he did not impose deadlines on the appellants' research or require that they work tirelessly; he did not use or copy the appellants' notebooks without their permission; and he did not control and direct the appellants' work or demand from them the result to be achieved or the details by which that result was to be achieved. Senior Research Investigator 1 represented that he did not decline the offer of another Principal Investigator to work with the appellants, that with their agreement he arranged with his laboratory chief for the Investigator's participation but the appellants later disapproved it.

According to Visiting Fellow 1, Senior Research Investigator 1 is a highly motivated and driven scientist, yet one who permits a considerable degree of flexibility with respect to the manner in which Visiting Fellow 1 designs and executes his laboratory-based projects, including the timing of his experiments and the overall direction of the research. Visiting Fellow 1 also represents that Senior Research Investigator 1 anticipates that a high standard and volume of work be accomplished in a timely manner. Visiting Fellow 1 further indicates that one of the beneficial aspects of conducting research under Senior Research Investigator 1's supervision is that Senior Research Investigator 1 is supportive of his involvement in other science-related activities at the NIH even though they do not enhance his current research output.

IRTA Fellow 1 represents that working conditions in the BPG are good and that he does not feel pressured to work "extra" hours or to publish faster. IRTA Fellow 1 also represents that he is able to set his own working hours and to obtain materials for experiments, after discussion with Senior Research Investigator 1, if they are not too expensive. IRTA Fellow 1 further represents that Senior Research Investigator 1 has a lenient management style and does not supervise his daily activities.

IRTA Fellow 2 represents that Senior Research Investigator 1 had a liberal attitude in allowing time off for vacations, family illnesses, and other personal matters, and that he allowed IRTA Fellow 2 considerable freedom in setting his own work hours. IRTA Fellow 2 also represents that Senior Research Investigator 1 motivated the fellows by giving them a good environment to work in, and by reminding them of how their research could make a difference in the effort to cure cancer.

## **Appeal Contentions**

On appeal, the appellants contend that the agency wrongly applied the *Spirits* test to the record facts. The appellants contend that the NIH controlled the means and manner of their work performance, including their research methods or protocols, whether they could collaborate with other researchers, how they divided up their research, and what materials they used. The appellants also contend that they were economically dependent on the NIH, and that the NIH imposed a number of restrictions on their appointment, renewal, and performance which were more consistent with an employer-employee relationship than with an employer-independent contractor relationship. The appellants further contend that consideration of the other *Spirides* factors, including the provision of laboratory space, equipment, and materials; the reimbursement for health insurance, and the granting of leave point to an employer-employee relationship. Finally, the appellants contend that since Title VII is remedial in nature, it should be liberally construed and ambiguities should be resolved in favor of the complaining party.

In response, the agency contends that because Title VII is a waiver of sovereign immunity, it ought to be strictly construed to limit remedies to persons who are clearly employees of the Federal Government. The agency also contends that the crux of the issue is whether or not the individual is treated in the same or in a similar enough manner as an employee to be given employee status under Title VII. The agency argues that it correctly considered all of the circumstances in concluding that the appellants were not employees under the *Spirides* test.

## **Analysis and Findings**

### **Sovereign Immunity**

The agency contends that because Title VII is a waiver of sovereign immunity, it ought to be strictly construed to limit remedies to persons who are clearly employees of the Federal Government. It has long been established that the United States, as sovereign, "is immune from suit save as it consents to be sued ... and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Testan*, 424 U.S. 392, 399 (1976), quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

Section § 717(c) of Title VII, 42 U.S.C. 2000e-16(c), sets forth the following consent to be sued:

an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Thereby, the United States has waived its sovereign immunity as to suits by employees and applicants for employment.

### **Definition of "Employee" in Section 717 of Title VII**

Section 717 of Title VII, 42 U.S.C. 2000e-16, does not provide a definition for the term "employee." The term "employee" is defined in section 701 (f) of Title VII, 42 U.S.C. 2000e (f), as "an individual employed by an employer."<sup>2</sup>

The Supreme Court has found, in a case arising under a statute with the identical definition of "employee," the Employee Retirement Income Security Act of 1974 (ERISA), that this definition of "employee" is "completely circular and explains nothing." *Nationwide Mutual Insurance Co. et. al. v. Darden*, 503 U.S. at 323. In the *Darden* case, the Court did not find any other provision in the statute that gave specific guidance on the term's meaning or that suggested that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results. Therefore, the Court adopted the common law of agency test for determining who qualifies as an "employee" under ERISA. Similarly, there is no provision in Title VII which provides specific guidance on the meaning of the term "employee" or that suggests that construing the term to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results. Thus, use of the common law of agency test for determining who qualifies as an "employee" under Title VII is consistent with the waiver of sovereign immunity set forth in section 717(c) of Title VII.

However, even if an argument could be made that the definition of employee in section 701 of Title VII does not apply to section 717 of Title VII, the common law of agency test for determining who qualifies as an "employee" still would be applicable to section 717 of Title VII.<sup>3</sup> In a case involving a statute which did not contain a definition of the term "employee," the Copyright Act of 1976, the Supreme Court observed that it was well established that "[w]here Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Community for Creative Non-violence v. Reid*, 490 U.S. at 739, quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981). The Court also observed that it had concluded in several prior cases that when Congress used the term "employee" without defining it, Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine. *Id.* at 739-740. The Court found nothing in the Copyright Act which indicated that Congress used the words "employee" and "employment" to describe anything other than the conventional relation of employer and employee. The Court concluded that Congress intended that the term "employee" in that statute be understood in light of the common law of agency. *Id.*

Based on the Court's decisions in the *Darden* and the *Reid* cases, the Commission finds that the term "employee" as it is used in section 717 of Title VII must be understood in light of the common law of agency.

### **The Common Law of Agency Test**

In the *Darden* case, the Court adopted the factors listed in the *Reid* case, 490 U.S. at 751-752, as part of the common-law test for determining who qualifies as an "employee" under ERISA: the hiring party's right to control the manner and means by which the product is accomplished; the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. 503 U.S. at 323-324. The Court also referenced the Restatement (Second) of Agency § 220(2) (1958) as listing nonexhaustive criteria for identifying a master-servant relationship, and Rev. Rul. 87-41, 1987-1 Cum. Bull. 296-299 as setting forth 20 factors as guides in determining whether an individual qualifies as a common-law "employee" in various tax law contexts. The Court emphasized, however, that the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, ... all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." 503 U.S. at 324, quoting *NLRB v. United Ins. Co. Of America*, 390 U.S. 254, 258 (1968).

In prior cases, the Commission has held that the test for determining whether an individual may be deemed an employee under section 717 of Title VII is set forth in the *Spirides* decision upon which the agency relied in dismissing the appellants' complaints. *Abramoff v. Department of the Navy*, EEOC Request No. 05940476 (December 22, 1994); *DaVeiga v. Department of the Air Force*, EEOC Request No. 05930201 (July 13, 1993) [93 FEOR 3336]; *Puri v. Department of the Army*, EEOC Request No. 05920107 (March 5, 1992); and *Bandali v. Department of Labor*, EEOC Request No. 05910067 (April 11, 1991). The *Spirides* court held that consideration of all of the circumstances surrounding the work relationship is essential and that no one factor is determinative. 613 F.2d at 831.<sup>4</sup>

The *Spirides* test is consistent with the Supreme Court's decisions in *Darden and Reid*, except that it references the "economic realities test" under which individuals are considered employees if, as a matter of economic reality, they are dependent upon the business to which they render service. 613 F.2d at 831 and n.22. For this reason, the *Spirides* test has been called a hybrid test. See *Frankel v. Bally, Inc.*, 987 F.2d 86, 89-90 (2d Cir. 1993) *Mares v. Marsh*, 111 F.2d 1066, 1067 (5th Cir. 1985) [86 FEOR 7010]. However, as shown in footnote 4, the factors listed for consideration in the *Spirides* decision are drawn from the common law of agency test, not the economic realities test. Thus, in practice, the application of the *Spirides* test has not differed

appreciably from an application of the common law of agency test. *Frankel v. Bally, Inc.*, 987 F.2d at 90.

Therefore, in accord with the Commission's prior practice and the Darden and Reid decisions, the Commission will apply the common law of agency test, considering all of the incidents of the relationship between the appellants and the agency, in order to determine whether the appellants should be deemed to be "employees" under section 717 of Title VII.

### **Application of the Common Law of Agency Test in this Case**

After considering all of the incidents of the relationship between the appellants and the agency, the Commission finds that the appellants, as Visiting Fellows, should not be deemed to be "employees" under section 717 of Title VII. Instead, the Commission finds that the appellants were the recipients of fellowship awards from the agency which enabled them to gain valuable biomedical research experience and training under the guidance of a senior research investigator. In this respect, the Visiting Fellowships were similar to the grants and fellowships which students receive to provide support for the continuation of their studies.

Of central importance, the Commission finds that, unlike either employees or independent contractors, the terms of the Visiting Fellowships did not require that the appellants complete specific assignments or perform a specified amount or quality of work in order to receive their monthly fellowship stipends. Instead, under the Visiting Fellowship Program the appellants were provided an opportunity to work on a research project of mutual interest to the appellants and Senior Research Investigator 1.

In contrast with an employer-employee relationship, the agency did not have the right to assign the appellants additional research projects without their agreement. The agency also did not establish the hours when the appellants were to do their research. The record contains conflicting testimony as to the amount of control Senior Research Investigator 1 exercised over the appellant's research. However, it is uncontroverted that Senior Research Investigator 1 did not supervise the appellants' research on a daily basis.

In order to obtain the research training, the appellants were required to perform their research in the agency's laboratory and to comply with the agency's safety procedures. The appellants also were required to meet with Senior Research Investigator 1 periodically to discuss their research. In addition, the agency provided the appellants with all of the materials, supplies, and equipment they needed for their research. While these factors could point to an employer-employee relationship, the Commission finds that they are insufficient to establish the existence of an employer-employee relationship given the totality of circumstances present in this case.

Other aspects of the relationship between the agency and the appellants, as recipients of Visiting Fellowships, also point to the lack of an employer-employee relationship. The agency did not make retirement or Social Security (FICA) payments for the appellants. The agency also did not withhold state and local taxes. Moreover, the appellants were not covered by the Federal workers' compensation program. They did not accrue sick leave and annual leave. They also were ineligible for other Government-wide employment benefits such as the opportunity to participate in the Federal Employees Health Benefits Program and to obtain Federal Employees Group Life Insurance.<sup>5</sup>

In addition, there is no persuasive evidence in the record that the parties intended to establish an employer-employee relationship. The agency informed the appellants in the pre-arrival instructions that their Visiting Fellow stipends would not represent compensation for employment services or remuneration for service subject to the direction or supervision of the NIH. The NIH Manual also specifies that the Visiting Fellowships offer advanced research experience and training but do not require the performance of services for the NIH.

Another indication that the appellants were not agency employees is the method the agency used to determine the Visiting Fellowship stipend levels. According to the NIH Manual, Visiting Fellowship stipend levels were to be periodically reviewed for comparability with awards for other training fellowship programs. In contrast, the stipend levels for Service Fellowships were to be based on the salary levels for the performance of professional scientific duties by agency employees in the Civil Service.

Finally, the training emphasis of the Visiting Fellowship Program also is suggested by the fact that Visiting Fellows do not count against an NIH Institute's position ceiling. In contrast, the recipients of Service Fellowships, who are required under the terms of the Service Fellowship Program to perform services for the agency, do count against an Institute's position ceiling.

Given the totality of the circumstances presented in these cases, the Commission concludes that the appellants were training fellowship recipients rather than "employees" of the agency.

### **Conclusion**

For the above-stated reasons, it is the decision of the Equal Employment Opportunity Commission to AFFIRM the agency's dismissal of the appellants' complaints.

[See M0795, FEOR p. 1-401 for Statement of Review Rights.]

[See S0993, FEOR p. I-403 for Statement of Review Rights.]

[See Z1092, FEOR p. I-404 for Right to Request Counsel.]

<sup>1</sup>Both appellants are Chinese nationals.

<sup>2</sup>The definition of "employee" includes some exceptions that are not relevant to this case.

<sup>3</sup>"Employee" is defined in section 701 (f) of Title VII, 42 U.S.C. 2000e(f), as "an individual employed by an employer. ..." However, the definition of "employer" in section 701 (b) of Title VII, 42 U.S.C. 2000e(b), specifically excludes the United States and corporations wholly owned by the Government of the United States. Instead, section 717 of Title VII, 42 U.S.C. 2000e-16, specifies the entities which are covered by that section.

<sup>4</sup>The *Spirides* decision included a non-exhaustive list of factors that should be considered in determining whether an individual is an employee under section 717 of Title VII: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. 613 F.2d at 832. The *Spirides* court indicated, however, that the most important factor to be considered is the extent of the employer's right to control the means and manner of the worker's performance. 613 F.2d at 831.

<sup>5</sup>The Commission observes that the agency reimbursed the Appellants for health insurance; permitted the appellants to use the Occupational Medical Service for on-the-job injuries; and granted the appellants excused absences from their research activities. However, the Commission does not find the provision of these fellowship benefits sufficient to establish employee status, absent other significant indicia of an employer-employee relationship.

***COMMUNITY FOR CREATIVE NON-VIOLENCE, et al., Petitioners, v. James Earl REID.***

**490 U.S. 730**

**109 S.Ct. 2166**

**U.S. Supreme Court**

**88-293**

**June 5, 1989**

**Judge / MARSHALL**

**APPEARANCES**

Robert Alan Garrett argued the cause for petitioners. With him on the briefs were Terri A. Southwick and L. Barrett Boss.

Joshua Kaufman argued the cause for respondent. With him on the brief was Jeffrey B. O'Toole.

Lawrence S. Robbins argued the cause for the Register of Copyrights as amicus curiae urging affirmance. With him on the brief were Acting Solicitor General Bryson, Deputy Solicitor General Merrill, and Ralph Oman.\*

Justice MARSHALL delivered the opinion of the Court.

In this case, an artist and the organization that hired him to produce a sculpture contest the ownership of the copyright in that work. To resolve this dispute, we must construe the "work made for hire" provisions of the Copyright Act of 1976 (Act or 1976 Act), 17 U.S.C. §§ 101 and 201(b), and in particular, the provision in § 101, which defines as a "work made for hire" a "work prepared by an employee within the scope of his or her employment" (hereinafter § 101(1)).

**I**

Petitioners are the Community for Creative Non-Violence (CCNV), a nonprofit unincorporated association dedicated to eliminating homelessness in America, and Mitch Snyder, a member and trustee of CCNV. In the fall of 1985, CCNV decided to participate in the annual Christmas time Pageant of Peace in Washington, D.C., by sponsoring a display to dramatize the plight of the homeless. As the District Court recounted:

"Snyder and fellow CCNV members conceived the idea for the nature of the display: a sculpture of a modern Nativity scene in which, in lieu of the traditional Holy Family, the two adult figures and the infant would appear as contemporary homeless people huddled on a street side steam grate. The family was to be black (most of the homeless in Washington being black); the figures were to be life-sized, and the steam grate would be positioned atop a platform 'pedestal,' or base, within which special-effects equipment would be enclosed to emit simulated 'steam' through the grid to swirl about the figures.

They also settled upon a title for the work -- 'Third World America' -- and a legend for the pedestal: 'and still there is no room at the inn.' " 652 F.Supp. 1453, 1454 (DC 1987).

Snyder made inquiries to locate an artist to produce the sculpture. He was referred to respondent James Earl Reid, a Baltimore, Maryland, sculptor. In the course of two telephone calls, Reid agreed to sculpt the three human figures. CCNV agreed to make the steam grate and pedestal for the statue. Reid proposed that the work be cast in bronze, at a total cost of approximately \$100,000 and taking six to eight months to complete. Snyder rejected that proposal because CCNV did not have sufficient funds, and because the statue had to be completed by December 12 to be included in the pageant. Reid then suggested, and Snyder agreed, that the sculpture would be made of a material known as "Design Cast 62," a synthetic substance that could meet CCNV's monetary and time constraints, could be tinted to resemble bronze, and could withstand the elements. The parties agreed that the project would cost no more than \$15,000, not including Reid's services, which he offered to donate. The parties did not sign a written agreement. Neither party mentioned copyright.

After Reid received an advance of \$3,000, he made several sketches of figures in various poses. At Snyder's request, Reid sent CCNV a sketch of a proposed sculpture showing the family in a crèche like setting: the mother seated, cradling a baby in her lap; the father standing behind her, bending over her shoulder to touch the baby's foot. Reid testified that Snyder asked for the sketch to use in raising funds for the sculpture. Snyder testified that it was also for his approval. Reid sought a black family to serve as a model for the sculpture. Upon Snyder's suggestion, Reid visited a family living at CCNV's Washington shelter but decided that only their newly born child was a suitable model. While Reid was in Washington, Snyder took him to see homeless people living on the streets. Snyder pointed out that they tended to recline on steam grates, rather than sit or stand, in order to warm their bodies. From that time on, Reid's sketches contained only reclining figures.

Throughout November and the first two weeks of December 1985, Reid worked exclusively on the statue, assisted at various times by a dozen different people who were paid with funds provided in installments by CCNV. On a number of occasions, CCNV members visited Reid to check on his progress and to coordinate CCNV's construction of the base. CCNV rejected Reid's proposal to use suitcases or shopping bags to hold the family's personal belongings, insisting instead on a shopping cart. Reid and CCNV members did not discuss copyright ownership on any of these visits.

On December 24, 1985, 12 days after the agreed-upon date, Reid delivered the completed statue to Washington. There it was joined to the steam grate and pedestal prepared by CCNV and placed on display near the site of the pageant. Snyder paid Reid the final installment of the \$15,000. The statue remained on display for a month. In late January 1986, CCNV members returned it to Reid's studio in Baltimore for minor repairs. Several weeks later, Snyder began making plans to take the statue on a tour of several cities to raise money for the homeless. Reid objected, contending that the Design Cast 62 material was not strong enough to withstand the ambitious itinerary. He urged CCNV to cast the

statue in bronze at a cost of \$35,000, or to create a master mold at a cost of \$5,000. Snyder declined to spend more of CCNV's money on the project.

In March 1986, Snyder asked Reid to return the sculpture. Reid refused. He then filed a certificate of copyright registration for "Third World America" in his name and announced plans to take the sculpture on a more modest tour than the one CCNV had proposed. Snyder, acting in his capacity as CCNV's trustee, immediately filed a competing certificate of copyright registration.

Snyder and CCNV then commenced this action against Reid and his photographer, Ronald Purtee,<sup>1</sup> seeking return of the sculpture and a determination of copyright ownership. The District Court granted a preliminary injunction, ordering the sculpture's return. After a 2-day bench trial, the District Court declared that "Third World America" was a "work made for hire" under § 101 of the Copyright Act and that Snyder, as trustee for CCNV, was the exclusive owner of the copyright in the sculpture. 652 F.Supp., at 1457. The court reasoned that Reid had been an "employee" of CCNV within the meaning of § 101(1) because CCNV was the motivating force in the statue's production. Snyder and other CCNV members, the court explained, "conceived the idea of a contemporary Nativity scene to contrast with the national celebration of the season," and "directed enough of [Reid's] effort to assure that, in the end, he had produced what they, not he, wanted." *Id.*, at 1456.

The Court of Appeals for the District of Columbia Circuit reversed and remanded, holding that Reid owned the copyright because "Third World America" was not a work for hire. 270 U.S.App.D.C. 26, 35, 846 F.2d 1485, 1494 (1988). Adopting what it termed the "literal interpretation" of the Act as articulated by the Fifth Circuit in *Easter Seal Society for Crippled Children & Adults of Louisiana, Inc. v. Playboy Enterprises*, 815 F.2d 323, 329 (1987), *cert. denied*, 485 U.S. 981, 108 S.Ct. 1280, 99 L.Ed.2d 491 (1988), the court read § 101 as creating "a simple dichotomy in fact between employees and independent contractors." 270 U.S.App.D.C., at 33, 846 F.2d, at 1492. Because, under agency law, Reid was an independent contractor, the court concluded that the work was not "prepared by an employee" under § 101(1). *Id.*, at 35, 846 F.2d, at 1494. Nor was the sculpture a "work made for hire" under the second subsection of § 101 (hereinafter § 101(2)): sculpture is not one of the nine categories of works enumerated in that subsection, and the parties had not agreed in writing that the sculpture would be a work for hire. *Ibid.* The court suggested that the sculpture nevertheless may have been jointly authored by CCNV and Reid, *id.*, at 36, 846 F.2d, at 1495, and remanded for a determination whether the sculpture is indeed a joint work under the Act, *id.*, at 39-40, 846 F.2d, at 1498-1499.

We granted certiorari to resolve a conflict among the Courts of Appeals over the proper construction of the "work made for hire" provisions of the Act.<sup>2</sup> 488 U.S. 940, 109 S.Ct. 362, 102 L.Ed.2d 352 (1988). We now affirm.

## II

### A

The Copyright Act of 1976 provides that copyright ownership "vests initially in the author or authors of the work." 17 U.S.C. § 201(a). As a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection. § 102. The Act carves out an important exception, however, for "works made for hire."<sup>3</sup> If the work is for hire, "the employer or other person for whom the work was prepared is considered the author" and owns the copyright, unless there is a written agreement to the contrary. § 201(b). Classifying a work as "made for hire" determines not only the initial ownership of its copyright, but also the copyright's duration, § 302(c), and the owners' renewal rights, § 304(a), termination rights, § 203(a), and right to import certain goods bearing the copyright, § 601(b)(1). *See* 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 5.03[A], pp. 5-10 (1988). The contours of the work for hire doctrine therefore carry profound significance for freelance creators -- including artists, writers, photographers, designers, composers, and computer programmers--and for the publishing, advertising, music, and other industries which commission their works.<sup>4</sup>

Section 101 of the 1976 Act provides that a work is "for hire" under two sets of circumstances:

"(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."<sup>5</sup>

Petitioners do not claim that the statue satisfies the terms of § 101(2). Quite clearly, it does not. Sculpture does not fit within any of the nine categories of "specially ordered or commissioned" works enumerated in that subsection, and no written agreement between the parties establishes "Third World America" as a work for hire.

The dispositive inquiry in this case therefore is whether "Third World America" is "a work prepared by an employee within the scope of his or her employment" under § 101(1). The Act does not define these terms. In the absence of such guidance, four interpretations have emerged. The first holds that a work is prepared by an employee whenever the hiring party<sup>6</sup> retains the right to control the product. *See Peregrine v. Lauren Corp.*, 601 F.Supp. 828, 829 (Colo.1985); *Clarkstown v. Reeder*, 566 F.Supp. 137, 142 (SDNY 1983). Petitioners take this view. Brief for Petitioners 15; Tr. of Oral Arg. 12. A second, and closely related, view is that a work is prepared by an employee under § 101(1) when the hiring party has actually wielded control with respect to the creation of a particular work. This approach was formulated by the Court of Appeals for

the Second Circuit, *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548, *cert. denied*, 469 U.S. 982, 105 S.Ct. 387, 83 L.Ed.2d 321 (1984), and adopted by the Fourth Circuit, *Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*, 810 F.2d 410 (1987), the Seventh Circuit, *Evans Newton, Inc. v. Chicago Systems Software*, 793 F.2d 889, *cert. denied*, 479 U.S. 949, 107 S.Ct. 434, 93 L.Ed.2d 383 (1986), and, at times, by petitioners, Brief for Petitioners 17. A third view is that the term "employee" within § 101(1) carries its common-law agency law meaning. This view was endorsed by the Fifth Circuit in *Easter Seal Society for Crippled Children & Adults of Louisiana, Inc. v. Playboy Enterprises*, 815 F.2d 323 (1987), and by the Court of Appeals below. Finally, respondent and numerous amici curiae contend that the term "employee" only refers to "formal, salaried" employees. *See, e.g.*, Brief for Respondent 23-24; Brief for Register of Copyrights as Amicus Curiae 7. The Court of Appeals for the Ninth Circuit recently adopted this view. *See Dumas v. Gommerman*, 865 F.2d 1093 (1989).

The starting point for our interpretation of a statute is always its language. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). The Act nowhere defines the terms "employee" or "scope of employment." It is, however, well established that "[w]here Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329, 101 S.Ct. 2789, 2794, 69 L.Ed.2d 672 (1981); *see also Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979). In the past, when Congress has used the term "employee" without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine. *See, e.g., Kelley v. Southern Pacific Co.*, 419 U.S. 318, 322-323, 95 S.Ct. 472, 475-476, 42 L.Ed.2d 498 (1974); *Baker v. Texas & Pacific R. Co.*, 359 U.S. 227, 228, 79 S.Ct. 664, 665, 3 L.Ed.2d 756 (1959) (per curiam); *Robinson v. Baltimore & Ohio R. Co.*, 237 U.S. 84, 94, 35 S.Ct. 491, 494, 59 L.Ed. 849 (1915). Nothing in the text of the work for hire provisions indicates that Congress used the words "employee" and "employment" to describe anything other than "the conventional relation of employer and employee." *Kelley, supra*, 419 U.S., at 323, 95 S.Ct., at 476, quoting *Robinson, supra*, 237 U.S., at 94, 35 S.Ct., at 494; *cf. NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 124-132, 64 S.Ct. 851, 857-861, 88 L.Ed. 1170 (1944) (rejecting agency law conception of employee for purposes of the National Labor Relations Act where structure and context of statute indicated broader definition). On the contrary, Congress' intent to incorporate the agency law definition is suggested by § 101(1)'s use of the term, "scope of employment," a widely used term of art in agency law. *See* Restatement (Second) of Agency § 228 (1958) (hereinafter Restatement).

In past cases of statutory interpretation, when we have concluded that Congress intended terms such as "employee," "employer," and "scope of employment" to be understood in light of agency law, we have relied on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms. *See, e.g., Kelley*, 419 U.S., at 323-324, and n. 5, 95 S.Ct., at 475-476, and n. 5; *id.*, at 332, 95 S.Ct., at 480 (Stewart, J., concurring in judgment); *Ward v. Atlantic Coast Line R. Co.*, 362 U.S. 396, 400, 80

S.Ct. 789, 792, 4 L.Ed.2d 820 (1960); *Baker, supra*, 359 U.S., at 228, 79 S.Ct., at 665. This practice reflects the fact that "federal statutes are generally intended to have uniform nationwide application." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43, 109 S.Ct. 1597, 1605, 104 L.Ed.2d 29 (1989). Establishment of a federal rule of agency, rather than reliance on state agency law, is particularly appropriate here given the Act's express objective of creating national, uniform copyright law by broadly preempting state statutory and common-law copyright regulation. *See* 17 U.S.C. § 301(a). We thus agree with the Court of Appeals that the term "employee" should be understood in light of the general common law of agency.

In contrast, neither test proposed by petitioners is consistent with the text of the Act. The exclusive focus of the right to control the product test on the relationship between the hiring party and the product clashes with the language of § 101(1), which focuses on the relationship between the hired and hiring parties. The right to control the product test also would distort the meaning of the ensuing subsection, § 101(2). Section 101 plainly creates two distinct ways in which a work can be deemed for hire: one for works prepared by employees, the other for those specially ordered or commissioned works which fall within one of the nine enumerated categories and are the subject of a written agreement. The right to control the product test ignores this dichotomy by transforming into a work for hire under § 101(1) any "specially ordered or commissioned" work that is subject to the supervision and control of the hiring party. Because a party who hires a "specially ordered or commissioned" work by definition has a right to specify the characteristics of the product desired, at the time the commission is accepted, and frequently until it is completed, the right to control the product test would mean that many works that could satisfy § 101(2) would already have been deemed works for hire under § 101(1). Petitioners' interpretation is particularly hard to square with § 101(2)'s enumeration of the nine specific categories of specially ordered or commissioned works eligible to be works for hire, e.g., "a contribution to a collective work," "a part of a motion picture," and "answer material for a test." The unifying feature of these works is that they are usually prepared at the instance, direction, and risk of a publisher or producer.<sup>7</sup> By their very nature, therefore, these types of works would be works by an employee under petitioners' right to control the product test.

The actual control test, articulated by the Second Circuit in *Aldon Accessories*, fares only marginally better when measured against the language and structure of § 101. Under this test, independent contractors who are so controlled and supervised in the creation of a particular work are deemed "employees" under § 101(1). Thus work for hire status under § 101(1) depends on a hiring party's actual control of, rather than right to control, the product. *Aldon Accessories*, 738 F.2d, at 552. Under the actual control test, a work for hire could arise under § 101(2), but not under § 101(1), where a party commissions, but does not actually control, a product which falls into one of the nine enumerated categories. Nonetheless, we agree with the Court of Appeals for the Fifth Circuit that "[t]here is simply no way to milk the 'actual control' test of *Aldon Accessories* from the language of the statute." *Easter Seal Society*, 815 F.2d, at 334. Section 101 clearly delineates between works prepared by an employee and commissioned works. Sound though other distinctions might be as a matter of copyright policy, there is no statutory

support for an additional dichotomy between commissioned works that are actually controlled and supervised by the hiring party and those that are not.

We therefore conclude that the language and structure of § 101 of the Act do not support either the right to control the product or the actual control approaches.<sup>8</sup> The structure of § 101 indicates that a work for hire can arise through one of two mutually exclusive means, one for employees and one for independent contractors, and ordinary canons of statutory interpretation indicate that the classification of a particular hired party should be made with reference to agency law.

This reading of the undefined statutory terms finds considerable support in the Act's legislative history. *Cf. Diamond v. Chakrabarty*, 447 U.S. 303, 315, 100 S.Ct. 2204, 2210-11, 65 L.Ed.2d 144 (1980). The Act, which almost completely revised existing copyright law, was the product of two decades of negotiation by representatives of creators and copyright-using industries, supervised by the Copyright Office and, to a lesser extent, by Congress. *See Mills Music, Inc. v. Snyder*, 469 U.S. 153, 159, 105 S.Ct. 638, 642-43, 83 L.Ed.2d 556 (1985); Litman, *Copyright, Compromise, and Legislative History*, 72 Cornell L.Rev. 857, 862 (1987). Despite the lengthy history of negotiation and compromise which ultimately produced the Act, two things remained constant. First, interested parties and Congress at all times viewed works by employees and commissioned works by independent contractors as separate entities. Second, in using the term "employee," the parties and Congress meant to refer to a hired party in a conventional employment relationship. These factors militate in favor of the reading we have found appropriate.

In 1955, when Congress decided to overhaul copyright law, the existing work for hire provision was § 62 of the 1909 Copyright Act, 17 U.S.C. § 26 (1976 ed.) (1909 Act). It provided that "the word 'author' shall include an employer in the case of works made for hire."<sup>9</sup> Because the 1909 Act did not define "employer" or "works made for hire," the task of shaping these terms fell to the courts. They concluded that the work for hire doctrine codified in § 62 referred only to works made by employees in the regular course of their employment. As for commissioned works, the courts generally presumed that the commissioned party had impliedly agreed to convey the copyright, along with the work itself, to the hiring party. *See, e.g., Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F.2d 569, 570, *rev'd*, 223 F.2d 252 (CA2 1955); *Yardley v. Houghton Mifflin Co.*, 108 F.2d 28, 31 (CA2 1939), *cert. denied*, 309 U.S. 686, 60 S.Ct. 891, 84 L.Ed. 1029 (1940).<sup>10</sup>

In 1961, the Copyright Office's first legislative proposal retained the distinction between works by employees and works by independent contractors. *See Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 87th Cong., 1st Sess., Copyright Law Revision 86-87 (H.R. Judiciary Comm. Print 1961). After numerous meetings with representatives of the affected parties, the Copyright Office issued a preliminary draft bill in 1963. Adopting the Register's recommendation, it defined "work made for hire" as "a work prepared by an employee within the scope of the duties of his employment, but not including a work made on special order or commission."

Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft, 88th Cong., 2d Sess., Copyright Law Revision, Part 3, p. 15, n. 11 (H. Judiciary Comm. Print 1964) (hereinafter Preliminary Draft).

In response to objections by book publishers that the preliminary draft bill limited the work for hire doctrine to "employees,"<sup>11</sup> the 1964 revision bill expanded the scope of the work for hire classification to reach, for the first time, commissioned works. The bill's language, proposed initially by representatives of the publishing industry, retained the definition of work for hire insofar as it referred to "employees," but added a separate clause covering commissioned works, without regard to the subject matter, "if the parties so agree in writing." S. 3008, H.R. 11947, H.R. 12354, 88th Cong., 2d Sess., § 54 (1964), reproduced in 1964 Revision Bill with Discussions and Comments, 89th Cong., 1st Sess., Copyright Law Revision, pt. 5, p. 31 (H.R. Judiciary Comm. Print 1965). Those representing authors objected that the added provision would allow publishers to use their superior bargaining position to force authors to sign work for hire agreements, thereby relinquishing all copyright rights as a condition of getting their books published. *See* Supplementary Report, at 67.

In 1965, the competing interests reached a historic compromise, which was embodied in a joint memorandum submitted to Congress and the Copyright Office,<sup>12</sup> incorporated into the 1965 revision bill, and ultimately enacted in the same form and nearly the same terms 11 years later, as § 101 of the 1976 Act. The compromise retained as subsection (1) the language referring to "a work prepared by an employee within the scope of his employment." However, in exchange for concessions from publishers on provisions relating to the termination of transfer rights, the authors consented to a second subsection which classified four categories of commissioned works as works for hire if the parties expressly so agreed in writing: works for use "as a contribution to a collective work, as a part of a motion picture, as a translation, or as supplementary work." S. 1006, H.R. 4347, H.R. 5680, H.R. 6835, 89th Cong., 1st Sess., § 101 (1965). The interested parties selected these categories because they concluded that these commissioned works, although not prepared by employees and thus not covered by the first subsection, nevertheless should be treated as works for hire because they were ordinarily prepared "at the instance, direction, and risk of a publisher or producer." Supplementary Report, at 67. The Supplementary Report emphasized that only the "four special cases specifically mentioned" could qualify as works made for hire; "[o]ther works made on special order or commission would not come within the definition." *Id.*, at 67-68.

In 1966, the House Committee on the Judiciary endorsed this compromise in the first legislative Report on the revision bills. *See* H.R.Rep. No. 2237, 89th Cong., 2d Sess., 114, 116 (1966). Retaining the distinction between works by employees and commissioned works, the House Committee focused instead on "how to draw a statutory line between those works written on special order or commission that should be considered as works made for hire, and those that should not." *Id.*, at 115. The House Committee added four other enumerated categories of commissioned works that could be treated as works for hire: compilations, instructional texts, tests, and atlases. *Id.*, at 116. With the single addition of "answer material for a test," the 1976 Act, as enacted,

contained the same definition of works made for hire as did the 1966 revision bill, and had the same structure and nearly the same terms as the 1966 bill.<sup>13</sup> Indeed, much of the language of the 1976 House and Senate Reports was borrowed from the Reports accompanying the earlier drafts. *See, e.g.*, H.R.Rep. No. 94-1476, p. 121 (1976); S.Rep. No. 94-473, p. 105 (1975), U.S.Code Cong. & Admin.News 1976, p. 5659.

Thus, the legislative history of the Act is significant for several reasons. First, the enactment of the 1965 compromise with only minor modifications demonstrates that Congress intended to provide two mutually exclusive ways for works to acquire work for hire status: one for employees and the other for independent contractors. Second, the legislative history underscores the clear import of the statutory language: only enumerated categories of commissioned works may be accorded work for hire status. The hiring party's right to control the product simply is not determinative. *See Note, The Creative Commissioner: Commissioned Works Under the Copyright Act of 1976*, 62 N.Y.U.L.Rev. 373, 388 (1987). Indeed, importing a test based on a hiring party's right to control, or actual control of, a product would unravel the " 'carefully worked out compromise aimed at balancing legitimate interests on both sides.' " H.R.Rep. No. 2237, *supra*, at 114, quoting Supplemental Report, at 66.<sup>14</sup>

We do not find convincing petitioners' contrary interpretation of the history of the Act. They contend that Congress, in enacting the Act, meant to incorporate a line of cases decided under the 1909 Act holding that an employment relationship exists sufficient to give the hiring party copyright ownership whenever that party has the right to control or supervise the artist's work. *See, e.g., Siegel v. National Periodical Publications, Inc.*, 508 F.2d 909, 914 (CA2 1974); *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1216 (CA2), *cert. denied*, 409 U.S. 997, 93 S.Ct. 320, 34 L.Ed.2d 262 (1972); *Scherr v. Universal Match Corp.*, 417 F.2d 497, 500 (CA2 1969), *cert. denied*, 397 U.S. 936, 90 S.Ct. 945, 25 L.Ed.2d 116 (1970); *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565, 567- 568 (CA2 1966). In support of this position, petitioners note: "Nowhere in the 1976 Act or in the Act's legislative history does Congress state that it intended to jettison the control standard or otherwise to reject the pre-Act judicial approach to identifying a work for hire employment relationship." Brief for Petitioners 20, citing *Aldon Accessories*, 738 F.2d, at 552.

We are unpersuaded. Ordinarily, "Congress' silence is just that -- silence." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686, 107 S.Ct. 1476, 1481, 94 L.Ed.2d 661 (1987). Petitioners' reliance on legislative silence is particularly misplaced here because the text and structure of § 101 counsel otherwise. *See Bourjaily v. United States*, 483 U.S. 171, 178, 107 S.Ct. 2775, 2780, 97 L.Ed.2d 144 (1987); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592, 100 S.Ct. 1889, 1897, 64 L.Ed.2d 525 (1980).<sup>15</sup> Furthermore, the structure of the work for hire provisions was fully developed in 1965, and the text was agreed upon in essentially final form by 1966. At that time, however, the courts had applied the work for hire doctrine under the 1909 Act exclusively to traditional employees. Indeed, it was not until after the 1965 compromise was forged and adopted by Congress<sup>16</sup> that a federal court for the first time applied the work for hire doctrine to commissioned works. *See*,

*e.g., Brattleboro Publishing Co., supra*, at 567-568. Congress certainly could not have "jettisoned" a line of cases that had not yet been decided.

Finally, petitioners' construction of the work for hire provisions would impede Congress' paramount goal in revising the 1976 Act of enhancing predictability and certainty of copyright ownership. *See* H. R. Rep. No. 94-1476, *supra*, at 129. In a "copyright marketplace," the parties negotiate with an expectation that one of them will own the copyright in the completed work. *Dumas*, 865 F.2d, at 1104-1105, n. 18. With that expectation, the parties at the outset can settle on relevant contractual terms, such as the price for the work and the ownership of reproduction rights.

To the extent that petitioners endorse an actual control test,<sup>17</sup> CCNV's construction of the work for hire provisions prevents such planning. Because that test turns on whether the hiring party has closely monitored the production process, the parties would not know until late in the process, if not until the work is completed, whether a work will ultimately fall within § 101(1). Under petitioners' approach, therefore, parties would have to predict in advance whether the hiring party will sufficiently control a given work to make it the author. "If they guess incorrectly, their reliance on 'work for hire' or an assignment may give them a copyright interest that they did not bargain for." *Easter Seal Society*, 815 F.2d, at 333; *accord, Dumas, supra*, at 1103. This understanding of the work for hire provisions clearly thwarts Congress' goal of ensuring predictability through advance planning. Moreover, petitioners' interpretation "leaves the door open for hiring parties, who have failed to get a full assignment of copyright rights from independent contractors falling outside the subdivision (2) guidelines, to unilaterally obtain work-made-for-hire rights years after the work has been completed as long as they directed or supervised the work, a standard that is hard not to meet when one is a hiring party." Hamilton, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U.Pa.L.Rev. 1281, 1304 (1987).

In sum, we must reject petitioners' argument. Transforming a commissioned work into a work by an employee on the basis of the hiring party's right to control, or actual control of, the work is inconsistent with the language, structure, and legislative history of the work for hire provisions. To determine whether a work is for hire under the Act, a court first should ascertain, using principles of general common law of agency, whether the work was prepared by an employee or an independent contractor. After making this determination, the court can apply the appropriate subsection of § 101.

## B

We turn, finally, to an application of § 101 to Reid's production of "Third World America." In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished.<sup>18</sup> Among the other factors relevant to this inquiry are the skill required;<sup>19</sup> the source of the instrumentalities and tools;<sup>20</sup> the location of the work;<sup>21</sup> the duration of the relationship between the parties;<sup>22</sup> whether the hiring party has the right to assign additional projects to the hired party;<sup>23</sup> the extent of the hired

party's discretion over when and how long to work;<sup>24</sup> the method of payment;<sup>25</sup> the hired party's role in hiring and paying assistants;<sup>26</sup> whether the work is part of the regular business of the hiring party;<sup>27</sup> whether the hiring party is in business;<sup>28</sup> the provision of employee benefits;<sup>29</sup> and the tax treatment of the hired party.<sup>30</sup> See Restatement § 220(2) (setting forth a nonexhaustive list of factors relevant to determining whether a hired party is an employee).<sup>31</sup> No one of these factors is determinative. See *Ward*, 362 U.S., at 400, 80 S.Ct., at 792; *Hilton Int'l Co. v. NLRB*, 690 F.2d 318, 321 (CA2 1982).

Examining the circumstances of this case in light of these factors, we agree with the Court of Appeals that Reid was not an employee of CCNV but an independent contractor. 270 U.S.App.D.C., at 35, n. 11, 846 F.2d, at 1494, n. 11. True, CCNV members directed enough of Reid's work to ensure that he produced a sculpture that met their specifications. 652 F.Supp., at 1456. But the extent of control the hiring party exercises over the details of the product is not dispositive. Indeed, all the other circumstances weigh heavily against finding an employment relationship. Reid is a sculptor, a skilled occupation. Reid supplied his own tools. He worked in his own studio in Baltimore, making daily supervision of his activities from Washington practicably impossible. Reid was retained for less than two months, a relatively short period of time. During and after this time, CCNV had no right to assign additional projects to Reid. Apart from the deadline for completing the sculpture, Reid had absolute freedom to decide when and how long to work. CCNV paid Reid \$15,000, a sum dependent on "completion of a specific job, a method by which independent contractors are often compensated." *Holt v. Winpisinger*, 258 U.S.App.D.C. 343, 351, 811 F.2d 1532, 1540 (1987). Reid had total discretion in hiring and paying assistants. "Creating sculptures was hardly 'regular business' for CCNV." 270 U.S.App.D.C., at 35, n. 11, 846 F.2d, at 1494, n. 11. Indeed, CCNV is not a business at all. Finally, CCNV did not pay payroll or Social Security taxes, provide any employee benefits, or contribute to unemployment insurance or workers' compensation funds.

Because Reid was an independent contractor, whether "Third World America" is a work for hire depends on whether it satisfies the terms of § 101(2). This petitioners concede it cannot do. Thus, CCNV is not the author of "Third World America" by virtue of the work for hire provisions of the Act. However, as the Court of Appeals made clear, CCNV nevertheless may be a joint author of the sculpture if, on remand, the District Court determines that CCNV and Reid prepared the work "with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101.<sup>32</sup> In that case, CCNV and Reid would be co-owners of the copyright in the work. See § 201(a).

For the aforesaid reasons, we affirm the judgment of the Court of Appeals for the District of Columbia Circuit.

It is so ordered.

\* Briefs of amici curiae urging reversal were filed for the Computer and Business Equipment Manufacturers Association et al. by Richard Dannay and Morton David

Goldberg; for Intellectual Property Owners, Inc., by Donald W. Banner and Herbert C. Wamsley; and for Magazine Publishers of America, Inc., by Slade R. Metcalf and Victor A. Kovner.

Briefs of Amici Curiae urging affirmance were filed for the American Society of Magazine Photographers et al. by Charles D. Ossola; for The Professional Photographers of America, Inc., by David Ladd, David E. Leibowitz, Bruce G. Joseph, and Thomas W. Kirby; and for Volunteer Lawyers for the Arts, Inc., et al. by Irwin Karp.

Arthur J. Levine and William L. LaFuze filed a brief for the American Intellectual Property Law Association as amicus curiae.

<sup>1</sup>Purtee was named as a defendant but never appeared or claimed any interest in the statue.

<sup>2</sup>*Compare Easter Seal Society for Crippled Children & Adults of Louisiana, Inc. v. Playboy Enterprises*, 815 F.2d 323 (CA5 1987) (agency law determines who is an employee under § 101), *cert. denied*, 485 U.S. 981, 108 S.Ct. 1280, 99 L.Ed.2d 491 (1988), with *Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*, 810 F.2d 410 (CA4 1987) (supervision and control standard determines who is an employee under § 101); *Evans Newton, Inc. v. Chicago Systems Software*, 793 F.2d 889 (CA7) (same), *cert. denied*, 479 U.S. 949, 107 S.Ct. 434, 93 L.Ed.2d 383 (1986); and *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (CA2) (same), *cert. denied*, 469 U.S. 982, 105 S.Ct. 387, 83 L.Ed.2d 321 (1984). *See also Dumas v. Gommerman*, 865 F.2d 1093 (CA 9 1989) (a multifactor formal, salaried employee test determines who is an employee under § 101).

<sup>3</sup>We use the phrase "work for hire" interchangeably with the more cumbersome statutory phrase "work made for hire."

<sup>4</sup>As of 1955, approximately 40 percent of all copyright registrations were for works for hire, according to a Copyright Office study. *See Varmer, Works Made for Hire and On Commission*, in *Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary*, Study No. 13, 86th Cong., 2d Sess., 139, n. 49 (Comm. Print 1960) (hereinafter *Varmer, Works Made for Hire*). The Copyright Office does not keep more recent statistics on the number of work for hire registrations.

<sup>5</sup>Section 101 of the Act defines each of the nine categories of "specially ordered or commissioned" works.

<sup>6</sup>By "hiring party," we mean to refer to the party who claims ownership of the copyright by virtue of the work for hire doctrine.

<sup>7</sup>*See* Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess., Copyright Law Revision, pt. 6, pp. 66-67 (H.R. Judiciary Comm. Print 1965) (hereinafter *Supplementary Report*);

Hardy, Copyright Law's Concept of Employment -- What Congress Really Intended, 35 J.Copr. Soc. USA 210, 244-245 (1988).

<sup>8</sup>We also reject the suggestion of respondent and amici that the § 101(1) term "employee" refers only to formal, salaried employees. While there is some support for such a definition in the legislative history, *see* Varmer, Works Made for Hire 130; n. 11, *infra*, the language of § 101(1) cannot support it. The Act does not say "formal" or "salaried" employee, but simply "employee." Moreover, respondent and those amici who endorse a formal, salaried employee test do not agree upon the content of this test. *Compare, e.g.*, Brief for Respondent 37 (hired party who is on payroll is an employee within § 101(1)) with Tr. of Oral Arg. 31 (hired party who receives a salary or commissions regularly is an employee within § 101(1)); and Brief for Volunteer Lawyers for the Arts, Inc., et al. as Amici Curiae 4 (hired party who receives a salary and is treated as an employee for Social Security and tax purposes is an employee within § 101(1)). Even the one Court of Appeals to adopt what it termed a formal, salaried employee test in fact embraced an approach incorporating numerous factors drawn from the agency law definition of employee which we endorse. *See Dumas*, 865 F.2d, at 1104.

<sup>9</sup>The concept of works made for hire first arose in controversies over copyright ownership involving works produced by persons whom all parties agreed were employees. *See, e.g., Colliery Engineer Co. v. United Correspondence Schools Co.*, 94 F. 152 (CC SDNY 1899); *Little v. Gould*, 15 F.Cas. 612 (No. 8,395) (CC NDNY 1852). This Court first took note of the work for hire doctrine in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 248, 23 S.Ct. 298, 299, 47 L.Ed. 460 (1903), where we found that an employer owned the copyright to advertisements that had been created by an employee in the course of his employment. *Bleistein* did not, however, purport to define "employee."

<sup>10</sup>*See* Varmer, Works Made for Hire 130; Fidlow, The "Works Made for Hire" Doctrine and the Employee/Independent Contractor Dichotomy: The Need for Congressional Clarification, 10 Hastings Comm.Ent. L.J. 591, 600-601 (1988). Indeed, the Varmer study, which was commissioned by Congress as part of the revision process, itself contained separate subsections labeled "Works Made for Hire" and "Works Made on Commission." It nowhere indicated that the two categories might overlap or that commissioned works could be made by an employee.

<sup>11</sup>*See, e.g.*, Preliminary Draft, at 259 (statement of Horace S. Manges, Joint Committee of the American Book Publishers Council and the American Textbook Publishers Institute) ("There would be a necessity of putting people on the payroll whom the employers wouldn't want to put on the payroll, and where the employees would prefer to work as independent contractors"); *id.*, at 272 (statement of Saul N. Rittenberg, MGM) ("[T]he present draft has given more emphasis to formalism than necessary. If I commission a work from a man, ordering a work specially for my purposes, and I pay for it, what difference does it make whether I put him under an employment contract or establish an independent contractor relationship?"); *id.*, at 260 (statement of John R. Peterson, American Bar Association) ("I don't think there is any valid philosophical or economic

difference between the situation in which you have a man on a continuing basis of orders which justifies placing him on your payroll, and the situation in which you give him a particular order for a particular job").

<sup>12</sup>The parties to the joint memorandum included representatives of the major competing interests involved in the copyright revision process: publishers and authors, composers, and lyricists. *See* Copyright Law Revision: Hearings on H.R. 4347, 5680, 6831, 6835 before Subcommittee No. 3 of the House Committee on the Judiciary, 89th Cong., 1st Sess., pt. 1, p. 134 (1965).

<sup>13</sup>An attempt to add "photographic or other portrait[s]," S.Rep. No. 94-473, p. 4 (1975), to the list of commissioned works eligible for work for hire status failed after the Register of Copyrights objected:

"The addition of portraits to the list of commissioned works that can be made into 'works made for hire' by agreement of the parties is difficult to justify. Artists and photographers are among the most vulnerable and poorly protected of all the beneficiaries of the copyright law, and it seems clear that, like serious composers and choreographers, they were not intended to be treated as 'employees' under the carefully negotiated definition in section 101." Second Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1975 Revision Bill, Chapter XI, pp. 12-13.

<sup>14</sup>Strict adherence to the language and structure of the Act is particularly appropriate where, as here, a statute is the result of a series of carefully crafted compromises. *See Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 617, 101 S.Ct. 1945, 1957-58, 68 L.Ed.2d 472 (1981); *United States v. Sisson*, 399 U.S. 267, 291, 298, 90 S.Ct. 2117, 2134, 26 L.Ed.2d 608 (1970).

<sup>15</sup>In framing other provisions of the Act, Congress indicated when it intended to incorporate existing case law. *See, e.g.*, H.R.Rep. No. 94-1476, p. 121 (1976), U.S.Code Cong. & Admin.News 1976, p. 5736 ("There is ... no need for a specific statutory provision concerning the rights and duties of the coowners [sic] of a work; court-made law on this point is left undisturbed"); S.Rep. No. 94-473, *supra*, at 104 (same).

<sup>16</sup>Over the course of the copyright revision process, Congress frequently endorsed a negotiated compromise which years later in 1976 it formally enacted with only minor revisions. *See Mills Music, Inc. v. Snyder*, 469 U.S. 153, 160-161, 105 S.Ct. 638, 643-644, 83 L.Ed.2d 556 (1985).

<sup>17</sup>Petitioners concede that, as a practical matter, it is often difficult to demonstrate the existence of a right to control without evidence of the actual exercise of that right. *See Murray v. Gelderman*, 566 F.2d 1307, 1310-1311 (CA5 1978).

<sup>18</sup>*See, e.g., Hilton Int'l Co. v. NLRB*, 690 F.2d 318, 320 (CA2 1982); *NLRB v. Maine Caterers, Inc.*, 654 F.2d 131, 133 (CA1 1981), *cert. denied*, 455 U.S. 940, 102 S.Ct. 1432, 71 L.Ed.2d 651 (1982); Restatement § 220(1).

<sup>19</sup>See, e.g., *Bartels v. Birmingham*, 332 U.S. 126, 132, 67 S.Ct. 1547, 1550-51, 91 L.Ed. 1947 (1947); *Hilton Int'l Co.*, *supra*, at 320; *NLRB v. A. Duie Pyle, Inc.*, 606 F.2d 379, 382 (CA3 1979); Restatement § 220(2)(d).

<sup>20</sup>See, e.g., *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258, 88 S.Ct. 988, 990-91, 19 L.Ed.2d 1083 (1968); *United States v. Silk*, 331 U.S. 704, 717, 718, 67 S.Ct. 1463, 1470, 1470-71, 91 L.Ed. 1757 (1947); *Dumas*, 865 F.2d, at 1105; Restatement § 220(2)(e).

<sup>21</sup>See, e.g., *United Ins. Co.*, *supra*, 390 U.S., at 258, 88 S.Ct., at 990-91; *Dumas*, *supra*, at 1105; *Darden v. Nationwide Mutual Ins. Co.*, 796 F.2d 701, 705 (CA4 1986); Restatement § 220(2)(e).

<sup>22</sup>See, e.g., *United Ins. Co.*, *supra*, 390 U.S., at 259, 88 S.Ct., at 991; *Bartels*, *supra*, 332 U.S., at 132, 67 S.Ct., at 1550-51; Restatement § 220(2)(f).

<sup>23</sup>See, e.g., *Dumas*, *supra*, at 1105.

<sup>24</sup>See, e.g., *United Ins. Co.*, *supra*, 390 U.S., at 258, 88 S.Ct., at 990-91; *Short v. Central States, Southeast & Southwest Areas Pension Fund*, 729 F.2d 567, 574 (CA8 1984).

<sup>25</sup>See, e.g., *Dumas*, *supra*, at 1105; *Darden*, *supra*, at 705; *Holt v. Winpisinger*, 258 U.S.App.D.C. 343, 351, 811 F.2d 1532, 1540 (1987); Restatement § 220(2)(g).

<sup>26</sup>See, e.g., *Bartels*, *supra*, 332 U.S., at 132, 67 S.Ct., at 1550-51; *Silk*, *supra*, 331 U.S., at 719, 67 S.Ct., at 1471; *Darden*, *supra*, at 705; *Short*, *supra*, at 574.

<sup>27</sup>See, e.g., *United Ins. Co.*, *supra*, 390 U.S., at 259, 88 S.Ct., at 991; *Silk*, *supra*, 331 U.S., at 718, 67 S.Ct., at 1470-71; *Dumas*, *supra*, at 1105; *Hilton Int'l Co.*, *supra*, at 321; Restatement § 220(2)(h).

<sup>28</sup>See, e.g., Restatement § 220(2)(j).

<sup>29</sup>See, e.g., *United Ins. Co.*, *supra*, 390 U.S., at 259, 88 S.Ct., at 991; *Dumas*, *supra*, at 1105; *Short*, *supra*, at 574.

<sup>30</sup>See, e.g., *Dumas*, *supra*, at 1105.

<sup>31</sup>In determining whether a hired party is an employee under the general common law of agency, we have traditionally looked for guidance to the Restatement of Agency. See, e.g., *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 323-324, and n. 5, 95 S.Ct. 472, 475-476, and n. 5, 42 L.Ed.2d 498 (1974); *id.*, at 332, 95 S.Ct., at 480 (Stewart, J., concurring in judgment); *Ward v. Atlantic Coast Line R. Co.*, 362 U.S. 396, 400, 80 S.Ct. 789, 792, 4 L.Ed.2d 820 (1960); *Baker v. Texas & Pacific R. Co.*, 359 U.S. 227, 228, 79 S.Ct. 664, 665, 3 L.Ed.2d 756 (1959).

<sup>32</sup>Neither CCNV nor Reid sought review of the Court of Appeals' remand order. We therefore have no occasion to pass judgment on the applicability of the Act's joint authorship provisions to this case.

***NATIONWIDE MUTUAL INSURANCE COMPANY, et al., Petitioners v. Robert T. DARDEN.***  
**503 U.S. 318**  
**112 S.Ct. 1344**  
**U.S. Supreme Court**  
**90-1802**  
**March 24, 1992**

**Judge / SOUTER**

APPEARANCES:

George R. Ragsdale, Raleigh, N.C., for petitioners.

Christopher J. Wright, Washington, D.C., for U.S. as amicus curiae.

Marion G. Follin, III, Greensboro, N.C., for respondent.

Justice SOUTER delivered the opinion of the Court.

In this case we construe the term "employee" as it appears in § 3(6) of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 834, 29 U.S.C. § 1002(6), and read it to incorporate traditional agency law criteria for identifying master-servant relationships.

**I**

From 1962 through 1980, respondent Robert Darden operated an insurance agency according to the terms of several contracts he signed with petitioners Nationwide Mutual Insurance Co. et al. Darden promised to sell only Nationwide insurance policies, and, in exchange, Nationwide agreed to pay him commissions on his sales and enroll him in a company retirement scheme called the "Agent's Security Compensation Plan" (Plan). The Plan consisted of two different programs: the "Deferred Compensation Incentive Credit Plan," under which Nationwide annually credited an agent's retirement account with a sum based on his business performance, and the "Extended Earnings Plan," under which Nationwide paid an agent, upon retirement or termination, a sum equal to the total of his policy renewal fees for the previous 12 months.

Such were the contractual terms, however, that Darden would forfeit his entitlement to the Plan's benefits if, within a year of his termination and 25 miles of his prior business location, he sold insurance for Nationwide's competitors. The contracts also disqualified him from receiving those benefits if, after he stopped representing Nationwide, he ever induced a Nationwide policyholder to cancel one of its policies.

In November 1980, Nationwide exercised its contractual right to end its relationship with Darden. A month later, Darden became an independent insurance agent and, doing

business from his old office, sold insurance policies for several of Nationwide's competitors. The company reacted with the charge that his new business activities disqualified him from receiving the Plan benefits to which he would have been entitled otherwise. Darden then sued for the benefits, which he claimed were nonforfeitable because already vested under the terms of ERISA. 29 U.S.C. § 1053(a).

Darden brought his action under 29 U.S.C. § 1132(a), which enables a benefit plan "participant" to enforce the substantive provisions of ERISA. The Act elsewhere defines "participant" as "any employee or former employee of an employer ... who is or may become eligible to receive a benefit of any type from an employee benefit plan ... ." § 1002(7). Thus, Darden's ERISA claim can succeed only if he was Nationwide's "employee," a term the Act defines as "any individual employed by an employer." § 1002(6).

It was on this point that the District Court granted summary judgment to Nationwide. After applying common-law agency principles and, to an extent unspecified, our decision in *United States v. Silk*, 331 U.S. 704, 67 S.Ct. 1463, 91 L.Ed. 1757 (1947), the court found that "'the total factual context' of Mr. Darden's relationship with Nationwide shows that he was an independent contractor and not an employee." App. to Pet. for Cert. 47a, 50a, *quoting NLRB v. United Ins. Co. of America*, 390 U.S. 254, 88 S.Ct. 988, 19 L.Ed.2d 1083 (1968).

The United States Court of Appeals for the Fourth Circuit vacated. *Darden v. Nationwide Mutual Ins. Co.*, 796 F.2d 701 (1986). After observing that "Darden most probably would not qualify as an employee" under traditional principles of agency law, *id.*, at 705, it found the traditional definition inconsistent with the "'declared policy and purposes'" of ERISA, *id.*, at 706, *quoting Silk, supra*, 331 U.S., at 713, 67 S.Ct., at 1468, and *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131-132, 64 S.Ct. 851, 861-862, 88 L.Ed. 1170 (1944), and specifically with the congressional statement of purpose found in § 2 of the Act, 29 U.S.C. § 1001.<sup>1</sup> It therefore held that an ERISA plaintiff can qualify as an "employee" simply by showing "(1) that he had a reasonable expectation that he would receive [pension] benefits, (2) that he relied on this expectation, and (3) that he lacked the economic bargaining power to contract out of [benefit plan] forfeiture provisions." 922 F.2d 203, 205 (CA4 1991) (summarizing 796 F.2d 701). The court remanded the case to the District Court, which then found that Darden had been Nationwide's "employee" under the standard set by the Court of Appeals. 717 F.Supp. 388 (EDNC 1989). The Court of Appeals affirmed. 922 F.2d 203 (1991).<sup>2</sup>

In due course, Nationwide filed a petition for certiorari, which we granted on October 15, 1991. 502 U.S. 905, 112 S.Ct. 294, 116 L.Ed.2d 239. We now reverse.

## II

We have often been asked to construe the meaning of "employee" where the statute containing the term does not helpfully define it. Most recently we confronted this problem in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 109 S.Ct. 2166,

104 L.Ed.2d 811 (1989), a case in which a sculptor and a nonprofit group each claimed copyright ownership in a statue the group had commissioned from the artist. The dispute ultimately turned on whether, by the terms of § 101 of the Copyright Act of 1976, 17 U.S.C. § 101, the statue had been "prepared by an employee within the scope of his or her employment." Because the Copyright Act nowhere defined the term "employee," we unanimously applied the "well established" principle that

"[w]here Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms. ... In the past, when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine. *See, e.g., Kelley v. Southern Pacific Co.*, 419 U.S. 318, 322-323 [95 S.Ct. 472, 475-476, 42 L.Ed.2d 498] (1974); *Baker v. Texas & Pacific R. Co.*, 359 U.S. 227, 228 [79 S.Ct. 664, 665, 3 L.Ed.2d 756] (1959) (per curiam); *Robinson v. Baltimore & Ohio R. Co.*, 237 U.S. 84, 94 [35 S.Ct. 491, 494, 59 L.Ed. 849] (1915)." 490 U.S., at 739-740, 109 S.Ct., at 2172 (internal quotation marks omitted).

While we supported this reading of the Copyright Act with other observations, the general rule stood as independent authority for the decision.

So too should it stand here. ERISA's nominal definition of "employee" as "any individual employed by an employer," 29 U.S.C. § 1002(6), is completely circular and explains nothing. As for the rest of the Act, Darden does not cite, and we do not find, any provision either giving specific guidance on the term's meaning or suggesting that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results. Thus, we adopt a common-law test for determining who qualifies as an "employee" under ERISA,<sup>3</sup> a test we most recently summarized in *Reid*:

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party." 490 U.S., at 751-752, 109 S.Ct., at 2178-2179 (footnotes omitted).

Cf. Restatement (Second) of Agency § 220(2) (1958) (listing nonexhaustive criteria for identifying master-servant relationship); Rev.Rul. 87-41, 1987-1 Cum.Bull. 296, 298-299 (setting forth 20 factors as guides in determining whether an individual qualifies as a common-law "employee" in various tax law contexts). Since the common-law test

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ERISA, defines an "employee" to include "any individual employed by an employer," it defines the verb "employ" expansively to mean "suffer or permit to work." 52 Stat. 1060, § 3, codified at 29 U.S.C. §§ 203(e), (g). This latter definition, whose striking breadth we have previously noted, *Rutherford Food, supra*, at 728, 67 S.Ct., at 1475, stretches the meaning of "employee" to cover some parties who might not qualify as such under a strict application of traditional agency law principles. ERISA lacks any such provision, however, and the textual asymmetry between the two statutes precludes reliance on FLSA cases when construing ERISA's concept of "employee."

Quite apart from its inconsistency with our precedents, the Fourth Circuit's analysis reveals an approach infected with circularity and unable to furnish predictable results. Applying the first element of its test, which ostensibly enquires into an employee's "expectations," the Court of Appeals concluded that Nationwide had "created a reasonable expectation on the 'employees' part that benefits would be paid to them in the future," *Darden*, 796 F.2d, at 706, by establishing "a comprehensive retirement benefits program for its insurance agents," *id.*, at 707. The court thought it was simply irrelevant that the forfeiture clause in Darden's contract "limited" his expectation of receiving pension benefits, since "it is precisely that sort of employer-imposed condition on the *employee's* anticipations that Congress intended to outlaw with the enactment of ERISA." *Id.*, at 707, n. 7 (emphasis added). Thus, the Fourth Circuit's test would turn not on a claimant's actual "expectations," which the court effectively deemed inconsequential, *ibid.*, but on his statutory entitlement to relief, which itself depends on his very status as an "employee." This begs the question.

This circularity infects the test's second prong as well, which considers the extent to which a claimant has relied on his "expectation" of benefits by "remaining for 'long years,' or a substantial period of time, in the 'employer's' service, and by foregoing other significant means of providing for [his] retirement." *Id.*, at 706. While this enquiry is ostensibly factual, we have seen already that one of its objects may not be: to the extent that actual "expectations" are (as in Darden's case) unnecessary to relief, the nature of a claimant's required "reliance" is left unclear. Moreover, any enquiry into "reliance," whatever it might entail, could apparently lead to different results for claimants holding identical jobs and enrolled in identical plans. Because, for example, Darden failed to make much independent provision for his retirement, he satisfied the "reliance" prong of the Fourth Circuit's test, *see* 922 F.2d, at 206, whereas a more provident colleague who signed exactly the same contracts, but saved for a rainy day, might not.

Any such approach would severely compromise the capacity of companies like Nationwide to figure out who their "employees" are and what, by extension, their pension-fund obligations will be. To be sure, the traditional agency law criteria offer no paradigm of determinacy. But their application generally turns on factual variables within an employer's knowledge, thus permitting categorical judgments about the "employee" status of claimants with similar job descriptions. Agency law principles comport, moreover, with our recent precedents and with the common understanding, reflected in those precedents, of the difference between an employee and an independent contractor.

### III

While the Court of Appeals noted that "Darden most probably would not qualify as an employee" under traditional agency law principles, *Darden, supra*, at 705, it did not actually decide that issue. We therefore reverse the judgment and remand the case to that court for proceedings consistent with this opinion.

So ordered.

<sup>1</sup>The Court of Appeals cited Congress's declaration that "many employees with long years of employment are losing anticipated retirement benefits," that employee benefit plans "have become an important factor affecting the stability of employment and the successful development of industrial relations," and that ERISA was necessary to "assur[e] the equitable character of such plans and their financial soundness." 796 F.2d, at 706, *quoting* 29 U.S.C. § 1001. None of these passages deals specifically with the scope of ERISA's class of beneficiaries.

<sup>2</sup>The Court of Appeals also held that the Deferred Compensation Plan was a pension plan subject to regulation under ERISA, but that the Extended Earnings Plan was not. 922 F.2d, at 208. We denied Darden's cross-petition for certiorari, which sought review of that conclusion. 502 U.S. 906, 112 S.Ct. 295, 116 L.Ed.2d 240 (1991).

<sup>3</sup>As in *Reid*, we construe the term to incorporate "the general common law of agency, rather than ... the law of any particular State." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740, 109 S.Ct. 2166, 2173, 104 L.Ed.2d 811 (1989).

<sup>4</sup>The National Labor Relations Act simply defined "employee" to mean (in relevant part) "any employee." 49 Stat. 450 (1935). The Social Security Act defined the term to "include," among other, unspecified occupations, "an officer of a corporation." 49 Stat. 647.

<sup>5</sup>While both Darden and the United States cite a Department of Labor "Opinion Letter" as support for their separate positions, *see* Brief for Respondent 34-35, Brief for United States as Amicus Curiae 16-18, neither suggests that we owe that letter's legal conclusions any deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984).

**TAB 4**

**Select Cases Related to Agency Contingent Worker Inquiries**

Richard E. Sundberg, Complainant, v. William J. Henderson, Postmaster General, United States Postal Service, Agency

Appeal No. 01993955 Agency No. 4-I-553-0036-99

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

2000 EEOPUB LEXIS 5447

August 2, 2000

**CORE TERMS:** common law, regulation, hiring, hired, common-law, age discrimination, addressing, referenced, accepting, revised, qualifies, sector, eeoc, bid

**ISSUEDBY:** [\*1] For the Commission by Carlton M. Hadden, Acting Director, Office of Federal Operations

**OPINION:  
DECISION**

On April 16, 1999, complainant filed a timely appeal with this Commission from an agency decision dated March 12, 1999, pertaining to his complaint of unlawful employment discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, [29 U.S.C. § 621](#) *et seq.* n1 In his complaint, complainant alleged that he was subjected to discrimination on the basis of age (DOB April 8, 1939) when:

On April 6, 1998, he was no longer permitted to be a Highway **Contract** Driver.

----- Footnotes -----

n1 On November 9, 1999, revised regulations governing the EEOC's federal sector complaint process went into effect. These regulations apply to all federal sector EEO complaints pending at any stage in the administrative process. Consequently, the Commission will apply the revised regulations found at [64 Fed. Reg. 37,644 \(1999\)](#), where applicable, in deciding the present appeal. The regulations, as amended, may also be found at the Commission's website at [www.eeoc.gov](http://www.eeoc.gov).

----- End Footnotes-----

[\*2] The agency dismissed complainant's complaint pursuant to the regulation set forth at [64 Fed. Reg. 37,644, 37,656 \(1999\)](#) (to be codified and hereinafter referred to as 29 C.F.R. § 1614.107(a)(1)), for failure to state a claim. Specifically, the agency stated that complainant was a previous employee who was not an applicant for employment at the time of the incident and thus argued that complainant did not have standing to pursue a discrimination complaint.

On appeal, complainant presents evidence that he applied for a bid in October 1998 with the agency and argues that despite being the lowest bidder, he was denied the **contract** in December 1998. Complainant argues that the agency's refusal to award him the bid was based on age discrimination. On appeal complainant also claims that Person A has continued to make false statements about complainant's work history.

The Commission's regulations provide that an agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that the agency has discriminated against him because of race, color, religion, sex, national origin, age, or disability. [64 Fed. Reg. 37,644, 37,656 \(1999\)](#) [\*3] (to be codified and hereinafter referred to as 29 C.F.R. § 1614.103). In order to determine whether an individual is an employee or applicant for employment under Title VII, "the Commission will apply the common law of agency test, considering all of the incidents of the relationship between the [complainant] and the agency . . ." *Ma and Zheng v. Department of Health and Human Services*, EEOC Appeal Nos. 01962390 and 01962389 (June 1, 1998). In *Ma*, the Commission held that "the application of the *Spirides* [[Spirides v. Reinhardt](#), 613 F.2d 826, 831-32 (D.C. Cir. 1979)] test has not differed appreciably from an application of the common law of agency test." *Id.* (citation omitted).

In *Ma*, the Commission described the common law of agency test as follows: In [[Nationwide Mutual Ins. Co. v. Darden](#), 503 U.S. 318, (1992)], the Court adopted the factors listed in (*Community for Creative Non - Violence v. Reid*, 490 U.S. 730, 751-752 (1989)), as part of the common-law test for determining who qualifies as an "employee" under ERISA: the hiring party's right to control the manner [\*4] and means by which the product is accomplished; the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. [503 U.S. at 323-324](#). The Court also referenced the Restatement (Second) of Agency § 220(2)(1958) as listing non-exhaustive criteria for identifying a master-servant relationship, and [Rev. Rul. 87-41, 1987-1 Cum. Bull. 296-299](#) as setting forth 20 factors as guides in determining whether an individual qualifies as a common-law "employee" in various tax law contexts. The Court emphasized, however, that the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, [\*5] . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." [503 U.S. at 324](#), quoting [NLRB v. United Ins. Co. of America](#), 390 U.S. 254, 258 (1968).

*Ma*, EEOC Appeal No. 01962390.

The Commission finds that the agency has not provided sufficient evidence in the record addressing whether complainant was an "applicant for federal employment." Because it is not clear whether the agency has jurisdiction over the matter, we shall REMAND the matter so that the agency can supplement the record with evidence addressing the common law of agency test as described in *Ma*.

Emilie Holmes, Complainant, v. John E. Potter, Postmaster General, United States Postal Service, (Capital Metro Area), Agency

Appeal No. 01A54613 Agency No. 6P-000-0032-04

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

2005 EEOPUB LEXIS 5113

October 14, 2005

**CORE TERMS:** final decision, staffing, contingent, Rehabilitation Act, common law, notice, temporary employment, Employment Act, et seq, investigative, disability, purchasing, occupation, calendar, weighed, manual

**ISSUEDBY:** [\*1] For the Commission by Carlton M. Hadden, Director, Office of Federal Operations

**OPINION:**  
DECISION

Complainant filed a timely appeal with this Commission from the agency's decision dated June 3, 2005, dismissing her complaint of unlawful employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, [29 U.S.C. § 791](#) et seq. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, [29 U.S.C. § 621](#) et seq. In her complaint, complainant alleged: (1) that she was subjected to discrimination on the bases of disability and age (D.O.B. 01/23/1950) when on December 16, 2003 she became aware via email that her application for a **Contract** Investigator position was rejected, and (2) that she was retaliated against for prior protected activity (presumably arising under the Rehabilitation Act and the ADEA) when on January 12, 2005 she was notified by Manpower that her pre-screening questionnaire was rejected.

In its final decision, the agency dismissed both claims pursuant to 29 C.F.R. § 1614.107(a)(1) for two reasons. The first reason was that complainant [\*2] was neither an employee nor an applicant for employment with respect to the claims because her application materials were submitted to Manpower, a staffing firm with whom the agency had **contracted** to process applications for **contract** EEO Investigators and to provide the agency with their services, as "contingent workers." The agency argues that complainant's cause of action is solely against Manpower and that the proper legal recourse is to file a charge of discrimination at the local EEOC office. In support of this argument, the agency cites the Commission's decision in *Austin v. United States Postal Service*, EEOC Appeal No. 01A44065 (September 21, 2004). The second reason articulated by the agency is that in accordance with Section 1.6.4.a of a "purchasing manual," because complainant is a current employee of the agency, she is prohibited from being a **Contractor** with the agency.

The Commission's regulations provide that an agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that the agency has discriminated against her because of race, color, religion, sex, national origin, age, or disability. See 29 C.F.R. § 1614.103. Complainants [\*3] who are neither employees of nor applicants for employment with the agency do not have standing to pursue their claims in the federal administrative process and their claim must be dismissed. To determine whether a complainant is an employee or applicant, the Commission applies the common law of agency test. See *Ma and Zheng v. Department of Health and Human Services*, EEOC Appeal Nos. 01962390, 01962389 (May 29, 1998) (citing [\*Nationwide Mutual Insurance Co. v. Darden\*, 503 U.S. 318, 323-24 \(1992\)](#)). In *Ma*, the Commission noted that the common law of agency test contains "no shorthand formula" or "magic phrase" and that all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.

The Commission has applied the common law of agency test to determine whether complainants are agency employees under laws enforced by the EEOC. See *id.* Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work usually is done under the [\*4] direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, *i.e.*, by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. See *id.*

The Commission's two Enforcement Guidance Applications of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (Dec. 3, 1997) and Application of the ADA to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms (Dec. 22, 2000) (hereinafter, "Guidance"), address the application of Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), the Americans [\*5] with Disabilities Act (ADA), and the Equal Pay Act (EPA) to individuals placed in job assignments by temporary employment agencies and other staffing firms, *i.e.*, "contingent workers." The term "contingent workers" generally refers to workers who are outside an employer's "core" work force, such as those whose jobs are structured to last only a limited period of time, are sporadic, or differ in any way from the norm of full-time, long-term employment. Contingent workers may be hired by "staffing firms" which may include a temporary employment agency or a **contract** firm. See Guidance. In the Guidance, we also recognize that a joint employment relationship may exist where both the agency and the staffing firm may be deemed employers. A determination of joint employment requires an assessment of the comparative amount and type of control the "staffing firm,"

and the agency each maintain over complainant's work. Thus, a federal agency will qualify as a joint employer of an individual if it has the requisite means and manner of control over the individual's work under the *Ma* criteria, whether or not the individual is on the federal payroll.

The Commission has held that the [\*6] "agency has the burden of providing evidence and/or proof to support its final decisions." *Ericson v. Department of the Army*, EEOC Request No. 05920623 (January 14, 1993). The Commission finds that the agency has not met its burden with respect to the final decision giving rise to this appeal. Initially we note that the final decision not only fails to contain the **contract** between the agency and Manpower but also fails to identify which, if any, of the incidents of the relationship between the agency and Manpower were assessed and weighed in order to conclude that complainant has no standing. Further, it is not possible to ascertain what "purchasing manual" the final decision refers to and what, if any relevance, it has to the instant complaint. In light of these deficiencies, we find the agency's reliance on the Commission's decision in *Austin v. United States Postal Service*, EEOC Appeal No. 01A44065 (September 21, 2004) unpersuasive.

The agency's final decision is therefore REVERSED, and the complaint is REMANDED to the agency for processing in accordance with the Order below.

Michelle Orozco, Complainant, v. Hansford T. Johnson, Acting Secretary, Department of the  
Navy, Agency

Appeal No. 01A34181 Agency No. 03-00243-004

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

2003 EEOPUB LEXIS 6002

October 9, 2003

**CORE TERMS:** agency official, common law, addressing, Civil Rights Act, sexual act, et seq, occupation, accepting, calendar, sister, kiss, mailed

**ISSUEDBY:** [\*1] For the Commission by Carlton M. Hadden, Director, Office of Federal Operations

**OPINION:**  
DECISION

Complainant filed a timely appeal with this Commission from the final agency decision dated May 30, 2003, dismissing her 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.*

In her formal complaint, filed on February 28, 2003, complainant alleged that she was subjected to discrimination on the bases of sex (female) and in reprisal for prior EEO activity when:

1. On November 20, 2002, [named agency official] told complainant that she was "cute" and that he "really wanted to kiss" her. Complainant alleges also that [named agency official] (a) told her that he liked "he-she's" and that he wanted complainant to tie him up and use a "strap-on;" (b) told complainant that he wanted her to tell him that she wanted him to wear women's undergarments to work; (c) called complainant into his office later that day and kissed her many times against her will; and (d) called complainant at home and told her that he wanted her to perform a sexual act.
2. On [\*2] November 21, 2002, [named agency official] called complainant into his office, and dropped his pants to reveal that he was wearing a pink thong. Complainant also alleges that [named agency official] tried to kiss her.
3. On one other occasion, [named agency official] called complainant at home and spoke to complainant's sister, indicating that he wanted complainant and her sister to perform a sexual act. Complainant alleges that later, [named agency official] telephoned her house and left a threatening message.

The agency found that complainant failed to state a claim because she was not an employee of the agency. The agency found that complainant was an employee of a private company engaged to perform services for the agency.

Before the Commission or the agency can consider whether the agency has discriminated against complainant in violation of Title VII, it first must determine whether complainant is an agency employee or applicant for employment within the meaning of Section 717(a) of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, [42 U.S.C. § 2000e](#) *et seq.*

The Commission has applied the common law of agency test [\*3] to determine whether complainant is an agency employee under Title VII. *See Ma v. Department of Health and Human Services*, EEOC Appeal No. 01962390 (June 1, 1998)(citing [Nationwide Mutual Insurance Mutual Insurance Co. et al. v. Darden](#), 503 U.S. 318, 323-24 (1992)). Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, *i.e.*, by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer;" (10) whether the worker accumulates retirement [\*4] benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. *See id.*

In *Ma*, the Commission noted that the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer...All of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.* (citations omitted). The Commission in *Ma*, also noted that prior applications of the test established in [Spirides v. Reinhardt](#), 613 F. 2d 286 (D.C. Cir. 1979), using many of the same elements considered under the common law test, was not appreciably different from the common law of agency test. *See id.*

Upon review, the Commission finds that the agency has not provided sufficient evidence in the record addressing whether the agency controlled the "means and manner" of complainant's work. The record contains no evidence addressing the factors set forth in *Ma*. Therefore, the Commission is unable to determine if the agency controlled the "means and manner" of complainant's work and we can not determine whether complainant was an employee of the agency. Because it is not clear [\*5] whether the agency has jurisdiction over the matter, we shall remand the matter so that the agency can supplement the record with evidence addressing the factors set forth in *Ma*.

The agency's decision dismissing the complaint is VACATED and we REMAND the complaint to the agency for further processing in accordance with this decision and applicable regulations.

Michael Martell, Complainant, v. Alberto Gonzales, Attorney General, Department of Justice, Agency

Appeal No. 01A62346 Agency No. M060007

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

2006 EEOPUB LEXIS 5288

August 15, 2006

**CORE TERMS:** common law, supervisor, cell, contractor, block, guard, personnel, Civil Rights Act, employment discrimination, et seq, staffing, additionally, articulated, harassment, occupation, subjected, annual, attaches, accepting

**ISSUEDBY:** [\*1] For the Commission by Carlton M. Hadden, Director, Office of Federal Operations

**OPINION:**  
DECISION

Complainant filed a timely appeal with this Commission from the final agency decision dated February 24, 2006, dismissing his formal EEO 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.*

In a formal complaint dated October 22, 2005, complainant, a **Contract** Guard with AKAL Security, Inc. (AKAL), a **contractor** of the United States Marshals Service (USMS), claimed that he was a victim of unlawful employment discrimination on the basis of sex. In its January 23, 2006 decision, the agency determined that the instant complaint was comprised of the claim that complainant was subjected to sex discrimination and sexual harassment while working as a **Contract** Custody Officer for the Central District of California USMS, with the most recent incident of harassment occurring on August 14, 2005.

The agency dismissed the complaint for failure to state a claim. Specifically, the agency determined that complainant was not a federal employee, and therefore failed [\*2] to state a cognizable claim. The agency first found that, under the guidelines of AKAL's Statement of Work, specifically General Requirements Section II(E), "Security personnel are not employees of the United States Government and shall not represent themselves to be employees of the Federal Government." The Section also stated that "Guard services performed pursuant to this **contract** do not entitle the **Contractor** to pension, health benefits, injury compensation, and other related Federal employee benefits and services." The agency additionally noted that, pursuant to Section III(F), "**Contractor** shall be responsible for the purchase of guard handguns and related equipment at no cost to the Federal Government."

In further analyzing complainant's employment status, the agency specifically determined that AKAL controlled the "means and manner" of complainant's performance, not the U.S. Marshals Service. The agency found that as a **contract** employee with AKAL Security, Inc., complainant's position in the USMS Central District of California was not directly supervised by the USMS, but by AKAL personnel. The agency also found that AKAL paid complainant's salary on a regularly scheduled basis; [\*3] withheld his taxes; provided his benefits package; and afforded him annual leave and/or vacation time. The agency stated that employment as a **Contract** Guard was established with AKAL Security, Inc., and AKAL was the only employer with the authority to discharge complainant from employment, or otherwise remove him from performing services on a **contract**. The agency determined that it was never the intention of the USMS for complainant to be considered an "employee"; rather, the intention of the parties was for complainant to be a **contract** employee of AKAL Security, Inc., **contracted** to provide guard services to the USMS Central District of California.

On appeal, complainant states that the USMS is "classifying individuals as independent **contractors** when individuals are really being controlled as an employee," and that the USMS controlled the "means and manner" of his performance, not AKAL. Complainant also contends that: he was required to comply with USMS instructions about where when and how to work; he was required to work with an experienced employee in the courts and cell block, and to attend meetings in the cell block because the USMS wanted things done in a particular manner; [\*4] his services were integrated into USMS operations and subjected to its direction and control; the employer-employee relationship was shown by his continuing relationship with USMS; his work location - the cell block and courts - show USMS control; when working the Santa Ana cell block, the USMS told him when to come to work, take lunch and breaks, and when to leave; the USMS required him to perform work in a specific order or sequence; and he used USMS vehicles, handcuffs, leg restraints, and belly chains.

Complainant also contends that at the time the alleged harassment began, he was "an employee of the [USMS] services and was receiving a paycheck from the [agency]," and attaches copies of USMS checks made out to him dated October 28 and November 10, 2003. Complainant also attaches a copy of his USMS identification, noting its statement that "the bearer of this card is a Custody Officer for the United States Marshals Services." Complainant additionally claims that his USMS supervisor "gave permission to every officer to [wear] the (USMS) logo on the back of their uniform and a (USMS) star on the front of their uniform." Finally, complainant asserts that, although AKAL did have supervisory [\*5] personnel, a USMS supervisor was his direct supervisor and "all things went through [her]." Complainant states that every AKAL officer had the USMS supervisor's cell number and "called her for everything from work schedules to complaints against other officers" with the knowledge of AKAL upper management.

Before the Commission or the agency can consider whether the agency has discriminated against complainant in violation of Title VII, it first must determine whether complainant is an agency employee or applicant for employment within the meaning of Section 717(a)

of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, [42 U.S.C. § 2000e-16\(a\)](#) *et seq.*

The Commission has applied the common law of agency test to determine whether complainant is an agency employee under Title VII. See *Ma v. Department of Health and Human Services*, EEOC Appeal No. 01962390 (June 1, 1998) (citing [Nationwide Mutual Insurance Co. et. al. v. Darden, 503 U.S. 318, 323-24 \(1992\)](#)). Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control [\*6] the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, *i.e.*, by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. See *Ma v. Department of Health and Human Services, supra*.

In *Ma*, the Commission noted that the common-law test contains, "no shorthand formula or magic phrase that can be applied to find the answer...All of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.*, (citations [\*7] omitted). The Commission in *Ma* also noted that prior applications of the test established in [Spirides v. Reinhardt, 613 F.2d 826 \(D.C. Cir. 1979\)](#), using many of the same elements considered under the common law test, was not appreciably different from the common law of agency test. See *Id.*

Furthermore, under the Commission's Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002 (December 3, 1997) (hereinafter referred to as the "Guidance"), we have also recognized that a "joint employment" relationship may exist where both the agency and the "staffing firm" may be deemed employers. Similar to the analysis set forth above, a determination of joint employment requires an assessment of the comparative amount and type of control the "staffing firm" and the agency each maintain over complainant's work. Thus, a federal agency will qualify as a joint employer of an individual if it has the requisite means and manner of control over the individual's work under the *Ma* criteria, whether or not the individual is on the federal payroll. See *Baker* [\*8] *v. Department of the Army*, EEOC Appeal No. 01A45313 (March 16, 2006).

Upon review, we find that the agency has provided insufficient evidence addressing whether complainant should be considered an agency employee or joint employee of the agency. The Commission acknowledges that the agency's final decision used many of the factors articulated in the common law of agency test as articulated in *Ma* to analyze whether complainant should be considered an agency employee under Title VII. We also note the agency's citation of specific provisions of AKAL's Statement of Work in its

analysis. The agency, however, has failed to provide any record evidence to support its statements, analysis, or conclusions concerning any of the factors in the common law of agency test. Moreover, the agency has not addressed complainant's assertions and evidence on appeal concerning the means and manner of control the agency maintained over the conditions of complainant's day-to-day work for the agency. Given the present record, the Commission is unable to ascertain whether or not the agency has jurisdiction. We shall remand the matter so that the agency can supplement the record with evidence addressed [\*9] in the common law of agency test as described in *Ma* and *Baker*.

The agency's dismissal of the complaint is **VACATED**, and we **REMAND** the complaint to the agency for further processing in accordance with the **ORDER** below.

ORDER

Athar M. Siddiqui, Complainant, v. Maria Cino, Acting Secretary, Department of  
Transportation, Agency

Appeal No. 01A63269 Agency No. 2005-20332-FMCSA-04

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

2006 EEOPUB LEXIS 5700

September 14, 2006

**CORE TERMS:** discriminated, final decision, staffing, Civil Rights Act, failure to state a claim, national origin, et seq, documentation, terminated, contractor, occupation, subjected, accepting, coworkers, religion, hiring, color, hired

**ISSUEDBY:** [\*1] For the Commission by Carlton M. Hadden, Director, Office of Federal Operations

**OPINION:**  
DECISION

Complainant filed a timely appeal with this Commission from the final agency decision dated April 3, 2006, dismissing his 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.*

In his formal complaint, filed on March 6, 2006, complainant claimed that he was subjected to discrimination on the bases of race (Middle Eastern), color, national origin (Pakistani), religion (Muslim), and in reprisal for protected activity.

In its final decision dated April 3, 2006, the agency determined that complainant's complaint was comprised of the following claims:

1. [Was complainant] discriminated against...when [he was] subjected to a hostile work environment from June 17, 2004 through September 12, 2005 (his termination date); n1
2. [Was complainant] discriminated against...when he was terminated from [his] position of Senior Systems Engineer on September 12, 2005;
3. [Was complainant] discriminated against...when [he] was not hired for the position [\*2] of Systems Engineer and two other positions in September 2005 by RS Information Systems, Inc. (RSIS)?

----- Footnotes -----

n1 Among other things, complainant asserted that upon his hiring he was told that the agency' s District Director had "a problem with Muslims" and he was questioned by agency management, including the District Director, about his beliefs and where he and his parents were from; agency coworkers twisted his arm and held him down, saying "that is what we do with your kind [of] boy"; comments were made by coworkers implying he was a terrorist following the London bombings; and he was denied office furniture and equipment promised.

----- End Footnotes-----

The agency dismissed complainant's complaint for failure to state a claim. Specifically, the agency stated that "RSIS was a federal **contractor** with the [agency]...At all relevant time periods, your managers were employees of RSIS. Based on the information provided in your formal complaint, RSIS had control over your work assignments, equipment provided, leave arrangements, pay and rate of [\*3] payment, and hiring and termination decisions. Therefore, a decision has been made to dismiss your complaint for failure to state a claim because you were neither an employee not an applicant for employment with the federal government."

On appeal, complainant, through his attorney, asserts that the agency's final decision dismissing his complaint is improper. Complainant states that he was employed by RSIS which was a federal **contractor** with the agency under the jurisdiction of and reporting to the Federal Motor Carrier Safety Administration (FMCSA). Complainant asserted that FMSCA controlled his job duties and assignments, provided feedback to RSIS with respect to his job performance which was used to control his performance, furnished all his employment equipment, controlled the hours he worked, and told RSIS that they did not want complainant to work for them, which resulted in RSIS terminating him.

The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been [\*4] discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. §§ 1614.103, .106(a).

The Commission must first determine whether complainant was an agency employee or applicant for employment within the meaning of Section 717(a) of Title VII of the Civil Rights Act of 1964, as amended, [42 U.S.C. 2000e-16\(a\)](#) *et seq.* The Commission has applied the common law of agency test to determine whether an individual is an agency employee under Title VII. See *Ma v. Department of Health and Human Services*, EEOC Appeal Nos. 01962389 & 01962390 (May 29, 1998) (citing [Nationwide Mutual Insurance Co. v. Darden](#), [503 U.S. 318, 323-24 \(1992\)](#)). Specifically, the Commission

will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the [\*5] "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, *i.e.*, by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. *See Ma, supra*. In *Ma*, the Commission noted that the common-law test contains, "no shorthand formula or magic phrase that can be applied to find the answer...All of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.*

Furthermore, under the Commission's *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, EEOC Notice No. 915.002 (December 3, 1997) (hereinafter referred to as the "Guidance") (available at [www.eeoc.gov](http://www.eeoc.gov)), we have also recognized that a "joint employment" [\*6] relationship may exist where both the agency and the "staffing firm" may be deemed employers. n2 Similar to the analysis set forth above, a determination of joint employment requires an assessment of the comparative amount and type of control the "staffing firm", and the agency each maintain over complainant's work. Thus, a federal agency will qualify as a joint employer of an individual if it has the requisite means and manner of control over the individual's work under the *Ma* criteria, whether or not the individual is on federal payroll. *See Guidance, supra* at 11; *Baker v. Department of the Army*, EEOC Appeal No. 01A45313 (March 16, 2006).

----- Footnotes -----

n2 Contingent workers generally refer to workers who are outside an employer's "core" workforce, such as those whose jobs are structured to last only a limited period of time, are sporadic, or differ in any way from the norm of full time, long term employment. Contingent workers may be hired by "staffing firms" which may include a temporary employment agency or a **contract** firm. *See Guidance supra* at 1 and 3.

----- End Footnotes----- [\*7]

Upon review of the record, we are unable to ascertain whether or not the agency was an employer or joint employer of complainant with respect to claims (1) and (2), as well as for the subject positions set forth in claim (3). Regarding claims (1) and (2), the record does not contain a copy of the **contract** between the agency and RSIS. Regarding claim (3), the record does not contain sufficient information regarding the positions

complainant claims that he was not selected for in September 2005.

Accordingly, we VACATE the agency's final decision dismissing complainant's complaint and we REMAND this matter to the agency for further processing in accordance with the ORDER below.

Brenda Benbow n1, Complainant, v. Dr. Francis J. Harvey, Secretary, Department of the Army, Agency

n1 The record reflects that complainant is also identified as "Brenda Stegall Benbow" and "Brenda Trent-Benbow."

Appeal No. 0120063993 n2

n2 Due to a new data system, this case has been re-designated with the above referenced appeal number. Agency No. ARHOOD06MAR01070

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

2006 EEOPUB LEXIS 6535

November 16, 2006

**CORE TERMS:** common law, supervisor, et seq, staffing, supervision, terminated, addressing, occupation, accepting, annual

**ISSUEDBY:** [\*1] For the Commission by Carlton M. Hadden, Director, Office of Federal Operations

**OPINION:**  
DECISION

Complainant filed a timely appeal with this Commission from the final agency decision dated May 22, 2006, dismissing her 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.* and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, [29 U.S.C. § 621](#) *et seq.*

In her formal EEO complaint, filed on May 18, 2006, complainant claimed that she was subjected to discrimination on the bases of race, national origin, sex, religion, color, age, and in reprisal for prior EEO activity when:  
on March 21, 2006, she was terminated from her **contractor** position as a Tank Automotive-Armament Commend (TACOM) Reset Liaison Officer, 4th CMMC, 4ID, Fort Hood, Texas.

The record reflects during the relevant time, complainant was a TACOM Reset Liaison Officer through a corporate entity identified as Battelle Memorial Institute (Battelle), at the agency's 4th CMMC, 4ID in Fort Hood, Texas.

In its May 22, 2006 [\*2] final decision, the agency dismissed complainant's complaint pursuant to regulation set forth at 29 C.F.R. § 1614.107(a)(1), for failure to state a claim. The agency determined that complainant was not a federal employee. The agency

determined further that according to a Labor Counselor, complainant was a **contract** employee of Battelle. The agency indicated that the Labor Counselor stated that during the relevant time, complainant was a TACOM Reset Liaison Officer providing logistics support. The agency further determined that the Labor Counselor stated that under the terms of the **contract** with the agency, Battelle controlled the means and manner of complainant's performance; directed complainant's duties; supervised complainant; paid complainant's salary; and approved her annual leave.

On appeal, complainant, through her attorney, argues that during the relevant time she worked under the supervision of agency employees and civilians, including her identified Supervisor, an agency employee. Complainant further states "Army and military personnel (including [Supervisor]) control the manner and means of [Complainant's] performance in that they directly assign her work, review and supervise [\*3] her work, and direct changes when changes are needed."

The Commission has applied the common law of agency test to determine whether complainant is an agency employee under Title VII. See *Ma v. Department of Health and Human Services*, EEOC Appeal No. 01962390 (June 1, 1998) (citing [Nationwide Mutual Insurance Co. et al v. Darden](#), 503 U.S. 318, 323-24 (1992)). Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particulate occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, *i.e.*, by one of both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work [\*4] is an integral part of the business of the "employer;" (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. In *Ma*, the Commission noted that the common-law test contains, "no shorthand formula or magic phrase that can be applied to find the answer... All of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.*

Furthermore, under the Commission's Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice 915.002 (December 3, 1997) (hereinafter referred to as the "Guidance"), we have also recognized that a "joint employment" relationship may exist where both the agency and the "staffing firm" may be deemed employers. Similar to the analysis set forth above, a determination of joint employment requires an assessment of the comparative amount and type of control the "staffing firm" and the agency each maintain over complainant's work. Thus, a federal agency will qualify as a joint employer of an individual if it has the requisite means and manner [\*5] of control over the

individual's work under the *Ma* criteria, whether or not the individual is on the federal payroll. See *Baker v. Department of the Army*, EEOC Appeal No. 01A45313 (March 16, 2006).

The agency has not provided sufficient evidence in the record addressing whether complainant is an agency employee or joint employee of the agency. Specifically, the record does not contain a copy of the **contract** between the agency and Battele, as discussed above. The agency has not provided evidence or analysis concerning a number of factors in the common law of agency test. In particular, and especially in light of the above-cited assertions in the record, the agency has not addressed the means and manner of control complainant's supervisor maintained over the conditions of complainant's day-to-day work at the agency. Given the present record, the Commission is unable to ascertain whether or not the agency has jurisdiction, we shall remand the matter so that the agency can supplement the record with evidence addressing the common law of agency test as described in *Ma* and *Baker*.

Accordingly, the agency's dismissal of the complaint is **VACATED** and we **REMAND** the [\*6] complaint to the agency for further processing in accordance with the **ORDER** below.

**ORDER**

Within thirty (30) calendar days after the date this decision becomes final, the agency is **ORDERED** to take the following action:

The agency shall supplement the record with evidence which shows whether complainant was an employee of the agency using the common law of agency test as defined in *Ma*, EEOC Appeal No. 01962390, and *Baker*, EEOC Appeal No. 01A45313, and identified in this decision. Thereafter, the agency shall determine whether complainant was an employee of the agency and whether the instant complaint states a claim of discrimination under 29 C.F.R. § 1614.403 or 1614.106(a).

Thereafter, the agency shall either issue a letter to complainant accepting the complaint for investigation or issue a new decision dismissing the complaint.

A copy of the agency's letter accepting the complaint for investigation or a copy of the new decision dismissing the complaint must be sent to the Compliance Officer as referenced herein

Yu-Yun Franke, Complainant, v. Dr. Donald C. Winter, Secretary, Department of the  
Navy, Agency

Appeal No. 0120064020 n1

n1 Due to a new data system, this case has been re-designated with the above referenced  
appeal number. Agency No. 05-00168-00266

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

2006 EEOPUB LEXIS 6632

November 29, 2006

**CORE TERMS:** common law, supervisor, Civil Rights Act, employment discrimination,  
staffing, supervision, terminated, contractor, occupation, accepting

**ISSUEDBY:** [\*1] For the Commission by Carlton M. Hadden, Director, Office of  
Federal Operations

**OPINION:**  
DECISION

Complainant filed a timely appeal with this Commission from the final agency decision dated May 12, 2006, dismissing her 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.*

On January 11, 2005, complainant filed a formal complaint, claiming that she was the victim of unlawful employment discrimination on the basis of national origin.

On May 12, 2006, the agency issued the instant final decision. Therein, the agency determined that complainant's complaint was comprised of two claims, that the agency identified as follows:

1. on October 15, 2004, a nurse subjected her to a hostile work environment by grabbing her shoulders while attempting to shake her, as an "in-your-face reprimand;"
2. on October 17, 2004, the agency supervisor notified her employer, Kelly Services, to replace her, and subsequently on December 6, 2004, she was terminated from employment

The agency dismissed complainant's complaint pursuant to the regulation set forth [\*2] at 29 C.F.R. § 1614.107(a)(1), for failure to state a claim. The agency found that complainant lacked standing to bring a formal complaint of discrimination against the agency because she was not an employee of the agency; and that she was instead a

**contractor** employee of a corporate entity identified as Kelly Services (hereinafter referred as "Kelly"). The agency stated that although complainant was assigned as a Front Desk Clerk, she might have received some daily supervision from agency management, but that she was employed as a **contractor** employee with Kelly.

On appeal, complainant contends that the agency "exerted a degree of control such that the [agency] was a joint employer with Kelly Services." Complainant further states that every aspect of her work was "under the direct supervision, control, and knowledge of the [agency's clinics]."

The Commission has applied the common law of agency test to determine whether an individual is an agency employee or applicant for employment within the meaning of Section 717(a) of Title VII of the Civil Rights Act of 1964, as amended, [42 U.S.C. 2000e-16\(a\)](#) *et. seq.* See *Ma v. Department of Health [\*3] and Human Services*, EEOC Appeal No. 01962390 (June 1, 1998) (citing [Nationwide Mutual Insurance Co. et al v. Darden, 503 U.S. 318, 323-24 \(1992\)](#)). Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, *i.e.*, by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. In *Ma*, [\*4] the Commission noted that the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer... All of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.*

Furthermore, under the Commission's Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002 (December 3, 1997) (hereinafter referred to as the "Guidance"), we have also recognized that a "joint employment" relationship may exist where both the agency and the "staffing firm" may be deemed employers. Similar to the analysis set forth above, a determination of joint employment requires an assessment of the comparative amount and type of control the "staffing firm" and the agency each maintain over complainant's work. Thus, a federal agency will qualify as a joint employer of an individual if it has the requisite means and manner of control over the individual's work under the *Ma* criteria, whether or not the individual is on the federal payroll. See *Baker v. Department of the Army*, EEOC Appeal No. 01A45313 (March 16, 2006).

The agency [\*5] has not provided sufficient evidence in the record addressing whether complainant should be considered an employee or joint employee of the agency. The record does not contain a copy of the **contract** between the agency and Kelly. The

agency has not provided evidence or analysis concerning the factors in the common law of agency test. In particular, the agency has not addressed the means and manner of control complainant's supervisor maintained over the conditions of complainant's day-to-day work at the agency. Given the present record, the Commission is unable to ascertain whether or not the agency has jurisdiction. The Commission shall remand the matter so that the agency can supplement the record with evidence addressed the common law of agency test as described in *Ma* and *Baker*.

Accordingly, the agency's dismissal of the complaint is **VACATED** and we **REMAND** the complaint to the agency for further processing in accordance with the **ORDER** below.

ORDER

Montaser Alsaied, Complainant, v. Michael Chertoff, Secretary, Department of  
Homeland Security, Agency

Appeal No. 0120064232 Agency No. 06ICE000061

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

2007 EEO PUB LEXIS 61

January 3, 2007

**CORE TERMS:** contractor, final decision, staffing, beard, Civil Rights Act, accommodation, terminated, occupation, terminate, religious, qualify, supplemental

**ISSUED BY:** [\*1] For the Commission by Carlton M. Hadden, Director, Office of Federal Operations

**OPINION:**  
DECISION

Complainant filed a timely appeal with this Commission from an agency decision, dated July 3, 2006, pertaining to 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. The Commission accepts the appeal in accordance with 29 C.F.R. § 1614.405.

Complainant contacted the EEO office claiming that he was subjected to religious discrimination. Informal efforts to resolve complainant's concerns were unsuccessful. Subsequently, complainant filed a formal complaint. The agency, in its decision, framed the claims as follows:

(1) on December 21, 2005, complainant was sent home from, and thereafter not allowed to return to, his position as an Armed Security Guard at a GSA-controlled facility because he had grown a goatee (beard);

(2) on January 3, 2006, complainant's request for a religious accommodation to wear a beard was denied; and

(3) on February 17, 2006, complainant's employment was consequently terminated by his employer, Coastal International Security, [\*2] Inc.

The agency issued a decision dismissing the complaint for failure to state a claim. The agency reasoned that complainant was not an applicant or employee, but rather a **contractor**, and did not have standing to file an EEO complaint. According to the agency, complainant has been an employee of the Coastal International Security, Inc (hereinafter "**Contractor**") from 1999 until his termination. Citing a response to the EEO

office, the agency noted that complainant wrote that the **Contractor** directly supervised him, provided his equipment, and paid his salary and benefits. Further, the agency stated that the **Contractor**, not the agency, had the ability to terminate complainant.

On appeal, complainant argues that the agency denied his request for a religious accommodation when they prohibited him from growing a beard. Further, complainant contends that the agency advised "my employer Costal International Security" to remove him from the **contract**.

The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complaint from any aggrieved employee or applicant for employment [\*3] who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. §§ 1614.103, .106(a).

The Commission must first determine whether the complainant was an agency employee or applicant for employment within the meaning of Section 717(a) of Title VII of the Civil Rights Act of 1964, an amended, [42 U.S.C. 2000e-16\(a\)](#) *et. seq.* The Commission has applied the common law of agency test to determine whether an individual is an agency employee under Title VII. *See Ma v. Department of Health and Human Services*, EEOC Appeal Nos. 01962389 & 01962390 (May 29, 1998) (citing [Nationwide Mutual Insurance Co. v. Darden](#), 503 U.S. 318, 323-24 (1992)). Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in [\*4] the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, *i.e.*, by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. *See Ma, supra*. In *Ma*, the Commission noted that the common-law test contains, "no shorthand formula or magic phrase that can be applied to find the answer...All of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.*

Furthermore, under the Commission's *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, EEOC Notice No. 915.002 (December 3, 1997) (hereinafter referred to as the "Guidance") (available at [www.eeoc.gov](http://www.eeoc.gov)), [\*5] we have also recognized that a "joint employment" relationship may exist where both the agency and the "staffing firm" may be deemed employers. n1 Similar to the analysis set forth above, a determination of joint employment requires an assessment of the comparative amount and type of control the "staffing firm, and the agency each maintain over complainant's work. Thus, a federal

agency will qualify as a joint employer of an individual if it has the requisite means and manner of control over the individual's work under the *Ma* criteria, whether or not the individual is on the federal payroll. See Guidance, *supra* at 11.

----- Footnotes -----

n1 Contingent workers generally refer to workers who are outside an employer's "core" work force, such as those whose jobs are structured to last only a limited period of time, are sporadic, or differ in any way from the norm of full-time, long term employment. Contingent workers may be hired by "staffing firms" which may include a temporary employment agency or a **contract** firm. See Guidance, *supra* at 1 & 3.

----- End Footnotes----- [\*6] Based on the instant record, the Commission is unable to determine whether the agency exercised sufficient control over complainant ' s position to qualify as the employer or joint employer of complainant. While the record contains various documents regarding whether or not the alleged actions were discriminatory, information addressing the factors cited in *Ma* is absent. The agency made reference to some elements in its decision (*i.e.* the ability to terminate, pay and benefits), however, it did not support any of these conclusions with evidence. The agency must substantiate the bases for its final decision. See *Marshall v. Department of the Navy*, EEOC Request No. 05910685 (September 6, 1991).

Accordingly, the agency's decision to dismiss complainant's complaint was improper, and is hereby **VACATED**. The complaint is **REMANDED** to the agency to supplement the record and analyze complainant' s position with the agency in light of the factors cited in *Ma*.

ORDER

Patricia A. Brown, Complainant, v. Dr. Francis J. Harvey, Secretary, Department of the  
Army, Agency

Appeal No. 01A54989 Agency No. ARPOLK05MAR08187

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

2006 EEOPUB LEXIS 4358

June 29, 2006

**CORE TERMS:** final decision, common law, federal employee, regulation, terminated, qualify, notice, failure to state a claim, evidence indicating, days of receipt, final action, investigative, occupation, aggrieved, calendar, untimely, staffing

**ISSUEDBY:** [\*1] For the Commission by Carlton M. Hadden, Director, Office of Federal Operations

**OPINION:**  
DECISION

Complainant filed a timely appeal with this Commission from the agency's decision dated June 9, 2005, dismissing her 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.](#) In her complaint, complainant alleged that she was subjected to discrimination on the basis of race (African-American) when on, March 24, 2005, complainant was terminated from her employment with Serco, Inc. (formally Resource Consultants, Inc.), a government **contractor** conducting business with the Army Community Service, Directorate of Morale, Welfare and Recreation, Fort Polk, LA.

The agency dismissed complainant's complaint. Specifically, the agency dismissed the complaint pursuant to 29 C.F.R. § 1614.107(a) for failure to state a claim, finding that complainant did not qualify as a federal employee within the scope of 29 C.F.R. § 1614.103.

On appeal, complainant argues that she qualified as a federal employee and notes that she was supervised by, and given work assignments [\*2] from, an agency employee. Complainant also argues that she regularly interacted with agency employees during the course of her employment. In response, the agency argues that complainant's appeal should be dismissed as untimely or, if the appeal is deemed timely, requests that we affirm the agency's final action. The agency argues that complainant was hired and paid by Serco, Inc.; that the **contract** employee site manager worked alongside complainant in the same building; that complainant's job did not require direct supervision by agency officials; that complainant was evaluated by Serco, Inc. rather than agency officials; and that Serco, Inc. officials disciplined and ultimately terminated complainant for alleged misconduct on the job.

### *Timeliness*

The Commission's regulations require that appeals to the Commission must be filed within thirty (30) days of receipt of the agency's dismissal, final action, or decision. 29 C.F.R. § 1614.402(a). The agency argues that complainant's appeal should be dismissed as untimely because she filed her appeal more than thirty (30) days after the agency issued its final decision dated June 9, 2005. However, the record is void of evidence indicating [\*3] when complainant received the agency's final decision. Thus, we deem complainant's appeal to be timely.

### *Failure to State a Claim*

The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. § 1614.103, § 1614.106(a). The Commission's federal sector case precedent has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. *Diaz v. Department of the Air Force*, EEOC Request No. 05931049 (April 21, 1994). To state a claim under the Commission's regulations, an employee must allege and show an injury in fact. Specifically, an employee must allege and show a "direct, personal deprivation at the hands of the employer," that is, a present and unresolved harm or loss affecting a term, condition, or privilege of his employment. [\*4] *Id.*

The Commission has applied the common law of agency test to determine whether complainants are agency employees under Title VII. *See Baker v. Department of the Army*, EEOC Appeal No. 01A45313 (March 16, 2006); *Ma v. Department of Health and Human Services*, EEOC Appeal No. 01962390 (May 29, 1998). Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "employer or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, *i.e.* by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer;" (10) whether the worker accumulates [\*5] retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. *See id.*

In *Ma*, the Commission noted that the common law test contains, "no shorthand formula or magic phrase that can be applied to find the answer... All of the incidents of the

relationship must be assessed and weighted with no one factor being decisive." *Id.* The Commission in *Ma* also noted that prior applications of the test established in [Spirides v. Reinhardt](#), 613 F.2d 826 (D.C. Cir. 1979), using many of the same elements considered under the common law test, was not appreciably different from the common law of agency test. *See id.*

Furthermore, in *Baker*, we noted that Commission has recognized that a "joint employment" relationship may exist where both the agency and the "staffing firm" may be deemed employers. EEOC Appeal No. 01A45313 (*citing* EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002 (December 3, 1997)). A joint employment determination requires an assessment of the comparative amount [\*6] and type of control the "staffing firm" and the agency each maintain over complainant's work. *Id.* Thus, a federal agency will qualify as a joint employer of an individual if it has the requisite means and manner of control over the individual's work under the *Ma* criteria, whether or not the individual is on the federal payroll. *Id.*

The Commission has held that the "agency has the burden of providing evidence and/or proof to support its final decisions." *Ericson v. Department of the Army*, EEOC Request No. 05920623 (January 14, 1993). Upon review, we find that the agency has not met its burden with respect to the final decision giving rise to the instant appeal. We note that that the final decision fails to identify which, if any, aspects of the relationship between Serco, Inc. and the agency were assessed and weighed in order to conclude that complainant did not qualify as a federal employee within the scope of 29 C.F.R. § 1614.103. Furthermore, we note that the record does not contain the **contract** between Serco, Inc. and the agency; evidence that Serco, Inc. paid the complainant; or any evidence indicating whether agency officials had any supervisory authority over [\*7] the complainant.

Accordingly, the agency's dismissal of complainant's complaint for failure to state a claim is REVERSED and REMANDED to the agency for further processing in accordance with this decision and the ORDER below.

ORDER (E0900)

**TAB 5**

## Select Contingent Worker Cases with Factor-by-Factor Matrix

### The 15 FACTORS

1. Did the firm (or NASA) have the right to control when, where, and how the contract worker performed the job, or did the aggrieved employee have the right?
2. Does the work require a high level of expertise?
3. Which entity furnishes the tools, materials, and equipment (is it the firm, NASA, or the contract worker)?
4. Was the work performed on the premises of the firm or NASA?
5. Was there a continuing [employer-employee] relationship between the contract worker and the firm or was such relationship with NASA? Did the contract worker previously work for NASA?
6. Did the firm (or NASA) have the right to assign additional projects to the contract worker?
7. Did the firm or NASA set the hours of work and the duration of the job?
8. Is the worker paid by the hour, week, or month rather than for the agreed cost of performing of a particular job?
9. Does the firm or NASA have a role in hiring and paying assistants?
10. Is the contract worker's duties part of the regular business of the firm or NASA?
11. Is contract worker engaged in his/her own distinct occupation or business?
12. Does the employer provide the worker with benefits such as insurance, leave, or workers' compensation?
13. Is the worker considered an employee of the employer for tax purposes(i.e., the employer withholds federal, state and Social Security taxes:
14. Who can discharge the contract worker (the firm or the agency)?
15. Did the firm or NASA believe that they created an employer-employee relationship?

## FACTORS

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	IR*
Antonio, Albert v. Navy																X
Baker, Nancy v. Dr. Francis J. Harvey, Secretary, Department of the Army	X					X			X					X		
Biladi-Ghanad, Beeta v. International Broadcasting Bureau		X					X	X					X	X		
Blake, John v. Veterans Affairs							X	X						X		
Brown, Patricia v. Army																X
Chamberlain, Theresa v. Army	X		X	X			X							X		
Cornelius, Larry R. v. Condoleezza Rice, Secretary, Department of State	X						X	X						X		
Corweye, Lois v. Army	X		X	X		X	X				X	X		X		-
Crogan, Christine M. v. Dr. Francis J. Harvey, Secretary, Department of the Army	X					X	X							X		
Dunn, Robin v. Dept. of Energy	X					X								X		
Ferebee, Charles v. Navy	X		X			X						X	X			
Fields, Cecilia v. GSA	X		X	X	X	X	X			X				X		
Garrity, James P. v. DOJ								X								
Glover, Steven v. Army								X				X				
Jahi, X-abian Montsho v. Carlos M. Gutierrez, Secretary, Department of Commerce	X							X				X		X		
Lawhorn, Charles E. ; Vann, Phelps D. v. Thomas E. White, Secretary, Department of the Army	X					X		X				X		X		
Majewski, Joseph v. Army	X					X						X	X			
Maynard, Sandra v. Gordon R. England, Secretary, Department of the Navy	X			X		X								X		
Mooney, James R. v. Michael Chertoff, Secretary, Department of Homeland Security																
Nguyen, Phu v. Dept. of State																X
Parsons, Stanton V. v. Gordon R. England, Secretary, Department of the Navy	X		X									X	X			
Pender, Tiffany v. Navy	X		X											X		
Prather-Soppeck, Susan R. v. Air Force		2									X					

**FACTORS**

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	IR*
Rogler, Edar Y. v. Department of Health and Human Services											X					
Ryfkogel, Kenneth L. v. Army		X									X					
Smith, Charles v. Army		X						X					X	X		
Vasquez, Jose v. NASA												X	X	X		
Walton, Palmyra v. Army							X	X				X	X	X		
Williams, Larry v. Dr. Francis J. Harvey, Secretary, Department of the Army			X									X		X		
Williams, Wellington J. v. Stephen L. Johnson, Acting Administrator, Environmental Protection Agency	X						X	X						X		
Wyatt, Jr., Lealon E. v. Glenn L. McCullough, Jr., Chairman, Tennessee Valley Authority	X		X									X		X		
* Cases related to Insufficient Records																

Index of Cases

	<u>Page</u>
<u>Albert Antonio v. Department of the Navy, EEOC</u> Appeal No. 0120051881 (February 16, 2007)	7
<u>Nancy Baker v. Department of the Army, EEOC</u> Appeal No.01A45313 (March16, 2006)	10
<u>Beeta Biladi-Ghanad v. International Broadcasting</u> <u>Bureau, EEOC Appeal No. 01A63551 (September 22, 2006)</u>	16
<u>John Blake v. Veterans Affairs, EEOC Appeal</u> No. 0120073484 (January 14, 2008)	19
<u>Patricia Brown v. Department of the Army, EEOC</u> Appeal No. 01A54989 (June 29, 2006)	22
<u>Theresa Chamberlain v. Department of the Army, EEOC</u> Appeal No. 01A61315 (June 6, 2006)	25
<u>Larry R. Cornelius v. Department of State, EEOC</u> Appeal No. 01A62520 (August 22, 2006)	29
<u>Lois Corwey v. Department of Army, EEOC</u> Appeal No. 01A51277 (March 23, 2006)	32
<u>Christine M. Crogan v. Department of the Army, Appeal</u> No.01A62300 (August 28, 2006)	36
<u>Robin Dunn v. Department of Energy, EEOC</u> Appeal No. 01A62654 (August 14, 2006)	41
<u>Charles Ferebee v. Department of the Navy, EEOC</u> Appeal No. 0120073212 (November 6, 2007)	45
<u>Cecilia Fields v. GSA, EEOC Appeal No. 01A51814</u> (April 14, 2006)	48
<u>James P. Garrity v. Department of Justice, EEOC Appeal</u> No. 01A31430 (March 12, 2004)	56
<u>Steven Glover v. Department of the Army, EEOC</u> Appeal No. 01A61631 (July 21, 2006)	58

---

<u>X-abian Montsho Jahi v. Department of Commerce, EEOC</u> Appeal No. 01A50035 (November 29, 2005)	62
<u>Charles E. Lawhorn, Phelps D. Vann v. Department of the Army, EEOC</u> Appeal Nos. 01A23281, 01A23301 (October 29, 2002)	67
<u>Joseph Majewski v. Department of the Army, EEOC</u> Appeal No. 01A62842 (August 28, 2006)	71
<u>Sandra Maynard v. Department of the Navy, EEOC</u> Appeal No. 01A20699 (June 25, 2002)	75
<u>James R. Mooney v. Department of Homeland Security, EEOC</u> Appeal No. 01A45921 (March 16, 2005)	82
<u>Phu Nguyen v. Department of State, EEOC</u> Appeal No. 01A61947 (May 31, 2006)	88
<u>Stanton V. Parsons v. Department of the Navy, EEOC</u> Appeal No. 01A14943 (July 3, 2002)	91
<u>Tiffany Pender v. Department of the Navy, EEOC</u> Appeal No. 0120080392 (January 11, 2008)	95
<u>Susan R. Prather-Soppeck v. Department of the Air Force, EEOC</u> Appeal No. 01990137 (December 22, 2000)	98
<u>Edar Y. Rogler v. Department of Health and Human Services, EEOC</u> Appeal No. 01A63657 (October 11, 2006)	102
<u>Kenneth L. Ryfkogel v. Department of the Army, EEOC</u> Appeal No. 01A04012 (August 16, 2000)	105
<u>Charles Smith v. Department of the Army, EEOC</u> Appeal No. 01A55755 (May 5, 2006)	109
<u>Jose Vasquez v. NASA, EEOC</u> Appeal No. 0120080720 (February 7, 2008)	112
<u>Palmyra Walton v. Department of the Army, EEOC</u> Appeal No. 01A60611 (April 20, 2006)	115
<u>Larry Williams v. Department of the Army, EEOC</u> Appeal No. 01A51807 (July 7, 2005)	119

Wellington J. Williams v. Environmental Protection Agency,  
EEOC Appeal No. 01A44018 (July 7, 2005)

123

Lealon E. Wyatt, Jr. v. Tennessee Valley Authority, EEOC  
Appeal No. 01A44308 (July 26, 2005)

128

## SELECTED CASES

Albert L. Antonio, Complainant, v. Dr. Donald C. Winter, Secretary, Department of the Navy, Agency

Appeal No.0120051881 n1

n1 Due to a new data system, your appeal has been re-designated with the above-referenced appeal number. Agency No. DON 03-0534A-001

## U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

February 16, 2007

**CORE TERMS:** notice, guard, security guard, defense contractor, common law, et seq, contractor, occupation, part-time, excerpts, employment relationship, jointly, hired

**ISSUEDBY:** [\*1] For the Commission by Carlton M. Hadden, Director, Office of Federal Operations

**OPINION:**  
DECISION

Complainant filed a timely appeal with this Commission from the agency's decision dated November 16, 2004, 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.* In his complaint, complainant alleged that he was subjected to discrimination on the bases of race (Filipino/Japanese), age (D.O.B. 9/21/47), and in reprisal for prior EEO activity when: his weapons authorization card was revoked and his authorization to carry a sidearm was rescinded by the Security Office at Pacific Missile Range Facility (PMFR).

The agency dismissed the complaint for failure to state a claim finding that complainant was not an employee of the agency. As support for its decision, the agency stated that complainant was employed as a part-time Security Guard for ITT Industries, Systems Division. This company, the agency [\*2] concluded, is a defense contractor under a specified contract number N00604-97-R-0001. The agency also relied on a note from the ITT Human Resources manager verifying complainant's employment with the company and attaching excerpts from the Statement of Work. The Statement of Work excerpts concerned the right of the government to prohibit contractor personnel from bearing arms at any time. The agency also concluded that it did not control the means and manner of complainant's work.

We rely on our most recent decision in *Baker v. Department of the Army*, EEOC Appeal No. 01A45313 (March 16, 2006), for authority as well as the Commission's *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, EEOC Notice No. 915.002 (Dec. 3, 1997)(*Guidance*) in deciding whether complainant is an employee of the agency. n2 In *Baker*, the Commission reaffirmed its recognition of the common law of agency and a non-exhaustive list of factors that should be considered in determining the employment status of a worker who sought employment with the agency. These same factors apply in determining whether complainant [\*3] should be deemed an employee of the agency for the purposes of filing an actionable claim under Title VII. Those factors include but are not limited to the following: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, *i.e.*, by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. In *Baker*, the Commission noted that the common-law test contains "no shorthand formula or magic phrase that [\*4] can be applied to find the answer." No one factor of the relationship is necessarily decisive. *Id*; *see also Guidance* at Section 2(b).

- - - - - Footnotes - - - - -

n2 The case *Ma v. Department of Health and Human Resources*, EEOC Appeal No. 01962390; 01962389 (May 29, 1998) originally set forth twelve factors to be addressed in determining whether an agency has an employment relationship with an individual.

----- End Footnotes----- Moreover, under the Commission's Guidance we also recognize that a "joint employment" relationship may exist where both the agency and a contracting firm jointly supply the work space, equipment, and supplies, and, between the two, they jointly control the details of the work to be performed, to make or change assignments, and to terminate the employment relationship. *Guidance* at Section 4.

The Commission concludes that the record in this case is largely insufficient and does not address the manner and means by which complainant's employment was controlled and by which entity - the agency or the defense contractor. *See Baker, supra*. [\*5] The agency failed to address any of the twelve factors set forth above and did not adequately

describe whether the agency and/or the contractor controlled the day to day work of complainant in his position as a part-time security guard. Rather the record only addressed the fact that the agency had the ultimate ability to revoke complainant's ability to carry a firearm. For these reasons and because the record is insufficiently developed, we vacate and remand the final decision and require the agency to document the record as described in the Order below.

#### ORDER (E0900)

The agency is ordered to conduct a supplemental investigation on the issue whether complainant is an employee of the agency. The agency will address the twelve factors set forth in *Baker, supra*, specifically discussing the agency's relationship with complainant on a day to day basis and its ability to control his activities including the following:

1. Obtain for the record a copy of the contract governing the relationship between ITT Industries and the agency.

2. Obtain the affidavits or statements of relevant officials concerning the working relationship between security guards hired through ITT Industries [\*6] and the agency consistent with *Baker* and our *Guidance* as referred to in this decision. In these affidavits, the agency should focus on the following factors: the party responsible for paying for the ITT Industries - hired security guards, the party responsible for providing their benefits, the party with authority to discipline them, the party responsible for their performance reviews, for setting their salaries, for directing and maintaining their schedules, for determining how much access they have to agency facilities as opposed to "regular" employees, how much input agency officials give in deciding which particular ITT Industries-hired security guards may work at the agency, and any other information relevant to the common law of agency test for employees.

1. Issue a letter of acceptance of the complaint or issue a new decision dismissing the complaint with appropriate appeal rights within sixty (60) calendar days of the date this decision becomes final. This decision must be based upon and supported by the information gathered in provisions (1) and (2) of the order.

A copy of the agency's letter of acknowledgment to complainant and a copy of the notice that transmits [\*7] the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

*Nancy Baker, Complainant v. Dr. Francis J. Harvey, Secretary, Department of the  
Army, Agency*  
**Equal Employment Opportunity Commission**  
**Appeal No. 01A45313**  
**Agency No. ARCAMPB04MAR037**  
**March 16, 2006**

## **Related Index Numbers**

### **Ruling**

The Department of the Army improperly dismissed an EEO complaint alleging discriminatory nonselection. Although the licensed practical nurse position at issue was to be filled through a private contractor, the Army's participation in the selection and supervision of the employee was such that the EEOC considered it a joint employer with the private contractor.

### **Meaning**

The EEOC considers a wide variety of factors when it applies the common law of agency test to determine whether a position should be deemed an agency position for the purposes of an EEO complaint. If an agency exercises sufficient control over the means and manner of the worker's performance, it may be considered a joint employer, regardless of whether a private contractor actually pays the worker's salary.

### **Case Summary**

The complainant alleged she was subjected to sex discrimination when she was not selected for a position that was offered through Dyncorp Technical Services LLC. The Department of the Army dismissed the complaint for failure to state a claim after concluding the complainant was neither an Army employee, nor an applicant for Army employment. It found the complainant had instead applied for a contract position with Dyncorp, a private sector contractor. The EEOC did not agree, finding the Army exercised enough control over the position at issue that it was a joint employer with Dyncorp.

The EEOC applies the common law of agency test to determine whether an individual is an agency employee under Title VII. This test considers a variety of factors, including the degree to which the agency controls the means and manner of the worker's performance, whether the agency or the individual furnishes the equipment used, whether the agency pays social security taxes, and whether the individual is afforded annual leave by the agency. Under the test, all of the relevant factors are weighed, "with no one factor being decisive." An assessment of the factors could lead to a determination that the agency and the private contractor are joint employers of the individual, whether or not the individual is on the federal payroll.

Applying the test to this case, the EEOC found the Army exercised sufficient control over the LPN position that it qualified as a joint employer with Dyncorp. The EEOC found Dyncorp forwarded resumes of prospective candidates to the Army, but an Army employee actually made the decision about whether or not the candidate should be hired. The record further indicated the agency's flight surgeon had supervisory authority over the individual in the LPN position, and the work was to be performed on agency premises, with agency equipment. Although the LPN position was identified as "contract personnel" and Dyncorp provided wages, benefits and leave for the LPN, the EEOC found the other evidence was sufficient to establish a joint employment relationship. Accordingly, it remanded the complaint for further processing.

## **Full Text**

### **Decision**

Complainant filed a timely appeal with this Commission from the agency's decision dated June 28, 2004, dismissing her 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. In her complaint, complainant alleged that she was subjected to discrimination on the basis of sex (female) when:

1. On three separate occasions with the most recent incident occurring on August 18, 2003, she applied for, and was not selected for a Licensed Practical Nurse (LPN) contract position offered through Dyncorp Technical Services LLC.

The agency dismissed the complaint on the grounds that the complaint failed to state a claim.<sup>1</sup> The agency determined that complainant lacked standing to bring a complaint of discrimination against the agency as complainant was not an employee of the agency nor an applicant for agency employment. Rather, the agency determined that the position for which complainant applied and was not selected, was a contract position with a private sector contractor, Dyncorp Technical Services.

On appeal, complainant argued that the selecting official for the position at issue was an employee of the United States Armed Forces and therefore she was an applicant for federal employment. In response, the agency maintains that the position at issue was staffed and controlled by Dyncorp.

Before the Commission can consider whether the agency has discriminated against complainant in violation of Title VII, we must first determine whether complainant was an agency employee or applicant for employment within the meaning of Section 717(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16(a) et. seq. The Commission has applied the common law of agency test to determine whether an individual is an agency employee under Title VII. *See Ma v. Department of Health and Human Services*, EEOC Appeal No. 01962390 (May 29, 1998) (*citing Nationwide Mutual Insurance Co. v. Darden* 503 U.S. 318, 323-24 (1992)). Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the

employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work usually is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. *See Ma v. Department of Health and Human Services, supra*. In *Ma*, the Commission noted that the common-law test contains, "no shorthand formula or magic phrase that can be applied to find the answer. ... [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.*

Furthermore, under the Commission's Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002 (December 3, 1997) (hereinafter Guidance), we also recognized that a "joint employment" relationship may exist where both the agency and the "staffing firm" may be deemed employers.<sup>2</sup> Similar to the analysis set forth above, a determination of joint employment requires an assessment of the comparative amount and type of control the "staffing firm," such as Dyncorp, and the agency each maintain over complainant's work. Thus, a federal agency will qualify as a joint employer of an individual if it has the requisite means and manner of control over the individual's work under the *Ma* criteria, whether or not the individual is on the federal payroll. See Guidance, *supra* at 11.

Based on the legal standards and criteria set forth herein, we find that the agency exercised sufficient control over the LPN position to qualify as a joint employer with Dyncorp. In so finding, we note that the agency controlled the selection process for the LPN position. Dyncorp forwarded the resumes or applications of prospective candidates to the agency and the agency approved or disapproved the candidates identified by Dyncorp. The record contains e-mail correspondence from a Dyncorp representative to an agency representative whereby the Dyncorp representative identified complainant as a viable candidate for the LPN position and forwarded a copy of complainant's resume. In response, the agency representative expressed the agency's disapproval stating that complainant's resume "shows clearly that she is NOT someone we want and that [the Regimental Surgeon] does not believe a woman should fill the position over a male." This correspondence corroborates Dyncorp's contention that its role in the selection process is limited to "identifying potential candidates only" and that it does not "have the authority to unilaterally employ any human resources [personnel] without specific instruction and/or approval from the customer [the agency]." Hence, contrary to the agency's contention, we find that the agency, not Dyncorp, controlled the selection process by retaining authority to accept or reject individuals identified by Dyncorp.

The record further reflects that the agency retained supervisory control over the LPN position. The LPN was to be supervised by a Physician's Assistant (PA) employed by Dyncorp and a Flight Surgeon employed by the agency. The Flight Surgeon retained supervisory authority over both the PA and the LPN. Hence, as the senior medical personnel, it is reasonable to assume that the Flight Surgeon retained ultimate authority and accountability for tasks assigned to, and work performed by, the PA and LPN, and any other subordinate medical staff.<sup>3</sup> Furthermore, all work performed by the LPN was performed on agency premises using agency equipment and supplies. In sum, we find these factors sufficient to sustain a finding that the agency exercised sufficient control over the LPN to render it a joint employer, such that complainant may be deemed an applicant for employment of the agency for the purpose of invoking the protection of Title VII.

While the contract between Dyncorp and the agency identified the LPN as "contract personnel" and specifically provided that "contract personnel are employees of the contractor and under its administrative supervision and control," we did not find this language controlling given the nature of the working relationship between the agency and Dyncorp. The nature of the relationship was such that the agency retained authority to approve the LPN "selected" by Dyncorp; and retained supervisory authority over the LPN via the Flight Surgeon employed by the agency. Notwithstanding the fact that Dyncorp provided wages, benefits and leave for the LPN, the record before us nonetheless demonstrates that the agency retained sufficient control over the LPN to qualify as a joint employer.

Accordingly, we find that complainant is an applicant for employment with the agency, and that the agency improperly dismissed the instant complaint on the grounds of failure to state a claim. We hereby reverse that determination and remand the complaint to the agency for further processing in accordance with this decision and applicable regulations.

#### **Order (E0900)**

The agency is ordered to process the remanded claim in accordance with 29 C.F.R. § 1614.108. The agency shall acknowledge to the complainant that it has received the remanded claims within thirty (30) calendar days of the date this decision becomes final. The agency shall issue to complainant a copy of the investigative file and also shall notify complainant of the appropriate rights within one hundred fifty (150) calendar days of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the complainant requests a final decision without a hearing, the agency shall issue a final decision within sixty (60) days of receipt of complainant's request.

A copy of the agency's letter of acknowledgment to complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

**Statement of Rights -- On Appeal Reconsideration (M0701)**

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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 (S0900)**

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 (Z1199)**

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that

the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

<sup>1</sup>Prior to filing a complaint against the U.S. Army, complainant filed a charge of discrimination against Dyncorp with the Kentucky Commission on Human Rights. The Louisville Area Office of the EEOC however, dismissed the charge finding that based on its investigation, it was unable to conclude the Dyncorp violated Title VII in that Dyncorp provided evidence that it forwarded complainant's application to the U.S Army for a hiring decision.

<sup>2</sup>Contingent workers generally refer to workers who are outside an employer's "core" work force, such as those whose jobs are structured to last only a limited period of time, are sporadic, or differ in any way from the norm of full-time, long term employment. Contingent workers may be hired by "staffing firms" which may include a temporary employment agency or a contract firm. See Guidance, *supra* at 1 & 3.

<sup>3</sup>If the Flight Surgeon determined that the LPN's performance was inadequate, it could so advise the LPN and request that corrective action be taken. If the LPN's performance did not improve, the Flight Surgeon retained the right to express concern to Dyncorp so that Dyncorp could take appropriate action including counseling, retraining or replacing the LPN. Declaration of Regiment Surgeon, U.S. Army. Hence, while Dyncorp may have had ultimate responsibility for terminating the LPN's employment for unsatisfactory performance, the agency retained authority to influence the contractor's decision via the feedback given regarding that performance.

### **Cases Cited**

**EEOC Appeal No. 01962390**  
**503 U.S. 318**

Beeta Biladi-Ghanad, Complainant, v. Kenneth Y. Tomlinson,  
Chairman, Broadcasting Board of Governors, Seth Cropsey,  
Chairman, International Broadcasting Bureau, Agency

Appeal No. 01A63551 Agency No. OCR-05-27

U.S. EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION

September 22, 2006

**ISSUEDBY:** [\*1] For the Commission by Carlton M. Hadden, Director, Office of Federal Operations

**OPINION:**

DECISION

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. In her formal complaint, filed on July 7, 2005, complainant claimed that she was the victim of unlawful employment discrimination on the bases of sex (female) and in reprisal for prior protected activity when:

- (1) the agency gave preferential treatment to fellow male purchase order vendors (POVs), in work assignments, shooting and editing training, and other conditions of employment;
- (2) the agency failed to take action to provide her an environment free of sexual harassment after she reported to agency officials that she was sexually harassed by a male co-worker who made sexual advances towards her; blew kisses at her; made comments about her body; asked her what color underwear she was wearing; and used sexually charged language by telling her that he was having an erection; and
- (3) on June 3, 2005, her purchase order vendor (POV) contract was terminated after she complained about being sexually harassed.

The agency previously [\*2] dismissed complainant's complaint pursuant to regulation set forth at 29 C.F.R. § 1614.107(a)(1), for failure to state a claim on the grounds that complainant was not a Federal employee. The agency found that complainant was an independent contractor not covered by Title VII. On appeal, the Commission vacated the dismissal and remanded the case to the agency for further processing. The Commission ordered the agency to analyze whether or not complainant was a federal employee or of a private contractor, using the standards set forth in *Ma v. Department of Health and*

*Human Services*, EEOC Appeal No. 01962390 (June 1, 1998). *Biladi-Ghanad v. International Broadcasting Bureau*, EEOC Appeal No. 01A60247 (March 2, 2006).

Following the agency's decision addressing the *Ma* standards, complainant filed the instant appeal.

EEOC Regulation 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by the agency because of race, color, religion, sex, national origin, age [\*3] or disabling condition. *See* 29 C.F.R. §§ 1614.103, .106(a). Accordingly, a complaint may be dismissed for failure to state a claim when the complainant is not an employee or applicant for employment with the federal government.

The Commission has applied the common law of agency test to determine whether complainants are agency employee under laws enforced by the EEOC. *See Ma v. Department of Health and Human Services*, (citing *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-24 (1992)). Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship [\*4] is terminated, i.e., by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer;" (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. *See id.*

In *Ma*, the Commission noted that the common law test contains, "no shorthand formula or magic phrase that can be applied to find the answer ... All of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.* The Commission in *Ma* also noted that prior applications of the test established in *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979), using many of the same elements considered under the common law test, was not appreciably different from the common law of agency test. *See id.*

Under this test, the Commission, after balancing many factors, finds that complainant was not an employee of the agency. The record contains four documents identified as "Amendment of Solicitation/Modification of Contract," dated October 27, 2004 (Contract [\*5] No. BBG-P05-58-3671). Therein, the contract states that complainant would provide television services and translate the news from English to Farsi on the following dates: from November 1, 2004 to November 30, 2004; from December 9, 2004 to

December 31, 2004; from January 1, 2005 to January 31, 2005; and from May 1, 2005 to July 30, 2005.

The record further contains a document entitled "Statement of Work for Producer/Writer/Research/Reporter For: West and South Asia Division, Persian Service." Therein, the contract states that complainant would produce television material suitable for broadcast; complete work assignments and deliver to the agency within the time agreed upon by complainant and the agency; perform an estimated number of 300 assignments, \$ 85.00 per assignment; would have access to agency's computer system and video equipment to perform specific assigned tasks; submit a detailed invoice to the agency on a monthly basis; review the quality and efficiency of her work to ensure that she is meeting the agency requirements; and furnish services up to the estimate amount of \$ 28,050.00. The record further reflects that the contract provides that the terms of the contract "shall [\*6] be extended for one year from the effective date with two options to extend at the Government's convenience, contingent upon the availability funds in future fiscal years."

Moreover, the record reflects that payment is made for work after submission of an invoice. No leave is afforded. There are no retirement benefits, and the agency does not pay social security taxes. Finally, the contract between complainant and the agency expressly indicates that complainant is an independent contractor which indicates that the parties did not intend an employment relationship.

Under these circumstances, the Commission determines that the agency's final decision dismissing complainant's complaint for failure to state a claim is **AFFIRMED** for the reasons set forth herein.

***John A. Blake, Complainant, v. R. James Nicholson, Secretary, Department of  
Veterans Affairs, Agency***  
**Equal Employment Opportunity Commission-OFO**  
**Appeal No. 0120073484**  
**Agency No. 200H06462007102381**  
**January 14, 2008**

## **Decision**

Complainant filed a timely appeal with this Commission from the agency's decision dated July 2, 2007, dismissing his complaint of unlawful employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. In his complaint, complainant alleged that he was subjected to discrimination on the basis of disability (learning disability) when on March 30, 2007; his contract with the agency was terminated.

Before the agency or Commission can consider whether the agency has discriminated against complainant in violation of the Rehab Act, it first must determine whether complainant is an agency employee or an independent contractor within the meaning of Commission regulations.

The Commission applies the common law test for determining whether an individual is an employee set forth in *Ma v. Department of Health and Human Services*, EEOC Appeal No. 01962390 (June 1, 1998). Specifically, the Commission looks at the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation (8) whether annual leave is afforded (9) whether the work is an integral part of the business of the "employer;" (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. In *Ma*, the Commission noted that the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer ... [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Ma v. Department of Health and Human Services*, EEOC Appeal No. 01962390 (June 1, 1998).

The record in this matter supports the finding that complainant is an independent contractor and not an agency employee. During the relevant time period, complainant was employed by Sterling Medical as a lab technician and given assignments through that company. As such, he was assigned to work at the agency as a technician and supervised

by the Regional Lab Supervisor who was also an employee of Sterling Medical. The record further indicates that Sterling Medical provided the equipment required to perform the job and complainant was paid by the hour directly by Sterling Medical and not the agency. Moreover, in its statement on appeal, the agency indicates that complainant did not accrue leave from the agency, did not receive a paycheck from the agency, nor was the agency required to withhold unemployment, retirement and other taxes from complainant's pay. Under these circumstances, the Commission determines that complainant was not an agency employee within the purview of EEOC regulations.

Accordingly, the Commission affirms the decision of the agency dismissing complainant's complaint.

### **Statement of Rights -- On Appeal Reconsideration (M0701)**

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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 (S0900)**

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 (Z1199)**

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

Patricia A. Brown, Complainant, v. Dr. Francis J. Harvey, Secretary, Department of the Army, Agency

Appeal No. 01A54989 Agency No. ARPOLK05MAR08187

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

June 29, 2006

**CORE TERMS:** final decision, common law, federal employee, regulation, terminated, qualify, notice, failure to state a claim, evidence indicating, days of receipt, final action, investigative, occupation, aggrieved, calendar, untimely, staffing

**ISSUEDBY:** [\*1] For the Commission by Carlton M. Hadden, Director, Office of Federal Operations

**OPINION:**  
**DECISION**

Complainant filed a timely appeal with this Commission from the agency's decision dated June 9, 2005, dismissing her 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.* In her complaint, complainant alleged that she was subjected to discrimination on the basis of race (African-American) when on, March 24, 2005, complainant was terminated from her employment with Serco, Inc. (formally Resource Consultants, Inc.), a government contractor conducting business with the Army Community Service, Directorate of Morale, Welfare and Recreation, Fort Polk, LA.

The agency dismissed complainant's complaint. Specifically, the agency dismissed the complaint pursuant to 29 C.F.R. § 1614.107(a) for failure to state a claim, finding that complainant did not qualify as a federal employee within the scope of 29 C.F.R. § 1614.103.

On appeal, complainant argues that she qualified as a federal employee and notes that she was supervised by, and given work assignments [\*2] from, an agency employee. Complainant also argues that she regularly interacted with agency employees during the course of her employment. In response, the agency argues that complainant's appeal should be dismissed as untimely or, if the appeal is deemed timely, requests that we affirm the agency's final action. The agency argues that complainant was hired and paid by Serco, Inc.; that the contract employee site manager worked alongside complainant in the same building; that complainant's job did not require direct supervision by agency officials; that complainant was evaluated by Serco, Inc. rather than agency officials; and that Serco, Inc. officials disciplined and ultimately terminated complainant for alleged misconduct on the job.

*Timeliness*

The Commission's regulations require that appeals to the Commission must be filed within thirty (30) days of receipt of the agency's dismissal, final action, or decision. 29 C.F.R. § 1614.402(a). The agency argues that complainant's appeal should be dismissed as untimely because she filed her appeal more than thirty (30) days after the agency issued its final decision dated June 9, 2005. However, the record is void of evidence indicating [\*3] when complainant received the agency's final decision. Thus, we deem complainant's appeal to be timely.

*Failure to State a Claim*

The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. § 1614.103, § 1614.106(a). The Commission's federal sector case precedent has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. *Diaz v. Department of the Air Force*, EEOC Request No. 05931049 (April 21, 1994). To state a claim under the Commission's regulations, an employee must allege and show an injury in fact. Specifically, an employee must allege and show a "direct, personal deprivation at the hands of the employer," that is, a present and unresolved harm or loss affecting a term, condition, or privilege of his employment. [\*4] *Id.*

The Commission has applied the common law of agency test to determine whether complainants are agency employees under Title VII. *See Baker v. Department of the Army*, EEOC Appeal No. 01A45313 (March 16, 2006); *Ma v. Department of Health and Human Services*, EEOC Appeal No. 01962390 (May 29, 1998). Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "employer or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, *i.e.* by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer;" (10) whether the worker accumulates [\*5] retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. *See id.*

In *Ma*, the Commission noted that the common law test contains, "no shorthand formula or magic phrase that can be applied to find the answer... All of the incidents of the relationship must be assessed and weighted with no one factor being decisive." *Id.* The

Commission in *Ma* also noted that prior applications of the test established in *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979), using many of the same elements considered under the common law test, was not appreciably different from the common law of agency test. *See id.*

Furthermore, in *Baker*, we noted that Commission has recognized that a "joint employment" relationship may exist where both the agency and the "staffing firm" may be deemed employers. EEOC Appeal No. 01A45313 (*citing* EEOC Enforcement Guidance: Application of EEO Laws to **Contingent Workers** Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002 (December 3, 1997)). A joint employment determination requires an assessment of the comparative amount [\*6] and type of control the "staffing firm" and the agency each maintain over complainant's work. *Id.* Thus, a federal agency will qualify as a joint employer of an individual if it has the requisite means and manner of control over the individual's work under the *Ma* criteria, whether or not the individual is on the federal payroll. *Id.*

The Commission has held that the "agency has the burden of providing evidence and/or proof to support its final decisions." *Ericson v. Department of the Army*, EEOC Request No. 05920623 (January 14, 1993). Upon review, we find that the agency has not met its burden with respect to the final decision giving rise to the instant appeal. We note that the final decision fails to identify which, if any, aspects of the relationship between Serco, Inc. and the agency were assessed and weighed in order to conclude that complainant did not qualify as a federal employee within the scope of 29 C.F.R. § 1614.103. Furthermore, we note that the record does not contain the contract between Serco, Inc. and the agency; evidence that Serco, Inc. paid the complainant; or any evidence indicating whether agency officials had any supervisory authority over [\*7] the complainant.

Accordingly, the agency's dismissal of complainant's complaint for failure to state a claim is REVERSED and REMANDED to the agency for further processing in accordance with this decision and the ORDER below.

#### ORDER (E0900)

The agency is ordered to process the remanded claim in accordance with 29 C.F.R. § 1614.108. The agency shall acknowledge to the complainant that it has received the remanded claim within thirty (30) calendar days of the date this decision becomes final. The agency shall issue to complainant a copy of the investigative file and also shall notify complainant of the appropriate rights within one hundred fifty (150) calendar days of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the complainant requests a final decision without a hearing, the agency shall issue a final decision within sixty (60) days of receipt of complainant's request.

A copy of the agency's letter of acknowledgment to complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

Theresa D. Chamberlain, Complainant, v. Dr. Francis J. Harvey, Secretary,

Department of the Army, Agency

Appeal No. 01A61315 Agency No. ARFTSAM05OCT118

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

June 26, 2006

**CORE TERMS:** terminated, final decision, attendance, qualify, notice, failure to state a claim, supervisory authority, retirement benefits, basis of sex, staffing, investigative, discriminated, supervision, contractor, occupation, counseling, counselor, workspace, calendar, training, removal, payroll, female, verbal

**ISSUEDBY:** [\*1] For the Commission by Carlton M. Hadden, Director, Office of Federal Operations

**OPINION:**  
DECISION

#### INTRODUCTION

Complainant filed a timely appeal with this Commission from the agency's decision dated November 18, 2005, dismissing her 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.* In her complaint, complainant alleged that she was subjected to discrimination on the basis of sex (female) when:

1. On or about the week of October 2, 2005, she was requested to change her time and attendance in order to retain her position at the Brooke Army Medical Center (BAMC).
2. On October 13, 2005, she was terminated from employment at BAMC.

#### ISSUE PRESENTED

The issue herein is whether the agency properly dismissed complainant's complaint based on a finding that complainant was not an employee of the agency.

#### BACKGROUND

Complainant's employment as an occupational therapist at the Burn Unit of BAMC began on January 10, 2005. Complainant received agency-specific training upon commencement of employment, and all equipment, supplies, and [\*2] workspace used by complainant in fulfilling her work duties were provided by the agency. The EEO

counselor's report revealed that an agency official (AO) acknowledged negotiating an alternative work schedule with complainant, "conduct[ing] verbal counselings and progressive discipline," and that AO "stated he should have terminated [complainant] some time ago." Complainant averred that throughout the relevant period, AO directed and monitored her work hours, attendance and duties.

In a memorandum dated October 12, 2005, AO recommended complainant's removal from employment, and complainant was removed the next day. On October 31, 2005, complainant initiated contact with the agency's EEO officer, and on November 8, 2005, she filed a formal complaint of discrimination on the basis of sex (female), alleging sexual harassment and unlawful removal from employment.

In its final decision, the agency dismissed the complaint for failure to state a claim. It found that complainant was not an employee of the Army or any other branch of the federal government, but rather a contractor under employment of Choctaw Management/Services Enterprise (CM/SE). On appeal, complainant argues that the agency [\*3] erred in dismissing her complaint because the agency qualifies as a joint employer for the purposes of Title VII.

#### ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint, or portion thereof, that fails to state a claim. An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age, or disabling condition. 29 C.F.R. § 1614.103; § 1614.106(a). Claims against agencies made by independent contractors, however, fail to state a claim. *See Mallory v. Environmental Protection Agency*, EEOC Request No. 05950142 (April 12, 1996). Thus, before the Commission can consider whether an agency has discriminated against a complainant in violation of Title VII, we must first determine whether the complainant was an agency employee or applicant for employment within the meaning of Section 717(a) of Title VII. The Commission has applied the common law of agency test to determine whether an individual is an agency employee under Title VII. *See Ma v. Dep't [\*4] of Health and Human Services*, EEOC Appeal Nos. 01962389 & 01962390 (May 29, 1998) (citing *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-24 (1992)). Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, *i.e.*, by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accumulates retirement

benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. [\*5] *See Ma, supra*. In *Ma*, the Commission noted that the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer ... All of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.*

Furthermore, under the Commission's *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, EEOC Notice No. 915.002 (December 3, 1997) (hereinafter referred to as the "*Guidance*"), we have also recognized that a "joint employment" relationship may exist where both the agency and the "staffing firm" may be deemed employers. Similar to the analysis set forth above, a determination of joint employment requires an assessment of the comparative amount and type of control the "staffing firm" and the agency each maintain over complainant's work. Thus, a federal agency will qualify as a joint employer of an individual if it has the requisite means and manner of control over the individual's work under the *Ma* criteria, whether or not the individual is on the federal payroll. *See Guidance*.

The record reveals that throughout [\*6] the relevant period, CM/SE listed complainant on its payroll, withheld taxes, and provided insurance and retirement benefits. The record supports the conclusion that CM/SE may be correctly identified as complainant's employer. The issue that remains, however, is whether the Department of the Army maintained sufficient control over complainant's employment that it may be held to be a joint employer.

Based on the legal criteria set forth herein, we find that the level of control the agency exercised over complainant's employment was sufficient to qualify the agency as a joint employer. *See generally, Baker v. Dep't of the Army*, EEOC Appeal No. 01A45313 (March 16, 2006). The record demonstrates that the agency provided training, supervision, workspace and equipment, and maintained careful records of complainant's work hours and absences. Although the agency denies any management authority, the record supports the conclusion that the AO exercised considerable supervisory authority over the complainant. This official verified to an EEO counselor that he conducted verbal counseling with complainant, negotiated alternative hours in order to accommodate complainant's needs, disciplined [\*7] complainant when he felt that her attendance record was unsatisfactory, and "stated he should have terminated her some time ago." These statements and actions reflect AO's exercise of supervisory authority over the complainant. Furthermore, the agency's employment policy for Occupational Therapists reads, in relevant part, "this contract is a personal services contract and intended to create an employer-employee relationship between the Government and the individual [Health Care Providers]." In light of the foregoing, the Commission finds that the Department of the Army was a joint employer of complainant, and that the dismissal of her complaint for failure to state a claim was improper. Accordingly, the agency's dismissal is reversed, and this case is remanded in accordance with this decision and the order below.

## ORDER (E0900)

The agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108. The agency shall acknowledge to the complainant that it has received the remanded claims within thirty (30) calendar days of the date this decision becomes final. The agency shall issue to complainant a copy of the investigative file and also shall notify complainant [\*8] of the appropriate rights within one hundred fifty (150) calendar days of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the complainant requests a final decision without a hearing, the agency shall issue a final decision within sixty (60) days of receipt of complainant's request.

A copy of the agency's letter of acknowledgment to complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

Larry R. Cornelius, Complainant, v. Condoleezza Rice,  
Secretary, Department of State, Agency

Appeal No. 01A62520 Agency No. DOS-F-033-06

U.S. EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION

August 22, 2006

**ISSUEDBY:** [\*1] For the Commission by Carlton M. Hadden, Director, Office of Federal Operations

**OPINION:**

DECISION

Complainant filed a timely appeal with this Commission from the agency's decision dated February 13, 2006, 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.*, Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, *29 U.S.C. § 791 et seq.*, and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, *29 U.S.C. § 621 et seq.*

The record indicates that complainant is a uniformed security officer assigned to the agency ' s headquarters in Washington, D.C. His employment is with Inter-Con Uniformed Protection Services (Inter-Con) which is a contractor for the agency and provides uniformed protective services for all agency facilities. Complainant contacted the EEO Counselor regarding the actions of the Deputy Project Manager, also an employee of Inter-Con. In his complaint, complainant alleged that he was subjected to discrimination [\*2] on the bases of race (Black), disability (back injury), age (D.O.B. 01/13/45), and reprisal for prior protected EEO activity n1 when:

1. On about December 8, 2005, the Deputy Project Manager accused complainant of having written an anonymous letter concerning a co-worker abusing his time;
2. On about December 21, 2005, the Deputy Project Manager asked complainant if his age and back injury were interfering with his work; and
3. Effective January 1, 2006, he was transferred from his assigned duty station to another, even though complainant had told the Deputy Project Manager that his age and back injury were not interfering with his work.

n1 The record indicates that complainant filed EEO complaints in 2000 and 2001 without any further details.

The agency dismissed the complaint pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim. Specifically, the agency noted that complainant was an employee of Inter-Con, not of the agency. Further, based on the weighing factors, the agency determined that [\*3] it did not have the requisite control over complainant ' s means and manner of work to give him the status of an employee of the agency. As such, the agency dismissed the complaint. Complainant appealed asserting that the agency was in total control over the operations of his hours and assignments. Further, he argued that, in order for the agency to carry out its mission, he and the other Inter-Con security staff were necessary to provide a high level of security especially in light of the current war on terror. The agency asked that we affirm its dismissal.

The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. §§ 1614.103, .106(a).

The Commission must first determine whether the complainant was an agency employee or applicant for employment within the meaning of Section 717(a) of Title VII of the Civil Rights Act of 1964, as amended, [\*4] 42 U.S.C. 2000e-16(a) *et. seq.* The Commission has applied the common law of agency test to determine whether an individual is an agency employee under Title VII. *See Ma v. Department of Health and Human Services*, EEOC Appeal Nos. 01962389 & 01962390 (May 29, 1998) (citing *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-24 (1992)). Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, *i.e.*, by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; [\*5] (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. *See Ma, supra.* In *Ma*, the Commission noted that the common-law test contains, "no shorthand formula or magic phrase that can be applied to find the answer...All of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.*

Furthermore, under the Commission's *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing*

*Firms*, EEOC Notice No. 915.002 (December 3, 1997) (hereinafter referred to as the "Guidance") (available at [www.eeoc.gov](http://www.eeoc.gov)), we have also recognized that a "joint employment" relationship may exist where both the agency and the "staffing firm" may be deemed employers. Similar to the analysis set forth above, a determination of joint employment requires an assessment of the comparative amount and type of control the "staffing firm, and the agency each maintain over complainant's work. Thus, a federal agency will qualify [\*6] as a joint employer of an individual if it has the requisite means and manner of control over the individual's work under the *Ma* criteria, whether or not the individual is on the federal payroll. *See* Guidance. The Guidance lists some additional factors to help determine if an individual is an employee, *i.e.*, (a) the firm has a right to assign additional projects to the worker, (b) the firm or the worker sets the hours of work, and (c) the worker has no role in hiring and paying assistants.

Upon review, we find that the record supports the agency's determination that complainant was not an employee of the agency at the time of the alleged discrimination. The record shows that complainant's salary is determined and directly paid by the contractor, Inter-Con, rather than by the agency. The record shows that it was Inter-Con that provided complainant with leave and other benefits. Further, it is evident that Inter-Con had authority to control the means and manner of complainant's work, and in this regard we note that the management official alleged to have engaged in the discriminatory activity is an employee of Inter-Con, not the agency. We note that on appeal complainant [\*7] asserts through counsel that the mission of Inter-Con 's security staff is to protect national security in effectively acting as the agency's police force. However, we find that this factor, even if accurate, is not sufficient to establish that complainant is a federal employee. Considering all the factors in this case and the record as a whole, we find that complainant is not an employee of the agency. We further find that the agency was not a "joint employer" of complainant, particularly in light of the limited control it had over the means and manner of complainant's work. Based on the record, we find that complainant was not an agency employee for purposes of Title VII.

Accordingly, the agency's decision dismissing the complaint on the grounds of failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1) was proper and is AFFIRMED.

*Lois J. Corweye, Complainant, v. Dr. Francis J. Harvey, Secretary, Department of the Army, Agency*

**Equal Employment Opportunity Commission-OFO**

**Appeal No. 01A51277**

**Agency No. ARCESTL03JUL01**

**March 23, 2006**

## **Decision**

On September 4, 2003, complainant filed a complaint alleging that she was discriminated against because of her race (Black). Specifically, complainant argued that racially-motivated mistreatment by her co-workers led to her termination from a secretarial position with the Regulatory Branch of the Corps of Engineers. On September 25, 2003, the agency issued a final decision dismissing the complaint on the grounds that complainant did not state a claim. The agency maintained that complainant did not meet the definition of an agency employee under Title VII. Complainant filed an appeal with the Commission. In *Corweye v. Department of the Army*, EEOC Appeal No. 01A40621 (March 2, 2004), the Commission vacated the agency's final decision and remanded the matter so that the agency could supplement the record with evidence that would determine whether complainant was an agency employee under Title VII. Specifically, the agency was asked to address the factors set forth in *Ma v. Department of Health and Human Services*, EEOC Appeal No. 01962390 (June 1, 1998) (citing *Nationwide Mutual Insurance Co. et al. v. Darden*, 503 U.S. 318, 323-24 (1992)).

In *Ma*, the Commission noted the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. *Id.*; see also *Baker v. Department of the Army*, EEOC Appeal No. 01A45313 (March 16, 2006).

The decision to remand the matter was upheld in *Corweye v. Department of the Army*, EEOC Request No. 05A40572 (September 14, 2004). On November 1, 2004, the agency, after supplementing the record as ordered, issued a new decision that again dismissed complainant's complaint on the grounds that it failed to state a claim.

On appeal, the agency argued that complainant was an employee of Kelly Services, Inc., not the agency. Kelly Services, Inc. (Kelly), a staffing contractor, had a contractual relationship with an entity called Franchise Business Activity (FedSource) to provide

temporary service providers to federal agencies. According to the agency, Kelly had control over both the manner and means by which complainant performed her job.

The record indicates that the agency, pursuant to a Memorandum of Understanding (MOU) with FedSource, submitted a task order to FedSource setting forth various services that it needed to be performed. These services included general filing, organizing correspondence, word processing, faxing, and answering the telephone. FedSource made the decision to obtain these services from Kelly, as opposed to another vendor. Kelly made the decision to assign complainant to the agency, not the agency or FedSource. When the agency determined that it no longer required the services performed by complainant, it terminated its task order with FedSource.

According to the agency's investigation, both A-1, the agency's liaison to FedSource, and A-2, the Chief of the Regulatory Branch, provided affidavits regarding complainant's assignment with the agency. Under the terms of the MOU, the service providers were assigned an Agency Project Officer (APO). APOs were given guidelines, supplied by FedSource, which stated that the APOs were not the supervisors of the service providers. Complainant's supervision remained the responsibility of Kelly. With regard to its service providers, Kelly monitored their performance, effected any disciplinary actions and dealt with conduct issues. APOs were told to report any problems with performance or attendance to the service contractor. Complainant worked in the agency's office and used an agency computer and supplies, but she was identified in the computer system as a contractor.

Complainant filed weekly time cards with Kelly. Furthermore, Kelly issued her paychecks, withheld her federal income tax and FICA. Kelly also provided benefits, such as, leave, insurance and workers' compensation. Although complainant notified the agency when she took leave, she had to contact Kelly in order to make her leave request. Finally, her hourly rate of pay was also determined by Kelly.

The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. §§ 1614.103, .106(a).

The Commission finds that the complaint failed to state a claim under the EEOC regulations. Nothing in the record indicates that complainant is an employee of the agency; therefore, we find that she does not have standing to bring the present complaint. Accordingly, the agency's final decision dismissing complainant's complaint is **AFFIRMED**.

**Statement of Rights -- On Appeal Reconsideration (M0701)**

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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 (S0900)**

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 (Z1199)**

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that

the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

*Christine M. Crogan, Complainant, v. Dr. Francis J. Harvey, Secretary, Department of the Army, Agency*  
**Equal Employment Opportunity Commission-OFO**  
**Appeal No. 01A62300**  
**Agency No. ARKNOX5**  
**August 28, 2006**

## **Full Text**

### **Decision**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC) from the agency's decision dated January 24, 2006, dismissing her 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.

Complainant was a Warehouse Specialist, placed with the agency by Westaff (USA), Inc., a national staffing firm, at an agency installation in Fort McCoy, Wisconsin. On December 28, 2005, complainant filed a formal EEO complaint with the agency alleging she had been discriminated against on the basis of her sex (female) when, from June to September 2005, she was sexually harassed and subjected to a hostile work environment. The agency dismissed the complaint for failure to state a claim, pursuant to 29 C.F.R. § 1614.107(a)(1), concluding complainant lacked standing to file because she was an employee of Westaff (USA), Inc., and not the agency. In its decision, the agency instructed complainant that the proper avenue for her complaint was the private sector complaint process of the EEOC. Complainant filed the instant appeal challenging the agency's dismissal of her appeal.

The record indicates that complainant alleged that on June 10, 2005, an agency official asked complainant if she was "fucking" a co-worker and that it should be considered a benefit.<sup>1</sup> On June 14, 2005, complainant claims she witnessed agency officials and civilians laughing at a naked picture of a woman drawn on a cardboard box. Complainant also alleges that another agency official in June 2005, brought in an explicit CD titled "Wild Adult Classics" and played it in front of complainant. Despite her protests, complainant stated that the agency official continued to play it.

In September 2005, complainant alleges a supervisor from the agency asked her if "black guys hit on her" and stated "you have a big 'ol booty butt". During a meeting at a hotel, complainant asserted that the same supervisor said rude things about her butt and asked if she was going home with anybody that night. She said that he also asked if she was a lesbian. That same evening, complainant claimed that the same supervisor squeezed her buttocks. Complainant asserted that she contacted management at Westaff (USA), Inc. regarding the incidents. Instead of dealing with her allegations, complainant stated her assignment with the agency was terminated on September 22, 2005.

The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. §§ 1614.103, .106(a).

The Commission must first determine whether the complainant was an agency employee or applicant for employment within the meaning of Section 717(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16(a) et. seq. The Commission has applied the common law of agency test to determine whether an individual is an agency employee under Title VII. *See Ma v. Department of Health and Human Services*, EEOC Appeal Nos. 01962389 & 01962390 (May 29, 1998) (citing *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-24 (1992)). Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. *See Ma, supra*. In *Ma*, the Commission noted that the common-law test contains, "no shorthand formula or magic phrase that can be applied to find the answer. All of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.*

Furthermore, under the Commission's Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002 (December 3, 1997) (hereinafter referred to as the "Guidance") (available at [www.eeoc.gov](http://www.eeoc.gov)), we have also recognized that a "joint employment" relationship may exist where both the agency and the "staffing firm" may be deemed employers.<sup>2</sup> Similar to the analysis set forth above, a determination of joint employment requires an assessment of the comparative amount and type of control the "staffing firm, and the agency each maintain over complainant's work. Thus, a federal agency will qualify as a joint employer of an individual if it has the requisite means and manner of control over the individual's work under the *Ma* criteria, whether or not the individual is on the federal payroll. *See Guidance, supra* at 11.

Based on the legal standards and criteria set forth herein, we find that, although complainant was not on the federal payroll, the agency exercised sufficient control over her position to qualify as a joint employer of complainant. *See generally, Baker v. Department of the Army*, EEOC Appeal No. 01A45313 (March 16, 2006). The agency, on appeal, argues that the language of its contract with Weststaff (USA), Inc., and

complainant's Statement of Work make it clear that the supervision and control of complainant's work rested with Westaff (USA), Inc., and no one from the agency supervised her work. However, this is directly contradicted by Westaff (USA), Inc., in a statement contained in the record, when it said that complainant's "immediate supervisors were Army personnel stationed at Ft. McCoy." Complainant, through counsel, indicated that agency officials directed complainant's daily work, provided her with the requisite training to do the job, monitored her time and attendance, approved her leave, and prepared her performance evaluations. The agency has provided no proof to the contrary. Complainant further contends that there was no on-site supervisor from Westaff (USA), Inc., a contention which is also confirmed by Westaff (USA), Inc.'s statement. Complainant also alleges that agency supervisors reprimanded her for directing work-related concerns to Westaff (USA), Inc., instructing her that all such concerns should be addressed to agency management. Finally, complainant asserts that agency officials would periodically threaten her job, stating that she was "one phone call away," implying that a call from the agency official to Westaff (USA), Inc., would result in termination for complainant. Taking into account all these factors, we conclude that the agency exercised sufficient control over complainant's position to qualify as a joint employer.

Accordingly, we find that the agency's dismissal of the instant complaint was in error. Therefore, we REVERSE the decision and REMAND the matter for further processing in accordance with the order below.

#### **Order (E0900)**

The agency is ordered to process the remanded claim in accordance with 29 C.F.R. § 1614.108 et seq. The agency shall acknowledge to the complainant that it has received the remanded claims within thirty (30) calendar days of the date this decision becomes final. The agency shall issue to complainant a copy of the investigative file and also shall notify complainant of the appropriate rights within one hundred fifty (150) calendar days of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the complainant requests a final decision without a hearing, the agency shall issue a final decision within sixty (60) days of receipt of complainant's request.

A copy of the agency's letter of acknowledgment to complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

#### **Implementation of the Commission's Decision (K0900)**

Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to the complainant. 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)(Supp. V 1993). 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.

### **Statement of Rights -- On Appeal Reconsideration (M0701)**

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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 (R0900)**

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 (Z1199)**

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

<sup>1</sup>We note that the co-worker has also filed an EEO complaint that is on appeal with the Commission regarding the same events. See *Majewski v. Department of the Army*, EEOC Appeal No. 01A62842.

<sup>2</sup>Contingent workers generally refer to workers who are outside an employer's "core" work force, such as those whose jobs are structured to last only a limited period of time, are sporadic, or differ in any way from the norm of full-time, long term employment. Contingent workers may be hired by "staffing firms" which may include a temporary employment agency or a contract firm. See Guidance, *supra* at 1 & 3.

Robin W. Dunn, Complainant, v. Samuel W. Bodman, Secretary, Department of Energy,  
Agency

Appeal No. 01A62654 Agency No. 05-5576-SRO

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

August 14, 2006

**CORE TERMS:** common law, manager, supervised, hired, failure to state a claim, sufficient evidence, social security, regulation, terminated, occupation, aggrieved, hereunder, personnel, staffing, qualify, salaries, sexual

**ISSUEDBY:** [\*1] For the Commission by Carlton M. Hadden, Director, Office of Federal Operations

**OPINION:**  
**DECISION**

Complainant filed a timely appeal with this Commission from the agency's decision dated February 21, 2006, dismissing her 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.* In her complaint, complainant, a contract employee, alleged that she was subjected to discrimination on the basis of sex (female) when an employee made inappropriate gestures, sexual innuendo, propositions, threats, and remarks of a sexual nature toward her.

The agency dismissed complainant's complaint pursuant to 29 C.F.R. § 1614.107(a) for failure to state a claim, finding that complainant, an employee of the Washington Savannah River Company (WSRC), n1 did not qualify as a federal employee within the scope of 29 C.F.R. § 1614.103. n2

- - - - - Footnotes - - - - -

n1 Formerly Westinghouse Savannah River Company n2 The record reflects that in October 2005, complainant filed a charge of sex discrimination and retaliation with the South Carolina Human Affairs Commission (SHAC) as to both the WSRC and the agency (SHAC # 3-05-292SH/Ret). SHAC accepted jurisdiction with respect to WSRC. Complainant also filed a charge with the EEOC Charlotte Field Office (EEOC # 14C-2005-02833C).

----- End Footnotes----- [\*2] On appeal, complainant argues that the agency erred in dismissing her complaint because there is sufficient evidence in the record that the agency served as her contract or statutory employer within the meaning of Title VII. Complainant argues that agency officials supervised complainant's job and planned what project work would be completed; complainant was required to get agency officials' permission regarding numerous issues affecting her work; and complainant had to create a weekly summary of her work which was presented to agency representatives. Complainant states that agency facility representatives evaluated contract employees and provided feedback regarding employees' performance assessments; agency officials were involved in hiring and termination decisions; and the agency decided elements regarding the pay of contract employees. Finally, complainant argues that there is also sufficient evidence in the record to prove that the agency served as a joint employer with WSRC.

In response to complainant's appeal, the agency requests that we affirm its final action. The agency argues that complainant was neither a contract nor statutory employee of the agency because, among other [\*3] things, WSRC hires, terminates, supervises, pays, withholds social security taxes from salaries, and provides benefits to all of its employees, including the complainant. In support of its argument, the agency submits two affidavits. n3

----- Footnotes -----

n3 We note that, although the Commission does not usually consider new evidence on appeal, we have the discretion to do so. Here, in order to complete the record and because complainant had the opportunity to respond, we exercise our discretion to consider the two affidavits.

----- End Footnotes-----The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. § 1614.103, § 1614.106(a). The Commission's federal sector case precedent has long defined an "aggrieved [\*4] employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. *Diaz v. Department of the Air Force*, EEOC Request No. 05931049 (April 21, 1994). To state a claim under the Commission's regulations, an employee must allege and show an injury in fact. Specifically, an employee must allege and show a "direct, personal deprivation at the hands of the employer," that is, a present and unresolved harm or loss affecting a term, condition, or privilege of his employment. *Id.*

The Commission has applied the common law of agency test to determine whether complainants are agency employees under Title VII. *See Baker v. Department of the Army*, EEOC Appeal No. 01A45313 (March 16, 2006); *Ma v. Department of Health and*

*Human Services*, EEOC Appeal No. 01962390 (May 29, 1998). Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without [\*5] supervision; (3) the skill required in the particular occupation; (4) whether the "employer or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, i.e. by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer;" (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. *See id.*

In *Ma*, the Commission noted that the common law test contains, "no shorthand formula or magic phrase that can be applied to find the answer... All of the incidents of the relationship must be assessed and weighted with no one factor being decisive." *Id.* The Commission in *Ma* also noted that prior applications of the test established in *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979), using many of the same elements considered under the common law test, was not appreciably [\*6] different from the common law of agency test. *See id.*

Furthermore, in *Baker*, we noted that Commission has recognized that a "joint employment" relationship may exist where both the agency and the "staffing firm" may be deemed employers. EEOC Appeal No. 01A45313 (*citing* EEOC Enforcement Guidance: Application of EEO Laws to **Contingent Workers** Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002 (December 3, 1997)). A joint employment determination requires an assessment of the comparative amount and type of control the "staffing firm" and the agency each maintain over complainant's work. *Id.* Thus, a federal agency will qualify as a joint employer of an individual if it has the requisite means and manner of control over the individual's work under the *Ma* criteria, whether or not the individual is on the federal payroll. *Id.*

Upon review, we find that the record supports the agency's determination that complainant was not an agency employee within the meaning of Title VII at the time of the alleged discrimination. Complainant does not dispute that she was hired as a contract employee under a contract between the agency and [\*7] WSRC. n4 The record contains a copy of relevant portions of the contract between WSRC and the agency, including Section H.9(a) which states:

In carrying out the work under this Contract, [WSRC] shall be responsible for the employment of all professional, technical, skilled, and unskilled personnel engaged by [WSRC] in the work hereunder, and for the training of personnel. Persons employed by [WSRC] shall be and remain employees of [WSRC] and shall not be deemed employees of the [agency] or the Government; however, nothing herein shall require the

establishment of any employer-employee relationship between [WSRC] and consultants or others whose services are utilized by [WSRC] for the work hereunder.

- - - - - Footnotes - - - - -

n4 Complainant was initially hired in 1988 as a contract employee by a different company. In April 1989, WSRC became the new contracting company, and complainant was then converted to a WSRC employee, which she remained during the relevant time period.

- - - - - End Footnotes- - - - -The record also indicates that complainant was paid by WSRC and [\*8] that WSRC is responsible for withholding taxes from complainant's pay. Manager, a WSRC employee, submitted an affidavit indicating that WSRC determined complainant's performance ratings, promotions, salaries, and benefits and that the agency provided no input as to whom WSRC hired or terminated. Manager further noted that all work performed by WSRC employees was directly supervised by WSRC managers. Responding Management Official (RMO), an agency employee, concurred with Manager's assessment that WSRC employees' day to day work was not supervised by agency employees. RMO stated that at a senior level, the agency contractually documents and approves changes to the work scope through an official process rather than directly to individual employees. RMO also noted that agency officials do observe portions of WSRC's work activities, but these officials do not dictate the work scope unless they witness an unsafe act or imminent danger.

Furthermore, we find that, based on the evidence noted above, the agency did not exert sufficient control over complainant for the agency to stand as a joint employer with WSRC.

Accordingly, the agency's dismissal of complainant's complaint for failure [\*9] to state a claim is AFFIRMED.

Charles L. Ferebee, Complainant, v. Dr. Donald C. Winter, Secretary, Department of the Navy, Agency

Appeal No. 0120073212 Agency No. 07-00189-00665

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

November 6, 2007

**CORE TERMS:** contractor, final decision, staffing, supervision, occupation, subjected, personnel, logistics, qualify

**ISSUEDBY:** [\*1] For the Commission by Carlton M. Hadden, Director, Office of Federal Operations

**OPINION:**  
**DECISION**

Complainant filed a timely appeal with this Commission from the final agency decision dated June 11, 2007, 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.*

The record reflects that during the relevant time, complainant was a Warehouse Specialist through a corporate entity identified as Management Consulting, Inc. (hereinafter referred to as "MANCON."), a subcontractor of Prolog, Inc. Complainant worked for the agency's Fleet and Industrial Supply Center (FISC), Norfolk Naval Shipyard in Norfolk, Virginia.

In the instant complaint, filed on March 16, 2007, complainant claimed that he was subjected to discrimination on the bases of race and in reprisal for prior EEO activity when:

FISC management failed to investigate his complaints of discrimination filed on July 1, 2006 and August 8, 2006; and he was subjected to a hostile work environment with respect to assignments of duties.

In its June 11, 2007 final decision, the agency [\*2] dismissed complainant's complaint for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1). The agency determined that complainant was not a Federal employee, and that he was instead a contractor, not covered by Title VII.

On appeal, complainant contends that he is an independent contractor of MANCON. Complainant contends, however, that MANCON and the agency "are acting as 'joint employers' because FISC serving as the client controls when, where, and how I as a contractor perform my job."

The record contains a document identified as "Statement of Work" between the agency and MANCON (Contract No. N00189-06-D-0052). The record reflects that according to the contract, MANCON would provide supply and logistics support including "requisition processing, storage, and warehousing, transportation/shipping, information technology support, and vehicle material handling equipment." This contract notes that MANCON would provide supply and logistics support from May 1, 2006 through September 30, 2006, to include two, 12-month option years. The record further reflects that contractor personnel, MANCON, "performing services under this order will be controlled, directed and supervised [\*3] at all times by management personnel of the contractor."

The record also contains a copy of MANCON Hampton Roads Regional Manager (RM)'s response to the agency's questionnaire concerning complainant's complaint. According to RM, complainant's supervision remained the responsibility of MANCON; and that MANCON monitored the performance of its employees, including complainant, effected any disciplinary actions and dealt with conduct issues. RM further stated that MANCON paid complainant's salary and provided him with benefits and leave; and withheld complainant's taxes. Furthermore, the record in the case reflects that during the EEO counseling process, complainant identified himself as a contractor employee of the agency.

The Commission has applied the common law of agency test to determine whether complainant is an agency employee under Title VII. *See Ma v. Department of Health and Human Services*, EEOC Appeal No. 01962390 (June 1, 1998) (citing *Nationwide Mutual Insurance Co. et al v. Darden*, 503 U.S. 318, 323-24 (1992)). Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extend of the employer's right [\*4] to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particulate occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, *i.e.*, by one of both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer;" (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. In *Ma*, the Commission noted that the common-law test contains, "no shorthand formula or magic phrase that can be applied to find the answer...All of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.*

Furthermore, under the Commission's Enforcement Guidance: [\*5] Application of EEO Laws to **Contingent Workers** Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice 915.002 (December 3, 1997) (hereinafter referred to as the "Guidance"), we have also recognized that a "joint employment" relationship may exist

where both the agency and the "staffing firm" may be deemed employers. Similar to the analysis set forth above, a determination of joint employment requires an assessment of the comparative amount and type of control the "staffing firm" and the agency each maintain over complainant's work. Thus, a federal agency will qualify as a joint employer of an individual if it has the requisite means and manner of control over the individual's work under the *Ma* criteria, whether or not the individual is on the federal payroll. See *Baker v. Department of the Army*, EEOC Appeal No. 01A45313 (March 16, 2006).

Based on these legal standards and criteria, we find that the agency did not exercise sufficient control over the complainant's position to qualify as the employer or joint employer of complainant. See generally, *Baker v. Department of the Army*, EEOC Appeal No. 01A45313 (March 16, 2006). The agency's dismissal was [\*6] appropriate and we **AFFIRM** the agency's final decision.

**LOAD-DATE:** November 26, 2007

Cecelia A. Fields, Complainant, v. David Bibb, Acting Administrator, General Services Administration, Agency

Hearing No. 110-2004-00257X Appeal No. 01A51814 Agency No. GSAR0420030001

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

April 14, 2006

**CORE TERMS:** property manager, harassment, hired, summary judgment, contractor, harassed, genuine issue of material fact, counseling, removal, final order, hostile work environment, co-worker, terminated, genuine, discriminated, regulation, non-moving, qualify, federal employee, discriminatorily, secretary, harshly, manager, staff, Civil Rights Act, unlawful employment practice, lack of jurisdiction, initial decision, way connected, staffing

**ISSUEDBY:** [\*1] For the Commission by Carlton M. Hadden, Director, Office of Federal Operations

**OPINION:**  
DECISION

On December 15, 2004, the complainant timely filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the agency's November 19, 2004 final order concerning her equal employment opportunity (EEO) complaint alleging 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.* The appeal is timely and is accepted pursuant to 29 C.F.R. § 1614.405(a).

ISSUES PRESENTED

Whether the agency's final order fully implementing an EEOC Administrative Judge (AJ)'s decision which dismissed the complainant's complaint for failure to state a claim because she is a contractor, not an employee of the agency or, in the alternative, found by summary judgment that she was not discriminatorily harassed.

BACKGROUND

At the time of events giving rise to this complaint, the complainant worked at the agency's Public Buildings Service, Property Management Center in Charleston, SC (Charleston office). On May 16, 2002, she was terminated from her position as a secretary for the [\*2] agency. She contends that she contacted the EEO office on May 16, 2002, and the agency does not contest this. Thereafter, she filed an EEO complaint.

The agency defined the complaint as whether the complainant was subjected to harassment based on her race/color (African-American/black), and religion (Christianity)

from May 11, 1993, n1 to the day of her termination from her employment on May 16, 2002. The agency investigated the EEO complaint.

- - - - - Footnotes - - - - -

n1 Consistent with the complainant's complaint, the agency actually defined the harassment as starting on May 11, 1991. However, the complainant later submitted evidence showing that she was initially hired by the agency on May 11, 1993.

- - - - - End Footnotes- - - - -

The complainant was initially appointed by the agency's Charleston office as a federal employee on May 11, 1993. All her work with the agency has been there, whether as a federal employee or purported contractor. She was hired as a clerk, GW-3, not to exceed May 10, 1994. She received another appointment, and on May 28, 1995, she was promoted [\*3] in the Charleston office to office automation clerk, GS-4, not to exceed September 30, 1995. She continued to work in this capacity to December 1995, and then had a short break in service. It appears that the agency, during this period, decided to outsource some of its support staff work, and complainant became employed by a succession of firms awarded the contract. From January 1996 to May 1998, she worked as an administrative assistant doing agency work as an employee of Digital Systems International Corp. She then worked as a secretary doing agency work as an employee of Fedserv Industries from May 1998 to November 2001. At this point, there was a regional contract change, and in November 2001, the complainant continued doing work as a secretary for the agency as an employee of the Lionel Henderson & Co., Inc. In argument, the agency concedes that its Charleston office recommended that it keep the complainant on a new contract with Lionel.

Regarding her harassment claim, the complainant contended that when she started working at the Charleston office on May 11, 1993, she was told that she was hired because she is black. She does not state who made this comment nor identify any [\*4] other incidents of alleged discrimination until October 1999.

The Charleston office had property manager 1 from approximately 1996 to March or April 2001. The complainant referred to her as her manager. Upon the retirement of property manager 1, property manager 2 took over. The complainant stated that she had no problems working for property manager 1. In her complaint, she contended that in October 1999 property manager 1 told her that the complainant was not given the opportunity to be hired as a customer liaison because this "would not go over well" with the Columbia, SC field office since she was black. The field office is over the Charlotte office. The complainant later affirmed that she was told in October 2000 by property manager 1 that the complainant was not offered any agency position related to property management because she was black and that property manager 1 said in the past she heard the above "not go over well remark." In another document the complainant

contended that while she did not recall who she spoke to, she thought she called the EEO office in October 2000, but was told that because she was a contractor, it could not help. She did not state what she sought [\*5] to raise with the EEO office.

The complainant contends that she was harassed by property manager 2 as soon as she started reporting to her. She contends that property manager 2 was short tempered, spoke to her harshly, and degraded her, detailing a number of incidents. The complainant contended that property manager 2 was responsible for her removal from the Charleston office and separation from Lionel.

In a decision without a hearing that incorporated the reasoning of the agency's motion for summary judgment, the AJ found that the complaint failed to state a claim because she was a contractor, not an employee of the agency, and in the alternative, found that the complainant failed to establish a *prima facie* case of hostile work environment harassment. The agency's final order adopted the AJ's decision.

On appeal, the complainant reiterates her claim that she was harassed from the time she was hired by the agency to May 16, 2002. However, as she did in her opposition to summary judgment, the complainant only addresses the incidents of claimed harassment by property manager 2, including her removal from the Charleston office. She argues that she meets the common law test for [\*6] being an employee of the agency, and that the AJ improperly denied her a hearing because there are genuine issues of material fact regarding whether she was harassed and discriminatorily removed.

In response to the complainant's appeal, the agency argues that the AJ made the proper rulings. The agency argues that the complainant did not specify any incidents of harassment prior to property manager 2 arriving in March or April 2001. It argues that the complainant failed to timely seek EEO counseling regarding harassment prior to March or April 2001.

## ANALYSIS AND FINDINGS

### *Contractor or Employee*

Before the Commission can consider whether the agency has discriminated against a complainant in violation of Title VII, we must first determine whether the complainant was an agency employee or applicant for employment within the meaning of Section 717(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16(a) *et. seq.* The Commission has applied the common law of agency test to determine whether an individual is an agency employee under Title VII. *See Ma v. Department of Health and Human Services*, EEOC Appeal Nos. [\*7] 01962389 & 01962390 (May 29, 1998) (citing *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-24 (1992)). Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (3)

the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, *i.e.*, by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. *See Ma, supra*. In *Ma*, the Commission [\*8] noted that the common-law test contains, "no shorthand formula or magic phrase that can be applied to find the answer...All of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.*

Furthermore, under the Commission's *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, EEOC Notice No. 915.002 (December 3, 1997) (hereinafter referred to as the "Guidance") (available at [www.eeoc.gov](http://www.eeoc.gov)), we have also recognized that a "joint employment" relationship may exist where both the agency and the "staffing firm" may be deemed employers. Similar to the analysis set forth above, a determination of joint employment requires an assessment of the comparative amount and type of control the "staffing firm," such as Lionel Henderson & Co., Inc., and the agency each maintain over complainant's work. Thus, a federal agency will qualify as a joint employer of an individual if it has the requisite means and manner of control over the individual's work under the *Ma* criteria, whether or not the individual is on the federal payroll. *See* Guidance. The Guidance lists [\*9] some additional factors to help determine if an individual is an employee, *i.e.*, (a) the firm has a right to assign additional projects to the worker, (b) the firm or the worker sets the hours of work, and (c) the worker has no role in hiring and paying assistants.

Based on the legal standards and criteria set forth herein, we find that the agency exercised sufficient control over the complainant's secretarial position to qualify as a joint employer of the complainant. *See generally, Baker v. Department of the Army*, EEOC Appeal No. 01A45313 (March 16, 2006). First, prior to her removal in May 2002, the complainant did clerical and secretarial work exclusively at the agency's Charleston office since 1993, a long continuous relationship. She was initially hired by the agency as a federal employee. With regard to her most recent contract, the record shows that the complainant continued to work at the Charleston office at the behest of the agency. Property manager 2 stated that she secured and approved a raise for the complainant, and agency argument suggests this was with Lionel. Further, the record shows that the agency retained full supervisory control over the complainant. [\*10] While property manager 2 stated that Lionel controlled or oversaw the manner of the complainant's performance, the record shows that Lionel did not even have a corporate office in Charleston, and the complainant's supervisor at Lionel never met the complainant. Property manager 2 assigned the complainant all her work, and direction. Further, in response to her contention that there was poor filing and the complainant attempted to shift blame, property manager 2 gave the complainant a letter of warning with a copy to Lionel. The complainant's work was reviewed and supervised by the agency. The agency supplied the

office and equipment for her work, and the complainant worked in part on contracting and procurement, a core function of the Charleston office. Further, the complainant had set reporting hours of 8:00 to 4:30 Monday through Friday. The complainant stated that when she needed leave, she got permission from property manager 2, and this is corroborated in the record by a copy of a leave slip signed by property manager 2. The agency terminated the complainant's services by telling Lionel it was dissatisfied with the complainant. When asked about who decided to end the complainant's [\*11] job at the Charleston office, the President of Lionel responded that there was no decision, rather, the customer--property manager 2 of the agency--asked that the complainant be removed, and Lionel did so. At that time, the complainant was also separated from Lionel.

While the contract between Lionel and the agency states there is no direct employee/employer relationship between contractor employees and the federal government, and the contractor shall provide project management direction of the administrative staff, we find this language is not controlling given the nature of the working relationship between the agency and the complainant. The nature of the relationship was such that the agency retained full authority over the complainant and her work. Notwithstanding the fact that Lionel paid wages, benefits and leave for the complainant, the record before us nonetheless demonstrates that the agency retained sufficient control over the complainant to qualify as a joint employer.

#### *Timeliness*

The agency argues that the complainant failed to timely seek EEO counseling regarding the claimed harassment which occurred prior to the arrival of property manager 2 in March or April 2001.

[\*12] An aggrieved person must seek EEO counseling within 45 days of the date of the alleged discriminatory action, or in the case of a personnel action, within 45 days of the effective date of the action. 29 C.F.R. § 1614.105(a)(1). Under 29 C.F.R. § 1614.105(a)(2), an agency shall extend the 45 day time limit to initiate EEO counseling where an individual shows that despite due diligence, she was prevented by circumstances beyond her control from contacting the counselor within the time limits or for other reasons considered sufficient by the agency or the Commission.

A hostile work environment claim is comprised of a series of separate acts that collectively constitute one unlawful employment practice. *National Railroad Passenger Corporation v. Morgan, Jr.*, 536 U.S. 101, 117 (2002). Unlike a claim which is based on discrete acts of discrimination, a hostile work environment claim is based upon the cumulative effect of individual acts that may not themselves be actionable. *Id.* at 115. A hostile work environment claim will not be time barred if all acts constituting the claim are part of the same unlawful practice even if some [\*13] component acts of hostile work environment fall outside the statutory time period so long as an act contributing to the claim falls within the filing period. *Id.* at 117.

The complainant argues that she is alleging a pattern of harassment. The complainant, however, has not shown that all her allegations were part of one unlawful employment practice. She alleges that upon being hired in May 1993, she was told that she was hired because she was black. There is no indication that the individual responsible for this incident was the same person responsible for any other alleged acts of harassment, or that this event was at all connected to the next identified event which did not occur until October 1999.

The complainant contended that in October 1999 she was told by property manager 2 that she was not given an opportunity to be hired because this "would not go over well" with people in the Columbia, SC field office since she was black. Whether this is regarded as a harassment claim or a discrete act involving not hiring, or both, the complainant has not shown that she timely sought EEO counseling regarding this matter. First, it is not clear when this occurred [\*14] since the complainant described what may be the same incident, indicating it occurred in October 2000. Next, while the complainant suggests that she sought EEO counseling in October 2000, this is not persuasive regarding the complaint at issue. She indicated that she "thought" she contacted the EEO office in October 2000, and did not state what she sought to raise. The record does not show that the event(s) which occurred in October 1999 or October 2000 are in any way connected to the actions of property manager 2, who took over in March or April 2001 after property manager 1 retired.

We find that the complainant's first contact with an EEO office with regard to the instant complaint was in May 2002. As the record does not show that the event which occurred in October 1999 or October 2000 is in any way connected to the actions complained of after property manager 2 took over in March or April 2001, we find that the October 1999 and/or October 2000 matter(s) were untimely counseled.

### *Summary Judgment*

The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This [\*15] regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. *Id.* at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. *Id.* at 255. An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. *Celotex v. Catrett*, 477 U.S. 317, 322-23 (1986); *Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to [\*16] affect the outcome of the case.

If a case can only be resolved by weighing conflicting evidence, issuing a decision without holding a hearing is not appropriate. Regarding her harassment claim after property manager 2 arrived in March or April 2001, the complainant contended that property manager 2 frequently talked to her in tones that were harsh, irritated, and sarcastic, and had thrown paper at her and raised her voice at her. Co-worker 1 (black), who worked with the complainant in a clerical capacity from January to May 2001 stated that property manager 2 belittled the complainant daily. The complainant contended that property manager 2 treated her and co-worker 1 more harshly than white staff, and Co-worker 2 stated the complainant was treated more harshly than white staff.

The agency argues that the complainant's mere perceptions that property manager 2 was inconsiderate does not rise to the level of harassment. The complainant gave a number of examples of claimed harassment. When viewed in isolation from each other these incidents do not rise to the level of harassment. However, when viewed together, along with claims of daily belittling and frequent use of a harsh, irritated, [\*17] and sarcastic voice at the complainant, there is a genuine issue of material fact regarding whether she was discriminatorily harassed.

The complainant included her removal in her harassment claim, and this matter was investigated. As an initial matter, the EEOC takes administrative notice of an initial decision by the Merit Systems Protection Board (MSPB) in the case of *Fields v. General Services Administration*, MSPB No. AT-0752-05-0211-I-1 (January 11, 2005). It indicates that the complainant filed an appeal with the MSPB concerning her May 16, 2002 separation. In argument, the agency avers that in her MSPB appeal, the complainant raised essentially the same arguments as in her complaint.

The MSPB denied the appeal for lack of jurisdiction on the grounds that the complainant is not an employee of the agency. We are not bound by this finding. Moreover, while not dispositive, the MSPB's decision does not indicate that it applied Commission standards for determining joint employment. n2

- - - - - Footnotes - - - - -

n2 In *Fields v. General Services Administration*, MSPB No. AT-0752-05-0211-I-1 (June 20, 2005), the MSPB denied the complainant's petition to review the initial decision.

----- End Footnotes----- [\*18] What is clear is that the MSPB divested itself of jurisdiction in the complainant's removal case. Where the MSPB dismisses for lack of jurisdiction, such cases are considered as "non-mixed" and processed accordingly under EEOC regulations. See generally *Schmitt v. Department of Transportation*, EEOC Appeal No. 01902126 (July 9, 1990); *Phillips v. Department of Army*, EEOC Request No. 05900883 (October 12, 1990); 29 C.F.R. § 1614.302(b).

Therefore, we will consider whether the AJ properly determined there was no genuine issue of material fact regarding the removal claim. The agency argues that it took action to remove the complainant from the Charleston office because she had a bad attitude and performed poorly, and there is no genuine issue of material fact regarding this. We disagree that there no genuine issues of material fact. First, the complainant stated that she had been successfully working at the agency since 1993, and it was not until property manager 2's arrival that her work was criticized. The complainant contends that prior to retiring, property manager 1 told her she was very pleased with the complainant's work. Further, there is evidence in the record that property [\*19] manager 2 caused the complainant and Co-worker 1 to be removed from the Charleston office on the same day, and both are black. There is evidence that the complainant was replaced with a white worker. Together with the above contentions and other contentions regarding her work, the complainant created a genuine issue of material fact regarding whether she was removed due to her attitude and performance as opposed to discriminatory reasons.

## CONCLUSION

The final order, which adopted the AJ's decision that the complainant's complaint failed to state a claim is reversed. The alternate finding of the AJ, which was adopted by the agency's final order, that the complainant was not harassed is vacated. The complainant's complaint is remanded in accordance with the order below.

## ORDER

The agency shall submit to the Hearings Unit of the appropriate EEOC field office the request for a hearing within fifteen (15) calendar days of the date this decision becomes final. The issues before the hearings unit are whether the complainant was discriminated against based on her on her race/color (African-American/black), and religion (Christianity) when from March or April 2001 (when property manager [\*20] 2 arrived in the Charleston office) to May 16, 2002 the complainant was allegedly harassed, and whether the complainant was discriminated against on the above bases when she was terminated from the agency on May 16, 2002. The agency is directed to submit a copy of the complaint file to the EEOC Hearings Unit within fifteen (15) calendar days of the date this decision becomes final. 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 on the complaint 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.

James P. Garrity, Complainant, v. John Ashcroft, Attorney  
General, Department of Justice, Agency

Appeal No. 01A31430 Agency No. M02-0053

U.S. EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION

March 12, 2004

**ISSUEDBY:** [\*1] For the Commission by Carlton M. Hadden, Director, Office of Federal Operations

**OPINION:**

DECISION

Complainant appeals to the Commission from the agency's December 11, 2002 n1 decision dismissing his complaint for failure to state claim, pursuant to 29 C.F.R. § 1614.107(a)(1). According to the agency decision, complainant alleges discrimination on the bases of sex and age when he was advised on July 16, 2002, that his personal services as an Aviation Security Officer (ASO) contract employee with the USMS Justice Prisoner and Alien Transportation System (JPATS) in Mesa, Arizona were no longer needed. The agency dismissed the complaint for failure to state a claim finding that complainant lacked standing to bring the claim because he was an independent contractor and not an employee of the agency.

n1 The agency issued two decisions for complainant's complaint identified as M02-0053. The decisions were issued on November 27, 2002 and December 11, 2002. Both decisions dismiss complainant's complaints on the same grounds. However, the December 11, 2002 decision contains a more comprehensive rationale for dismissal. Although there is no notice to rescind the first decision, we find that it was the agency intent by issuing a subsequent decision. Therefore, this appeal will focus solely on the agency December 11, 2002 decision.

[\*2] The Commission has applied the common law of agency test to determine whether complainants are agency employees. *See Ma v. Department of Health and Human Services*, EEOC Appeal No. 01962390 (June 1, 1998)(citing *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 218, 323-24 (1992)). Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupations, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the

work relationship is terminated, *i.e.*, by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker [\*3] accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. *Id.*

The record in this case contains a Special Conditions clause under the agency and JPATS Personal Services Contract, signed and dated September 11, 2001 by complainant. This provision states, in pertinent part, that complainant "is NOT an employee of the USMS, or its designee, and is NOT entitled to pension benefits, health benefits, or other federal employee benefits." (emphasis original). The Special Conditions clause further reads: "all contracted working hours will be on an on-call/as-needed basis. . .[contract guard is] not guaranteed any hours."

After a thorough review of the record, we find that complainant is not an employee of the agency. Complainant, therefore, lacks standing to bring a claim, and thus fails to state a claim.

The agency's decision dismissing complainant's complaint is AFFIRMED.

*Steven Glover, Complainant, v. Dr. Francis J. Harvey, Secretary, Department of the Army, Agency*

**Equal Employment Opportunity Commission-OFO**

**Appeal No. 01A61631**

**Agency No. ARBRAGG05JUL09678**

**July 21, 2006**

## **Decision**

Complainant filed a timely appeal with this Commission from the final agency decision dated September 1, 2005, dismissing his 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.

In his formal complaint, filed on August 25, 2005, complainant claimed that he was the victim of unlawful employment discrimination on the basis of race when on or about June 20, 2005, the agency's Contracting Officer Representative (Mr. M) unduly influenced the Vice-President of the Logistics Solutions Group (Mr. F), who was the hiring authority for a private contractor, not to offer the complainant employment on the contractor's project.

The record reflects during the relevant time, complainant was a Supply Liaison Officer through a private company identified as ITT Industries. ITT Industries provided the agency with logistics support as part of a contract between the agency and ITT. The record reflects that on July 15, 2005, ITT Industries turned over its contract to another private company identified as Logistics Solutions Group (LSG). On July 6-7, 2005, LSG conducted a job fair to identify qualified applicants for 193 positions. Complainant applied for a position with LSG, but was not selected. The complainant claimed that the agency's contracting officer approach the LSG hiring official, and informed him not to hire complainant for the contractor's project.

On September 1, 2005, the agency issued a final decision. Therein, the agency dismissed complainant's complaint pursuant to 29 C.F.R. 1614.107(a)(1), for failure to state a claim finding that complainant was not an employee with the agency or applicant for employment.

On appeal, the agency contends that complainant was a contract employee at the time of the alleged discrimination. The agency determined that complainant was an employee of ITT, a contractor to the Director of Logistic on Fort Bragg; that the contractor was the complainant supervisor and appraised his job performance; that the contractor paid complainant's salary and provided him with benefits; and, that the contractor withheld his taxes. Furthermore, the agency noted that complainant identified his job classification as Civil Contractor, and that he indicated that his duty organization is ITT Industries, System Division, Colorado Springs, Colorado.

Before the Commission or the agency can consider whether the agency has discriminated against complainant in violation of Title VII, it first must determine whether complainant is an agency employee or applicant for employment within the meaning of Section 717(a)

of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16(a). Section 717(a) provides in relevant part that "[a]ll personnel actions affecting employees or applicants for employment ... in executive agencies ... shall be made free from any discrimination based on race, color, religion, sex, or national origin." Thus, Section 717(a) expressly prohibits discrimination by federal agencies against "employees" and "applicants for employment." Section 717(a) does not expressly prohibit discrimination by federal agencies against independent contractors. Therefore, complainant is protected from discrimination by the agency by Title VII only if he may be deemed an employee of the agency or applicant for employment with the agency.

The Commission has held that it will apply the common law of agency test in order to determine whether the complainants should be deemed to be "employees" under section 717 of Title VII. Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. *See Zheng v. Department of Health and Human Services*, EEOC Appeal No. 01962389 (June 1, 1998); *Ma v. Department of Health and Human Services*, EEOC Appeal No. 01962390 (June 1, 1998) (*citing Nationwide Mutual Insurance Co. et. al. v. Darden*, 503 U.S. 318, 323-24 (1992)).

The Commission finds that the record supports the agency's determination that complainant was not an employee or an applicant with the agency at the time of the alleged discrimination. Complainant does not dispute that he was hired by ITT to provide logistics support and service under a contract between ITT and the agency. The record contains a copy of an offer of employment letter from ITT to complainant, signed by complainant on June 6, 2005. Therein, ITT identifies complainant's rate of pay, and informs complainant that as an employee of ITT Industries he would work as a Supply Liaison in the Fort Bragg Project. The record further contains an affidavit from the Human Resources Manager for ITT which states that complainant's work was supervised by ITT employees, who also prepared his performance appraisals. The affidavit further indicated that ITT paid complainant his salary and benefits, and had the right to terminate his employment at any time, with or without cause. Based on the evidence of record, we find that the agency did not exert sufficient control over complainant to render him a de facto employee or to stand as a joint employer.

The record further reflects that when LSG assumed the contract of ITT with the agency, complainant applied for a position with LSG, but was not hired. Specifically, in a letter dated August 25, 2005, complainant acknowledged that he was an applicant for

employment for LSG but that he was not hired by the LSG hiring official. There is no evidence of record to indicate that the agency would have any greater control of LSG employees than it had had over ITT employees. Based on the record before us, we find that complainant was not an employee or applicant with the agency at the time of the alleged discrimination. Therefore, the Commission finds that the matter was correctly dismissed pursuant to 29 C.F.R. 1614.107(a) (1) for failure to state a claim. Accordingly, the agency's decision is AFFIRMED.

### **Statement of Rights -- On Appeal Reconsideration (M0701)**

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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 (S0900)**

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 (Z1199)**

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

*X-abian Montsho Jahi, Complainant, v. Carlos M. Gutierrez, Secretary, Department of Commerce, Agency*  
**Equal Employment Opportunity Commission-OFO**  
**Appeal No. 01A50035**  
**Agency No. 04-51-00097**  
**November 29, 2005**

### **Related Index Numbers**

### **Ruling**

An employee of a private company under contract with the Department of Commerce didn't have standing to bring an EEO claim. The government had insufficient control over the employee to deem him an employee of the agency.

### **Meaning**

Individuals who are not employees of the federal government don't have standing to bring EEO claims before the EEOC.

### **Case Summary**

The employee worked a security officer for a firm that was under contract with the federal government. The federal contracting officer had no control over the employee's job performance, and the employee did not receive federal benefits or accrue leave. The employee filed an EEO claim, alleging discrimination on the basis of religion (Muslim) when he was terminated. The agency determined that the employee failed to state a claim because he was not an agency employee. The EEOC noted that the extent of the government's right to control the employee is a major factor in determining if someone is an agency employee. Because the record showed that the government had minimal control over the employee, the commission concluded he was not an agency employee and not entitled to bring an EEO claim.

### **Full Text**

### **Decision**

Complainant filed a timely appeal with this Commission from the agency's decision dated August 24, 2004, 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. In his complaint, complainant alleged that he was subjected to discrimination on the basis of religion (Muslim) and in retaliation for unionizing when:

1. On October 28, 2004, complainant was transferred from one work location to another; and
2. On November 24, 2004, complainant was terminated.

The agency dismissed complainant's complaint pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim. Specifically, the agency concluded complainant is not an agency employee. The agency stated complainant was hired, terminated, paid, and granted employee benefits by Coastal International Security, Inc., (Coastal) and not the agency. The agency contends that Coastal retained ultimate disciplinary and supervisory authority over complainant. Moreover, the agency states that Coastal provides an on-site Program Manager who is responsible for ensuring that the Special Police Officers are performing all duties as specified in the contract, and that the Contracting Officer Technical Representative (COTR), a federal employee, has no control over the means and manner of complainant's performance. Thus, the agency concluded complainant failed to establish standing as a federal employee.

The record contains an August 16, 2004 statement from Person A, Project Manager, stating that Coastal was responsible for issuing complainant's wages and collecting federal, state, and social security taxes from complainant's wages. Person A stated that he, a non-federal employee, was responsible for all special police officers performance on the contract, including issuing work schedules, directing assignments, and approving leave. Further, Person A states that Coastal is responsible for terminating all employees.

The record contains an August 18, 2004 letter from Person B, COTR, who stated that complainant did not receive federal retirement benefits, accrue sick or annual leave, or participate in the Thrift Savings Program. Person B explains that his duties include monitoring the Security Contract at the agency. Person B states that he did not control the means and manner of complainant's performance.

Finally, we note that the record contains a November 24, 2003 letter from the Director of Human Resources at Coastal informing complainant that Coastal has completed a comprehensive investigation of the allegation that complainant failed to inspect a vehicle. The letter informed complainant that the investigation revealed that complainant did not stop a vehicle in order to conduct an inspection which violated post orders and verbal instructions of the Project Manager. As a result, the letter stated that complainant's employment as a security officer with Coastal is terminated.

The Commission has applied the common law of agency test to determine whether complainants are agency employees under Title VII. *See Ma v. Department of Health and Human Services*, EEOC Appeal No. 01962390 (June 1, 1998) {citing *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-24 (1992)}. Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision, (3) the skill required in the

particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. *See id.*

In *Ma*, the Commission noted that the common law test contains, "no shorthand formula or magic phrase that can be applied to find the answer ... [A] 11 of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.* The Commission in *Ma* also noted that prior applications of the test established in *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979), using many of the same elements considered under the common law test, was not appreciably different from the common law of agency test. *See id.*

Upon review, we find that the record supports the agency's determination that complainant was not an employee of the agency at the time of the alleged discrimination. Complainant does not dispute that his salary was directly paid by the contractor Coastal rather than by the agency. Complainant has failed to refute the agency's position that it was Coastal that provided him with annual and sick leave and other benefits. Additionally, we note that in both his formal complaint and in a November 3, 2003 letter to the agency, complainant states that he was contracted as a security officer to work at the agency. Further, the record reveals that Coastal solely had the authority to terminate complainant's employment. Moreover, we find that the agency was not a joint employer of complainant in light of it not having sufficient control over the means and manner of complainant's work. See Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002 (December 3, 1997). Based on the record, we find that complainant was not an agency employee.

Accordingly, the agency's decision dismissing complainant's complaint is AFFIRMED.

#### **Statement of Rights -- On Appeal Reconsideration (M0701)**

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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 (S0900)**

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 (Z1199)**

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

### **Regulations Cited**

#### **29 CFR 1614.107(a)(1)**

**Cases Cited**

**EEOC Appeal No. 01962390**

**503 U.S. 318**

**613 F.2d 826**

*Charles E. Lawhorn, Phelps D. Vann Complainants, v. Thomas E. White, Secretary,  
Department of the Army, Agency.*

**Equal Employment Opportunity Commission-OFO**

**01A23281**

**01A23301**

**ARMCCOY02APR0002**

**ARMCCOY02APR0003**

**October 29, 2002**

## **Full Text**

## **Decision**

Complainants were employed by Raytheon Aerospace, LLC, to work as heavy equipment operators under a contract with the agency. They were terminated by Raytheon, and filed individual employment discrimination complaints on the bases of race (African-American) and reprisal for prior EEO activity, alleging that the agency was responsible for their termination.

The agency separately dismissed each of their complaints for failure to state a claim, pursuant to 29 C.F.R. § 1614.107(a)(1). It found that the complainants were not employees of the agency, but rather contractors who lacked standing to raise employment discrimination claims against the agency. The complainants, both represented by the same attorney, appealed to this Commission, arguing in a collectively filed brief that they were "joint employees" of both the agency and Raytheon. The Commission will address both appeals in the present decision, pursuant to its discretion under 29 C.F.R. § 1614.606.

In their formal complaints, the complainants assert that agency officials "call the shots" with respect to job descriptions, rates of compensation, layoffs, and terminations of Raytheon contract employees. They contend that the agency was responsible for a hostile work environment by making disparaging remarks about minorities, and prohibiting them from using the break room, although agency maintenance employees were allowed to use the room. Complainant Vann claims that agency management reviewed their time sheets every day, and complained about any irregularities to their Raytheon supervisor.

On appeal, however, complainants describe a greater degree of agency control than in their formal complaints. They claim that agency officials made "binding decisions" regarding job duties and performance, and communicated their demands directly to the employees without the intervention of a Raytheon supervisor. They claim that they were required to submit time sheets to the agency officials, who critiqued the amount of time they took to perform each task. They reiterate that the agency had exclusive control over the worksite and facilities, as evidenced by excluding the complainants from the breakroom.

Claimants who are neither employees nor applicants do not have standing to pursue their claims in the federal administrative process. *Scott v. Department of Energy*, EEOC Request No. 05A00268 (December 12, 2001). The Commission applies the common law of agency test to determine whether complainant is an "employee" under Title VII. *Lonergan v. Department of Veterans Affairs*, EEOC Request No. 05970406 (July 10, 2000) (applying the test from *Community for Creative Non-violence v. Reid*, 490 U.S. 730, 751-752 (1989) and *Nationwide Mutual Insurance Co., et al. v. Darden*, 503 U.S. 316, 323-324 (1992)). Relevant factors for determining whether the complainants are "employees" or "contractors" include: (1) the extent of the agency's right to control the means and manner of the complainants' performance; (2) the kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the agency furnishes the equipment used at the worksite; (5) the length of time the complainants have worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the agency's business; (10) whether the worker accumulates retirement benefits; (11) whether the agency pays social security taxes; and (12) the parties' intention. *Ma and Zheng v. Department of Health and Human Services*, EEOC Appeal Nos. 01962390, 01962389 (May 29, 1998). This list is not exhaustive; the common law of agency test "contains no shorthand formula or magic phrase[.] ... [A]ll of the incidents of a relationship must be assessed and weighed with no one factor being decisive." *Id.* (quoting *Darden*, 503 U.S. at 324).

The record contains copies of the employment agreements between Raytheon and the complainants. These documents, signed by the complainants, outline the "at will" employment relationship between Raytheon and the complainants. They note that pay rates may vary if the employees are transferred to a different function. The record also includes a copy of the agency's contract with Raytheon.

A Raytheon official stated that the employees were paid by Raytheon at an hourly rate established by calculations based on a "Nationwide Wage Determination" from the Department of Labor. The number of hours worked were controlled by "work orders" from the agency to Raytheon. Raytheon withheld taxes from their pay checks, provided their benefits, and approved all leave. The complainants reported to and received work assignments from a Raytheon supervisor on the worksite; the complainants' primary duties involved driving repaired vehicles to ensure their road-worthiness. The complainants were evaluated by Raytheon officials without input from agency officials. Since the complainants duties involved testing agency materials, the agency provided the equipment for them to test. Any reimbursable expenses were paid by the agency to Raytheon -- Raytheon was responsible for reimbursing the complainants individually.

The complainants concede that they were offered a transfer to a different Raytheon work location. Both refused to relocate, and received a written counseling letter for their refusals. Although both claim that the agency "called the shots" on their employment, the Commission finds otherwise. They reported to a Raytheon supervisor, were paid by

Raytheon, and received all leave and benefits from Raytheon. Although they contended on appeal that agency officials directly criticized their performance, attendance, and leave, their formal complaints state that the officials expressed dissatisfaction through their Raytheon supervisor. They never received discipline from the agency, but did receive discipline, and ultimately notice of their termination, from the Raytheon supervisor.<sup>1</sup> The Raytheon supervisor was stationed at the worksite with the complainants, and no evidence indicates that the agency had any involvement with their selection. The complainants also did not have the same access to agency facilities, such as the break room, as agency employees. In sum, the agency did not maintain the means and manner of control over the complainants' day to day work necessary to be considered a "joint employer." The complainants were employees of Raytheon Aerospace, LLC, not the agency. Therefore, we find that both complaints were properly dismissed for failure to state a claim pursuant to § 1614.107(a)(1).

### **Conclusion**

Accordingly, the agency's dismissals are AFFIRMED.

### **Statement of Rights -- On Appeal Reconsideration (M0701)**

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. *See* 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. *See* 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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 (S0900)**

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 (Z1199)**

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. *See* Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.*; the Rehabilitation Act of 1973, *as amended*, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action")

<sup>1</sup>In fact, complainants contend that agency officials attempted to have them fired previously, but Raytheon refused to terminate their employment. The complainants assert that Raytheon kept them in their positions in order to have leverage over them during the investigation of a coworker's discrimination claim against Raytheon.

Joseph R. Majewski, Complainant, v. Dr. Francis J. Harvey, Secretary, Department of the Army, Agency

Appeal No. 01A62842 Agency No. ARKNOX05

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

August 28, 2006

**CORE TERMS:** agency official, supervisor, staffing, co-worker, qualify, notice, Civil Rights Act, final decision, et seq, investigative, terminated, occupation, subjected, requisite, calendar, payroll, sex

**ISSUEDBY:** [\*1] For the Commission by Carlton M. Hadden, Director, Office of Federal Operations

**OPINION:  
DECISION**

Complainant filed a timely appeal with this Commission from the agency's decision dated January 24, 2006, 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.*

The record indicates that complainant was a Materials Coordinator, placed with the agency by Westaff (USA), Inc., a national staffing firm, at an agency installation in Fort McCoy, Wisconsin. Complainant filed a formal EEO complaint with the agency alleging he was subjected to discrimination on the bases of sex (male) and reprisal (prior protected EEO activity), n1 when he was harassed and subjected to a hostile work environment. The agency dismissed the complaint for failure to state a claim, pursuant to 29 C.F.R. § 1614.107(a)(1), concluding complainant lacked standing to file because he was an employee of Westaff (USA), Inc., and not the agency. In its decision, the agency instructed complainant that the proper avenue for his complaint was the private sector complaint process [\*2] of the EEOC. Complainant filed the instant appeal challenging the agency's dismissal of his appeal.

- - - - - Footnotes - - - - -

n1 The EEO Counselor ' s report indicates that complainant was a witness in an EEO matter in September 2005.

----- End Footnotes-----The record indicates that complainant

alleged that on June 10, 2005, an agency official asked him if he was "fucking" a co-worker and that it should be considered a benefit. n2 On June 14, 2005, complainant alleged he witnessed agency officials and civilians laughing at a naked picture of a woman drawn on a cardboard box. Complainant also alleged that another agency official in June 2005, brought in an explicit CD titled "Wild Adult Classics" and played it in front of complainant. Despite his protests, the agency official continued to play it. From June through August 2005, complainant asserted that an agency official would refer to complainant's co-worker as "Joe's [complainant's] little bitch." In September 2005, complainant asserted that he and his coworker contacted management at Weststaff (USA), Inc., regarding [\*3] the incidents. Instead of dealing with the allegations, complainant stated both their assignments with the agency were terminated on September 22, 2005.

- - - - - Footnotes - - - - -

n2 We note that the co-worker has also filed an EEO complaint that is on appeal with the Commission regarding the same events. See *Crogan v. Department of the Army*, EEOC Appeal No. 01A62300.

----- End Footnotes-----The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. §§ 1614.103, .106(a).

The Commission must first determine whether the complainant was an agency employee or applicant for employment within the meaning of Section 717(a) of Title VII of the Civil Rights Act of 1964, an amended, 42 U.S.C. 2000e-16 [\*4] (a) *et. seq.* The Commission has applied the common law of agency test to determine whether an individual is an agency employee under Title VII. See *Ma v. Department of Health and Human Services*, EEOC Appeal Nos. 01962389 & 01962390 (May 29, 1998) (citing *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-24 (1992)). Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, *i.e.*, by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business [\*5] of the "employer"; (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes;

and (12) the intention of the parties. *See Ma, supra*. In *Ma*, the Commission noted that the common-law test contains, "no shorthand formula or magic phrase that can be applied to find the answer...All of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.*

Furthermore, under the Commission's *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, EEOC Notice No. 915.002 (December 3, 1997) (hereinafter referred to as the "Guidance") (available at [www.eeoc.gov](http://www.eeoc.gov)), we have also recognized that a "joint employment" relationship may exist where both the agency and the "staffing firm" may be deemed employers. n3 Similar to the analysis set forth above, a determination of joint employment requires an assessment of the comparative amount and type of control the "staffing firm, and the agency each maintain over complainant's work. Thus, a federal agency will qualify as a joint employer of an individual if it has the requisite [\*6] means and manner of control over the individual's work under the *Ma* criteria, whether or not the individual is on the federal payroll. *See Guidance, supra* at 11.

- - - - - Footnotes - - - - -

n3 **Contingent workers** generally refer to workers who are outside an employer's "core" work force, such as those whose jobs are structured to last only a limited period of time, are sporadic, or differ in any way from the norm of full-time, long term employment. **Contingent workers** may be hired by "staffing firms" which may include a temporary employment agency or a contract firm. *See Guidance, supra* at 1 & 3.

- - - - - End Footnotes- - - - -Based on the legal standards and criteria set forth herein, we find that, although complainant was not on the federal payroll, the agency exercised sufficient control over his position to qualify as a joint employer of complainant. *See generally, Baker v. Department of the Army*, EEOC Appeal No. 01A45313 (March 16, 2006). The agency, on appeal, argues that the language of its contract with Westaff (USA), Inc., and complainant's [\*7] Statement of Work make it clear that the supervision and control of complainant ' s work rested with Westaff (USA), Inc., and no one from the agency supervised his work. However, this is directly contradicted by Westaff (USA), Inc., in a statement contained in the record, when it said that complainant's "immediate supervisors were Army personnel stationed at Ft. McCoy." Complainant, through counsel, indicated that agency officials directed complainant's daily work, provided him with the requisite training to do the job, monitored his time and attendance, approved his leave, and prepared his performance evaluations. The agency has provided no proof to the contrary. Complainant further contends that there was no on-site supervisor from Westaff (USA), Inc., a contention which is also confirmed by Westaff (USA), Inc.'s statement. Complainant also alleges that agency supervisors reprimanded him for directing work-related concerns to Westaff (USA), Inc., instructing

him that all such concerns should be addressed to agency management. Finally, complainant asserts that agency officials would periodically threaten his job, stating that he was "one phone call away," implying that a call from [\*8] the agency official to Weststaff (USA), Inc., would result in termination for complainant. Taking into account all these factors, we conclude that the agency exercised sufficient control over complainant ' s position to qualify as a joint employer.

Accordingly, we find that the agency's dismissal of the instant complaint was in error. Therefore, we REVERSE the decision and REMAND the matter for further processing in accordance with the order below.

ORDER (E0900)

The agency is ordered to process the remanded complaint in accordance with 29 C.F.R. § 1614.108 *et seq.* The agency shall acknowledge to the complainant that it has received the remanded claims within thirty (30) calendar days of the date this decision becomes final. The agency shall issue to complainant a copy of the investigative file and also shall notify complainant of the appropriate rights within one hundred fifty (150) calendar days of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the complainant requests a final decision without a hearing, the agency shall issue a final decision within sixty (60) days of receipt of complainant' s request.

A copy of the [\*9] agency' s letter of acknowledgment to complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

*Sandra Maynard, Complainant, v. Gordon R. England, Secretary, Department of the Navy, Agency.*

**Equal Employment Opportunity Commission-OFO**

**Appeal No. 01A20699**

**Agency No. DON-01-00216-002**

**June 25, 2002**

## **Full Text**

### **Decision**

Complainant filed a timely appeal with this Commission from an October 5, 2001 agency decision dismissing her complaint of unlawful employment discrimination brought pursuant to Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. The Commission accepts the appeal in accordance with 29 C.F.R. § 1614.405.

Review of the record shows that on March 15, 2000, complainant accepted an offer of a part time position as an Environmental Analyst with Flex-Tech Professional Services, Inc., a contract service provider for the agency's Naval Air Station (NAS) Corpus Christi.<sup>1</sup> Under contract, Flex-Tech Professional Services, Inc. provided the agency with personnel to manage all aspects of the Natural Resources and Cultural Resources Program. Under this contract, complainant worked at the agency's NAS Corpus Christi in the Public Works (PW) Department, providing environmental analysis services. The record further reflects that complainant worked closely with an agency Supervisory Environmental Engineer. The record also shows that the agency had the Supervisory Environmental Engineer designated as a "Customer Representative" to oversee its "contract" personnel.

On January 9, 2001, funding for complainant's position had been exhausted and as a result, complainant was terminated.

Believing that she was a victim of discrimination, complainant contacted an EEO Counselor and subsequently filed an EEO complaint on August 2, 2001. Therein, complainant claimed that she was the victim of unlawful employment discrimination on the bases of sex and in reprisal for prior protected activity. Complainant claimed that she was subjected to a hostile work environment and harassment when:

(a) on or about October 10, 2000, Public Works (PW) management officials questioned other PW employees regarding conversations with her and whether PW management officials were discussed;

(b) on or about October 17, 2000, she was targeted for reprisal and subjected to an e-mail policy to which other employees were not subjected;

(c) on October 17, 2000, her request to be moved to another building and removed from the supervision of the Supervisory Environmental Engineer/Customer Representative and a Facility Manager was denied;

(d) on October 17, 2000, her complaint to the Executive Officer of reprisal and harassment was ignored;

(e) on or about October 10 through October 17, 2000, she was threatened by the Supervisory Environmental Engineer/Customer Representative that her Statement of Work (SOW) would be shifted to non-biologist; and that the Flex-Tech contract would be discontinued five to six months earlier than scheduled;

(f) on or about the weekend of October 21 through October 23, 2000, her office at Naval Air Station Corpus Christi was vandalized;

(g) on or about October 26, 2000, she began receiving an onslaught of suspicious phone calls at her home;

(h) anonymous hotline calls were made to various levels of the command, including the Inspector General, to investigate her and her Navy husband for frivolous claims of alleged interference with PW management. Complainant determined that this purported action was an attempt by PW management to interfere with and discourage a contract for her services;

(i) on January 9, 2001, the contract with Flex-Tech for her services, which was scheduled to extend until February 19, 2001, was terminated with no prior warning;

(j) on February 22, 2001, the Supervisory Environmental Engineer/Customer Representative sent an e-mail to the chief of Naval Air Training Inspector General making claims that she had written her down SOW and was being excessively compensated;

(k) on or about February 23, 2001, an anonymous telefax was sent from a Kinko's in Corpus Christi to Naval Facilities Headquarters threatening a congressional inquiry if her position were funded again;

(l) after learning a contract had been negotiated for her services, the Supervisory Environmental Engineer/Customer Representative instructed that all e-mails in her work computer be erased, without her consent or consultation with her; and

(m) Naval Air Station Corpus Christi failed to take appropriate action to resolve the hostile work environment or stop the reprisal actions by PW management officials.

The agency dismissed the complaint for failure to state a claim, finding that complainant did not meet the common law of agency test requirements for employee standing.

On appeal, complainant, through her attorney, asserted that the Supervisory Environmental Engineer/Customer Representative controlled complainant's work and day-to-day tasks, and provided additional details regarding the circumstances giving rise to her complaint. The attorney further asserted that the Supervisory Environmental Engineer/Customer Representative established complainant's pay rate; assigned complainant to an office near her own; provided complainant with office equipment and secretarial support; approved and signed complainant's daily tune sheets, and authorized complainant's work travel. In her brief, the attorney wrote "[I]n reality, Flex-Tech was merely a conduit for government funds assigned to pay [complainant] ... To this date, [complainant] has never met anyone from Flex-Tech face-to-face. [Complainant's] minimal contact with Flex-Tech has been principally related to the retaliation and discrimination by Appellee." The agency submits no response to complainant's appeal.

Before the Commission or the agency can consider whether the agency has discriminated against complainant in violation of Title VII, it first must determine whether complainant is an agency employee or applicant for employment within the meaning of Section 717(a) of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e-16(a) et seq.

The Commission has applied the common law of agency test to determine whether complainant is an agency employee under Title VII. *See Ma v. Department of Health and Human Services*, EEOC Appeal No. 01962390 (June 1, 1998) (citing *Nationwide Mutual Insurance Co. et. al. v. Darden*, 503 U.S. 318, 323-24 (1992)). This same test applies to claims brought under the ADEA. Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. *See Ma v. Department of Health and Human Services, supra*.

In *Ma*, the Commission noted that the common-law test contains, "no shorthand formula or magic phrase that can be applied to find the answer... [A] 11 of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.*, (citations omitted). The Commission in *Ma* also noted that prior applications of the test established in *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979), using many of the same elements considered under the common law test, was not appreciably different from the common law of agency test. *See Id.*

Furthermore, under the Commission's Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (December 3, 1997) (Guidance), we also recognize that a "joint employment" relationship may exist where both the agency and the "staffing firm," such as Flex-Tech, may be deemed employers. Similar to the analysis set forth above, a determination of joint employment requires an assessment of the comparative amount and type of control the "staffing firm" and the agency each maintained over complainant's work. *See Lopez v. Department of the Navy*, EEOC Appeal No. 01A03036 (February 28, 2001). Thus, a federal agency will qualify as a joint employer of an individual assigned to it if it has the requisite means and manner of control over that individual's work under the Ma criteria, whether or not the individual is on the federal payroll. *See* Guidance, *supra* at 11.

Based on the legal standards and criteria set forth above, we find that the agency jointly employed complainant, along with Flex-Tech, based on the means and manner of control the agency's Manager maintained over the conditions of complainant's day-to-day work at the agency.

According to the record, complainant's work was specified, negotiated for a set period, and to be performed at a specified location. The record shows that complainant was closely supervised by an agency Supervisory Environmental Engineer/Customer Representative. In fact, the record discloses that the Supervisory Environmental Engineer/Customer Representative, not Flex-Tech, recruited, interviewed and selected complainant for her position. It is equally clear that Flex-Tech had little, if any, input into complainant's day-to-day assignments.

In conclusion, notwithstanding the fact that the Flex-Tech employment contract shows that it employed complainant part time, providing wages, benefits, and leave, the record before us nonetheless demonstrates that the agency, via the Supervisory Environmental Engineer/Customer Representative, controlled essentially all aspects of complainant's day-to-day work. The Supervisory Environmental Engineer/Customer Representative assigned complainant to an office near her own, and provided complainant with all of her assignments. Complainant did not work independently, and she received supervision from no one other than the Supervisory Environmental Engineer/Customer Representative. Given the nature of this relationship, and the cooperative process used by the agency and Flex-Tech regarding personnel actions, we find that the agency exerted the degree of control necessary to qualify it as a joint employer with Flex-Tech, such that complainant may be deemed an "employee" of the agency for the purpose of invoking Title VII protection.

Accordingly, we find that complainant is an "employee" of the agency, and that the agency improperly dismissed the instant complaint on the grounds of failure to state a claim. We REVERSE that determination, and REMAND the complaint to the agency for further processing.<sup>2</sup>

**Order (E0900)**

The agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108. The agency shall acknowledge to the complainant that it has received the remanded claims within thirty (30) calendar days of the date this decision becomes final. The agency shall issue to complainant a copy of the investigative file and also shall notify complainant of the appropriate rights within one hundred fifty (150) calendar days of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the complainant requests a final decision without a hearing, the agency shall issue a final decision within sixty (60) days of receipt of complainant's request.

A copy of the agency's letter of acknowledgment to complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

**Implementation of the Commission's Decision (K0501)**

Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to the complainant. 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.

**Statement of Rights - On Appeal Reconsideration (M0701)**

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. *See* 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. *See* 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the tune period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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 (R0900)**

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 (Z1199)**

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. *See* Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your tune in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

<sup>1</sup>Flex-Tech Professional Services, Inc., having its headquarters in Sandusky, Ohio.

<sup>2</sup>We advise the parties this decision only establishes the agency's jurisdiction over this complaint, and does not address the merits of the underlying claim, nor the relative liability of the agency and Flex-Tech as joint employers should complainant prevail in her claim.

***James R. Mooney, Complainant, v. Michael Chertoff, Secretary, Department of Homeland Security, (Customs and Border Protection), Agency.***  
**Equal Employment Opportunity Commission-OFO**  
**Appeal No. 01A45921**  
**Agency Nos. CBP#04-156C/04-4139**  
**March 16, 2005**

### **Ruling**

The complainant qualified as an "employee" of the agency and was therefore eligible to bring a complaint against it under Title VII.

### **Meaning**

The EEOC considers a variety of factors in determining whether a person is eligible to bring a complaint as an agency's "employee" under Title VII. There is no precise formula for deciding if an employment relationship exists. The commission focuses primarily on the amount of control the agency exercises over the individual's work.

### **Case Summary**

The complainant accused the Department of Homeland Security of discrimination based on race (Caucasian) and disability (unspecified). An outside contractor, Northrop Grumman, provided his services to DHS. His complaint arose out of a work assignment and subsequent performance improvement plan. He said an agency supervisor directed him to go to an outlying station without regard for the complainant's physical disability. Approximately two months later, Northrop Grumman imposed the PIP. The agency dismissed the complaint. It said the complainant was not the agency's employee and could therefore not state a claim. The EEOC reversed.

Independent contractors are ineligible to assert Title VII complaints against agencies. To determine whether an individual is an agency's employee or an independent contractor, the EEOC examines the entire relationship between the person and the agency. The commission asks how much control the agency exercises over the individual's work. There is "no shorthand formula or magic phrase" to find the answer. Multiple aspects of the agency's arrangement with the individual are relevant. Sometimes, an agency may be deemed the "joint employer" of the person whose services are supplied by a staffing firm.

The EEOC found the agency retained supervisory control over the complainant's work. He had been in his position for eight years -- even though the outside contractor, which furnished his services to the agency, had changed multiple times. The agency supervisor gave the complainant all his assignments. The complainant never consulted Northrop Grumman to clarify work responsibilities. Instead, the supervisor provided all guidance. The complainant used agency equipment and supplies, and he performed all his work on agency premises. The supervisor contributed to the complainant's performance appraisal.

Northrop Grumman paid the complainant and administered his benefits and leave arrangements. The EEOC found that, in combination, Northrop Grumman and the agency served as the complainant's joint employers. The complainant could therefore maintain a Title VII complaint against the agency.

### **Full Text**

### **Decision**

Complainant filed a timely appeal with this Commission from the agency's decision dated August 13, 2004, 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 Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. In his complaint, complainant alleged that he was subjected to discrimination on the bases of race (Caucasian) and disability when:

1. in October 2003, Supervisor Patrol Agent (agency's supervisor) (S1), directed him to immediately go and provide technical support to an outlying station without regard to his physical disability;
2. on December 12, 2003, he was issued a Performance Improvement Plan (PIP) by his Northrop Grumman Corporation supervisor (S2); and
3. on an on-going basis, S1 speaks to peers, subordinates, and employees at the sector in Spanish.

The agency dismissed the complaint on the grounds that complainant failed to state a claim. The agency determined that complainant is not an "employee" within the meaning of the EEO regulations, but rather is an independent contractor and, therefore, does not have standing to file a discrimination complaint against the agency.

On appeal, complainant contends that he qualifies not as an independent contractor, but as an "employee." Complainant also contends that he is a "co-employee" of the agency and the company that currently holds the Legacy/INS contract. Specifically, complainant argued that all work he performed was directly supervised by S1, not a supervisor or any other employee of the five different contracting companies that have held the Legacy/INS contract. Complainant alleged that S1 directed him in what, where and when to do the work. Complainant further contends that all the equipment that he has used in the performance of his job duties, i.e. office, telephone, computer equipment, etc ..., have all been provided by the agency.

Before the Commission can consider whether the agency has discriminated against complainant in violation of Title VII, we must first determine whether complainant was an agency employee with the meaning of Section 717(a) of Title VII of the Civil Rights

Act of 1964, and amended, 42 U.S.C. 2000e-16(a) et. seq. The Commission has applied the common law of agency test to determine whether complainant is an "employee" under Title VII. *Lonegan v. Department of Veterans Affairs*, EEOC Request No. 05970406 (July 10, 2000) (applying the test from *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989) and *Nationwide Mutual Insurance Co., et al. v. Darden*, 503 U.S. 316, 323-324 (1992)). Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work usually is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer;" (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. *See Ma and Zheng v. Department of Health and Human Services*, EEOC Appeal Nos. 01962390, 01962389 (May 29, 1998) (*quoting Darden*, 503 U.S. at 324). In *Ma*, the Commission noted that the common-law test contains, "no shorthand formula or magic phrase that can be applied to find the answer ... [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.*

Furthermore, under the Commission's Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002 (December 3, 1997) (hereinafter Guidance), we also recognized that a "joint employment" relationship may exist where both the agency and the "staffing firm" may be deemed employers.<sup>1</sup> Similar to the analysis set forth above, a determination of joint employment requires an assessment of the comparative amount and type of control the "staffing firm," and the agency each maintain over complainant's work. Thus, a federal agency will qualify as a joint employer of an individual if it has the requisite means and manner of control over the individual's work under the *Ma* criteria, whether or not the individual is on the federal payroll. *See* Guidance, *supra* at 11.

Based on the legal standards and criteria set forth herein, we find that the agency exercised sufficient control over the Systems Technician to qualify as a joint employer with Northrop Grumman. In so finding, we note that the agency retained supervisory control over complainant's position. We also take in consideration complainant's length of time in his position, and the skills required in his position. Specifically, the record reveals that complainant began working at the Del Rio Border Patrol in June 1996, as a System Technician. In the almost eight years that complainant has worked, five different contracting companies have held the Legacy/INS contract for this position, and complainant always retained his position. Complainant's duties include, but are not limited to, maintenance of the Del Rio Sector Novell computer network. This includes file servers, computers' installation, maintaining desktop, configuring workstation, desktop maintenance and supporting end-user.

The record also shows that S1 has been the Automated Data Processing (ADP) Department supervisor since 1999. S1 directed all the ADP operations for both government employees and contractors. The record further shows that S1 assigned complainant all work assignments via e-mail or verbal instructions. Complainant's testimony reveals that S1 initiated a policy whereby any and all computer-related support calls were to be directed exclusively to his office. Complainant alleged that S1 instructed all ADP government and contract employees that he "personally, would determine who handled what work assignment, in what order, and in what time frame." For example, complainant alleged that on many occasions S1, either via -- mail or verbally, instructed him what computer to install, where to install it, and when to install it. Complainant further alleged that he never contacted his contracting company regional manager for clarification on work assignments. If he had questions regarding the work assignment, he would immediately contact S1 for further guidance. Furthermore, the record reveals that all work performed by Systems Technician was performed on agency premises using agency equipment and supplies. The record also reveals that S1 submitted his comments and recommendations for complainant's performance appraisal.

Notwithstanding the fact that Northrop Grumman provided wages, benefits and leave for the Systems Technician, the record before us demonstrates that the agency retained sufficient control over the Systems Technician position to qualify as a joint employer. Accordingly, for purposes of exercising his rights under Title VII and the Rehabilitation Act, we find that complainant is an employee of the agency, and that the agency improperly dismissed the instant complaint on the grounds of failure to state a claim. We hereby REVERSE that determination and REMAND the complaint to the agency for further processing in accordance with this decision and applicable regulations.

#### **Order (E0900)**

The agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108. The agency shall acknowledge to the complainant that it has received the remanded claims within thirty (30) calendar days of the date this decision becomes final. The agency shall issue to complainant a copy of the investigative file and also shall notify complainant of the appropriate rights within one hundred fifty (150) calendar days of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the complainant requests a final decision without a hearing, the agency shall issue a final decision within sixty (60) days of receipt of complainant's request.

A copy of the agency's letter of acknowledgment to complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

#### **Statement of Rights -- On Appeal Reconsideration (M0701)**

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. *See* 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. *See* 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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 (R0900)**

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 (Z1199)**

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. *See* Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§791, 794(c). The grant or denial of

the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

<sup>1</sup>Contingent workers generally refer to workers who are outside an employer's "core" work force, such as those whose jobs are structured to last only a limited period of time, are sporadic, or differ in any way from the norm of full-time, long term employment. Contingent workers may be hired by "staffing firms" which may include a temporary employment agency or a contract firm. *See* Guidance, *supra* at 1 & 3.

### **Statutes Cited**

**42 USC 2000e-16(a)**

### **Cases Cited**

**EEOC Request No. 05970406**

**490 U.S. 730**

**503 U.S. 316**

**EEOC Appeal No. 01962390**

**EEOC Appeal No. 01962389**

Phu T. Nguyen, Complainant, v. Condoleezza Rice, Secretary,

Department of State, Agency

Appeal No. 01A61947 Agency No. F00306

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

May 31, 2006

**CORE TERMS:** common law, Civil Rights Act, employment discrimination, corporate entity, staffing, supervisor, occupation, accepting

**ISSUEDBY:** [\*1] For the Commission by Carlton M. Hadden, Director, Office of Federal Operations

**OPINION:**  
**DECISION**

Complainant filed a timely appeal with this Commission from the final agency decision dated January 4, 2006, dismissing his formal EEO 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.

In his formal complaint, dated October 11, 2005, complainant claimed that he was the victim of unlawful employment discrimination in reprisal for prior protected EEO activity when the Task Manager bullied and harassed him; and on April 20, 2005, he was requested to resign because he brought the harassment issue to the attention of the Project Director.

The agency dismissed complainant's complaint pursuant to the regulation set forth at 29 C.F.R. § 1614.107(a)(1), for failure to state a claim. The agency found that complainant was not an employee of the agency; and that he was instead a contractor employee of a corporate entity identified as Systems Sciences Corporation International (hereinafter referred as "SCCI"). The agency stated that during the relevant time, [\*2] complainant was an Oracle Data Base Administrator through SSCI, which is a subcontractor of another corporate entity identified as Creative Information Technology, Inc. (hereinafter referred to as "CITI"). The agency found that SSCI and CITI had a general teaming agreement to provide maintenance support of the agency's Passport Systems. The agency determined that SSCI controlled the "means and manner" of complainant's performance; paid complainant's salary; provided him with benefits; and approved all of his leave requests.

The Commission has applied the common law of agency test to determine whether an individual is an agency employee or applicant for employment within the meaning of Section 717(a) of Title VII of the Civil Rights Act of 1964, an amended, 42 U.S.C. 2000e-16(a) *et. seq.* considered a dual employee of complainants are agency employees

under laws enforced by the EEOC. *See Ma v. Department of Health and Human Services*, EEOC Appeal No. 01962390 (June 1, 1998) (citing *Nationwide Mutual Insurance Co. et al v. Darden*, 503 U.S. 318, 323-24 (1992)). Specifically, the Commission will look to [\*3] the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "emplo yer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accumulates retirement benefits; (11) whether the "employer " pays social security taxes; and (12) the intention of the parties. In *Ma*, the Commission noted that the common-law test contains, "no shorthand formula or magic phrase that can be applied to find the answer ... All of the incidents of the relationship must be assessed and weighed with no one factor [\*4] being decisive." *Id.*

Furthermore, under the Commission's *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, EEOC Notice No. 915.002 (December 3, 1997) (hereinafter referred to as the "Guidance"), we have also recognized that a "joint employment" relationship may exist where both the agency and the "staffing firm" may be deemed employers. Similar to the analysis set forth above, a determination of joint employment requires an assessment of the comparative amount and type of control the "staffing firm" and the agency each maintain over complainant's work. Thus, a federal agency will qualify as a joint employer of an individual if it has the requisite means and manner of control over the individual's work under the *Ma* criteria, whether or not the individual is on the federal payroll. See *Baker v. Department of the Army*, EEOC Appeal No. 01A45313 (March 16, 2006).

The Commission finds that the agency test has not provided sufficient evidence in the record addressing whether complainant should be considered an employee or joint employee of the agency. As noted above, the record contains [\*5] a copy of a document identified as "Genera 1 Teaming Agreement" between SSCI and CITI. The record also contains copies of documents identified as "SSCI, Inc. Time Sheet," indicating the hours that complainant worked from December 16, 2004 to January 31, 2005, and from April 1, 2005 to April 30, 2005. However, the agency has not provided evidence or analysis concerning the factors in the common law of agency test. In particular, and especially, in light of the above-cited assertions in the record, the agency has not addressed the means and manner of control complainant's supervisor maintained over the conditions of complainant's day-to-day work at the agency.

Given the present record, the Commission is unable to ascertain whether or not the agency has jurisdiction, we shall remand the matter so that the agency can supplement the record with evidence addressed the common law of agency test as identified in *Ma* and *Baker*.

Accordingly, the agency's dismissal of the complaint is **VACATED** and we **REMAND** the complaint to the agency for further processing in accordance with the **ORDER** below.

#### ORDER

Within thirty (30) days after the date this decision becomes final, the [\*6] agency is **ORDERED** to take the following action:

The agency shall supplement the record with evidence which shows whether complainant was an employee of the agency using the common law of agency test as defined in *Ma*, EEOC Appeal No. 01962390, and *Baker*, EEOC Appeal No. 01A45313, and identified in this decision. Thereafter, the agency shall determine whether complainant was an employee of the agency and whether the instant complaint states a claim of discrimination under 29 C.F.R. § 1614.403 or 1614.106(a).

Thereafter, the agency shall either issue a letter to complainant accepting the complaint for investigation or issue a new decision dismissing the complaint.

A copy of the agency's letter accepting the complaint for investigation or a copy of the new decision dismissing the complaint must be sent to the Compliance Officer as referenced herein.

*Stanton V. Parsons, Complainant, v. Gordon R. England, Secretary, Department of the Navy, Agency.*

**Equal Employment Opportunity Commission-OFO**

**Appeal No. 01A14943**

**Agency No. DON 01-09520-002**

**July 3, 2002**

## **Full Text**

### **Decision**

Complainant filed an appeal with this Commission from a decision of the agency pertaining to 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. The Commission accepts the appeal in accordance with 29 C.F.R. § 1614.405.

On April 23, 2001, complainant filed a formal complaint. Therein, complainant claimed that he was discriminated against while employed under contract N00019-97-C-0136 with the Boeing Company. Specifically, complainant claimed that he was discriminated against when:

(a) on January 2, 2001, he was issued a "lay-off" notice from the Boeing Company, due to undue influence on the part of Navy officials; and

(b) from March 20, 2000 to the date of this termination, he was harassed by Navy officials, particularly in regard to his continued access to Navy facilities and unclassified Navy documents.

The record reflects during the relevant time complainant was a Customer Training Specialist through a corporate entity identified as Boeing Company, and worked at the agency's F/A-18E/F Weapons System and Aircrew Training at the Naval Air Station in Lemoore, California.

On July 30, 2001, the agency dismissed the complaint for failure to state a claim, finding that complainant did not meet the common law of agency test necessary to satisfy requirements for employee standing.

On appeal, complainant through his representative, argues that the agency improperly dismissed his complaint because the agency qualifies as a "joint employer".

In response, the agency argues that complainant was a contractor employee at the time of the alleged discrimination. The agency argues that a Boeing Unit Manager for Aircrew Training was complainant's on-site first-line supervisor; that the contractor exercised exclusive control over every detail of how complainant performed his job; and that the contractor paid complainant's salary and provided him with vacation and retirement benefits. The agency further argues that it has no control over the hiring and firing of

contractor employees, and that only the contractor has this control. The agency contends that training and equipment necessary for complainant's position were provided by the contractor. The agency further contends that the contractor, not the agency, exercised its employment authority over complainant when he could not obtain his security clearance.

The agency states that the record shows that on January 2, 2001, the contractor provided complainant with an Advance Notification of Layoff because he was unable to obtain a security clearance. The agency states that the record also shows that on April 10, 2001, the contractor reinstated its layoff notice and advised complainant that he should seek a position within Boeing that did not require a security clearance. Furthermore, the agency concludes that it had no involvement in either the security clearance decision or complainant's employment status with the contractor.

The record in this case contains a document identified as F/A-18E/F Statement of Work, July 18, 1997. Therein, Table of Contents 3.1 "Contractor Program Management" lists the contractor's responsibilities and requirements under contract N00019-97-C- 0136 with the agency. The record also contains a letter dated April 10, 2001 from the contractor to complainant. In the letter, a Boeing Human Resources General Manager wrote "In summary, Boeing values you as an employee. We too have done everything we can do to assist you in obtaining a clearance and/or finding another job within Boeing that does not require a security clearance."

Before the Commission or the agency can consider whether the agency has discriminated against complainant in violation of Title VII, it first must determine whether complainant is an agency employee or applicant for employment within the meaning of Section 717(a) of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e-16(a) et seq.

The Commission has applied the common law of agency test to determine whether complainant is an agency employee under Title VII. *See Ma v. Department of Health and Human Services*, EEOC Appeal No. 01962390 (June 1, 1998) (citing *Nationwide Mutual Insurance Co. et al v. Darden*, 503 U.S. 318, 323-24 (1992)). Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. *See Ma v. Department of Health and Human Services, supra.*

In *Ma*, the Commission noted that the common-law test contains, "no shorthand formula or magic phrase that can be applied to find the answer ... [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.*, (citations omitted). The Commission in *Ma* also noted that prior applications of the test established in *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979), using many of the same elements considered under the common law test, was not appreciably different from the common law of agency test. *Id.*

Under this test, the Commission finds that complainant was not an employee for employment with the agency. The record contains evidence reflecting that complainant is paid, supervised and disciplined by contractor employees. The record further reflects that training and equipment necessary for complainant's position were provided by the contractor, that vacation and retirement benefits are provided by the contractor; and that complainant is not considered an employee of the agency for tax purposes. Under such circumstances, the Commission determines that complainant was not an agency employee.

For the reasons set forth herein, the Commission AFFIRMS the decision of the agency dismissing the complaint.

#### **Statement of Rights -- On Appeal Reconsideration (M0701)**

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. *See* 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. *See* 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing

of the request. Any supporting documentation must be submitted with your 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 (S0900)**

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 (Z1199)**

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. *See* Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

Tiffany M. Pender, Complainant, v. Dr. Donald C. Winter, Secretary, Department of the  
Navy, Agency

Appeal No. 0120080392 Agency No. 07-68546-02582

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

January 11, 2008

**CORE TERMS:** contractor, specialist, Civil Rights Act, final decision, staffing, supervision, supervisor, terminated, occupation, subjected, personnel, qualify

**ISSUEDBY:** [\*1] For the Commission by Carlton M. Hadden, Director, Office of Federal Operations

**OPINION:**  
**DECISION**

Complainant filed a timely appeal with this Commission from the final agency decision dated October 1, 2007, dismissing her 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.*

The record reflects that during the relevant time, complainant was a Program Manager II through a corporate entity identified as Management Consulting, Inc. (hereinafter referred to as "MANCON."). Complainant worked for the agency's Navy Environmental Health Center in Portsmouth, Virginia.

In the instant formal complaint, filed on August 27, 2007, complainant claimed that she was subjected to discrimination on the bases of sex (female) and in reprisal for current EEO activity when:

(1) she was subjected to harassment regarding her work assignment and procedure by a co-worker and management failed to rectify it; and

(2) on August 17, 2007, she was physically escorted out of the Navy Environmental Health Center building by her MANCON supervisor and then terminated [\*2] from her contractor position.

In its October 1, 2007 final decision, the agency dismissed complainant's complaint for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1). The agency determined that complainant was not a Federal employee., and that she was instead a contractor, not covered by Title VII.

The record contains a document identified as "Statement of Work" between the agency and MANCON (Contract No. W91CRB-06-D-0041). The record reflects that according to the contract, MANCON would provide program management services to satisfy the overall operational objectives of the Navy Environmental Health Center. This contract notes that MANCON would provide supply and logistics support from September 25, 2006 through September 24, 2007 with an option year from September 25, 2007 through September 24, 2008. The record reflects that contractor personnel, MANCON, "performing services under this order will be controlled, directed and supervised at all times by management personnel of the contractor." The record further reflects that MANCON was responsible for complainant's salary and benefits; and withheld complainant's taxes.

The record also contains a copy of MANCON [\*3] Human Resources Specialist (Specialist)'s response to the agency's questionnaire concerning complainant's complaint. According to the Specialist, complainant's supervision remained the responsibility of MANCON; and that MANCON monitored the performances of its employees, including complainant, effected any disciplinary actions and dealt with conduct issues. Furthermore, the record in the case reflects that during the EEO counseling process, complainant identified herself as a contractor employee of the agency.

The Commission has applied the common law of agency test to determine whether an individual is an agency employee or applicant for employment within the meaning of Section 717(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16(a) *et. seq.* See *Ma v. Department of Health and Human Services*, EEOC Appeal No. 01962390 (June 1, 1998) (citing *Nationwide Mutual Insurance Co. et al v. Darden*, 503 U.S. 318, 323-24 (1992)). Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of [\*4] the worker's performance; (2) the kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, *i.e.*, by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. In *Ma*, the Commission noted that the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer...All of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.*

Furthermore, under the Commission's Enforcement Guidance: Application of EEO Laws to **Contingent [\*5] Workers** Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002 (December 3, 1997) (hereinafter referred to as the "Guidance"), we have also recognized that a "joint employment" relationship may exist where both the agency and the "staffing firm" may be deemed employers. Similar to

the analysis set forth above, a determination of joint employment requires an assessment of the comparative amount and type of control the "staffing firm" and the agency each maintain over complainant's work. Thus, a federal agency will qualify as a joint employer of an individual if it has the requisite means and manner of control over the individual's work under the *Ma* criteria, whether or not the individual is on the federal payroll. *See Baker v. Department of the Army*, EEOC Appeal No. 01A45313 (March 16, 2006).

Based on these legal standards and criteria, we find that the agency did not exercise sufficient control over the complainant's position to qualify as the employer or joint employer of complainant. *See generally, Baker v. Department of the Army*, EEOC Appeal No. 01A45313 (March 16, 2006). The agency's dismissal was appropriate and we **AFFIRM** the [\*6] agency's final decision.

*Susan R. Prather-Soppeck v. F. Whitten Peters, Secretary, Department of the Air Force*

**Equal Employment Opportunity Commission-OFO**

**EEOC 01990137**

**December 22, 2000**

**Full Text**

**DECISION**

Complainant filed a timely appeal with this Commission from an agency decision dated September 16, 1998, dismissing her complaint of unlawful employment discrimination pursuant to Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e *et seq.*<sup>1</sup>

The record reveals that complainant is a licensed registered nurse providing professional medical services in the agency's "Homes Program" under a contract between the agency and a staffing firm. Complainant contends that an identified agency official inappropriately tried to supervise her work; subjected her to unwarranted verbal counseling; and made unfounded accusations against her of a very serious nature, which could potentially result in the loss of her license. As a result of this treatment, complainant contends that she (complainant) did not renew her contract with the staffing service to continue working with the Homes Program.

After unsuccessful EEO counseling regarding the above concerns, complainant filed a formal complaint against the agency claiming that she was subjected to harassment on the bases of race and reprisal.

The agency dismissed the complaint finding that complainant was an independent contractor, and not an agency employee. Complainant appeals this determination. In response, the agency argues that it did not control the "means and manner" under which complainant provided services, noting that complainant worked off-site in the homes of patients. Additionally, the agency found that it did not maintain complainant on its payroll or provide her with employee benefits, and did not have the authority to terminate her. The agency argues that based on these factors, complainant was not an agency employee, and its dismissal was proper.

The Commission's regulations provide that an agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that the agency has discriminated against him because of race, color, religion, sex, national origin, age, or disability. *See* 29 C.F.R. §1614.103. In order to determine whether an individual is an employee under Title VII, "the Commission will apply the common law of agency test, considering all of the incidents of the relationship between the [complainant] and the agency ..." *Ma and Zheng v. Department of Health and Human Services*, EEOC Appeal

Nos. 01962390 and 01962389 (June 1,1998). In *Ma*, the Commission held that "the application of the *Spirides* [*Spirides v.Reinhardt*, 613 F.2d 826, 831-32 (D.C. Cir. 1979)] test has not differed appreciably from an application of the common law of agency test." *Id.* (citation omitted).

In *Ma*, the Commission described the common law of agency test as follows:

In [*Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, (1992)], the Court adopted the factors listed in [*Community for Creative Non - Violence v. Reid*, 490 U.S. 730, 751-752 (1989)], as part of the common-law test for determining who qualifies as an "employee" under ERISA: the hiring party's right to control the manner and means by which the product is accomplished; the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. 503 U.S. at 323-324. The Court also referenced the Restatement (Second) of Agency §220(2)(1958) as listing non-exhaustive criteria for identifying a master-servant relationship, and Rev. Rul. 87-41, 1987-1 Cum. Bull. 296-299 as setting forth 20 factors as guides in determining whether an individual qualifies as a common-law "employee" in various tax law contexts. The Court emphasized, however, that the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer,...all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." 503 U.S. at 324, quoting *NLRB v. United Ins. Co. Of America*, 390 U.S. 254, 258 (1968). *Ma*, EEOC Appeal No. 01962390.

Based on a careful review of the record, we find that complainant was an independent contractor and not an employee of the agency. Specifically, we determine that as a highly skilled, independently licensed, medical professional, complainant worked autonomously off-site in the homes of her patients providing patient care. We note that any control exercised by the agency was limited to assessments of contract compliance, such as the number of hours of service provided and the quality of the service as reflected in standard post-service peer reviews. We note that the instant complaint concerns the actions of an identified agency manager to extend certain controls over complainant's work, and that the complainant avers that she rejected these attempts because the supervisor did not have this authority over her work. Moreover, we find the fact that complainant was not on the agency's payroll, or receiving any agency employee benefits, although certainly not decisive, strongly suggests that complainant was not an "employee" of the agency. See generally the Commission's Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (December 3, 1997).

Therefore, we find that complainant was not an employee of the agency, and that the agency's decision dismissing the present case was proper. Accordingly, we AFFIRM the agency's dismissal.

### **STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0900)**

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the office of federal operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. *See* 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. *See* 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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 (S0900)**

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 (Z1199)**

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

**FOOTNOTES**

1 On November 9, 1999, revised regulations governing the EEOC's federal sector complaint process went into effect. These regulations apply to all federal sector EEO complaints pending at any stage in the administrative process. Consequently, the Commission will apply the revised regulations found at 29 C.F.R. Part 1614 in deciding the present appeal. The regulations, as amended, may also be found at the Commission's website at [www.eeoc.gov](http://www.eeoc.gov).

Edar Y. Rogler, n1 Complainant, v. Mike Leavitt, Secretary,  
Department of Health and Human Services, (National Institutes  
of Health), Agency

n1 The record reflects that complainant also goes by the  
name "Edar Deborah Rogler."

Appeal No. 01A63657 Agency No. NIHCC-06-0008

U.S. EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION

October 11, 2006

**ISSUEDBY:** [\*1] For the Commission by Carlton M. Hadden, Director, Office of  
Federal Operations

**OPINION:**

DECISION

Upon review, the Commission determines that complainant's formal complaint was properly dismissed pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim.

In her formal complaint, filed on April 18, 2006, complainant claimed that she was the victim of unlawful employment discrimination on the bases of sex (female), religion (Greek Orthodox), and in reprisal for prior protected EEO activity when:

on January 5, 2006, her contract to provide pastoral care/consulting counseling services to patients and families of the Clinical Center was terminated. n2

n2 The Commission notes that the record does not contain a copy of complainant's formal complaint. However, we are nonetheless able to review complainant's appeal, as we can readily discern the essence of complainant's formal complaint from her statements and various other documents of record.

On May 24, 2006, the agency issued a final decision. Therein, the agency [\*2] dismissed complainant's complaint pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim. The agency determined that complainant was not a Federal employee, and that she was instead an independent contractor, not covered by Title VII.

EEOC Regulation 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by the agency because of race, color, religion, sex, national origin, age or disabling condition. *See* 29 C.F.R. §§ 1614.103, .106(a). Accordingly, a complaint may be dismissed for failure to state a claim when the complainant is not an employee or applicant for employment with the federal government.

The Commission has applied the common law of agency test to determine whether complainants are agency employee under laws enforced by the EEOC. *See Ma v. Department of Health and Human Services*, (citing *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-24 (1992)). Specifically, the Commission will look to [\*3] the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer;" (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. *See id.*

In *Ma*, the Commission noted that the common law test contains, "no shorthand formula or magic phrase that can be applied to find the answer ... All of the incidents of the relationship must be assessed and weighed with [\*4] no one factor being decisive." *Id.* The Commission in *Ma* also noted that prior applications of the test established in *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979), using many of the same elements considered under the common law test, was not appreciably different from the common law of agency test. *See id.*

Under this test, the Commission, after balancing many factors, finds that complainant was not an employee of the agency. The record contains a document identified as "Order for Supplies or Services," dated November 29, 2005 (Order No. 269-MM-602634). n3 This document states that complainant would provide pastoral care/consulting services to patients and families from November 28, 2005 to December 31, 2005.

n3 On appeal complainant argues that she was not an independent contractor, but rather an "applicant" for federal employment, at the time she served as a witness in an EEOC hearing testifying on behalf of an agency employee. She reasons that she had no contract in effect with the agency at the time she served as the witness, and asserts that it was this testimony for which she was unlawfully retaliated against by agency management. However, the claim in her complaint concerns the

*termination* of her contract in January 2006. Therefore, the only relevant consideration is her employment status at the time of the agency's alleged discriminatory actions (the termination of her contract) and not at the time she engaged in protected EEO activity as a witness.

[\*5] The record further contains a document entitled "Statement of Work for [complainant], Associate Chaplain" dated November 21, 2005. Therein, the contract states that complainant would provide ministry services and spiritual needs to patients and families throughout the Clinical Center or on an as needed basis from November 28, 2005 to December 31, 2006 at a total cost of \$ 23,200.00 for 928 hours at \$ 25,00 per hour; respond to on-call as assigned and conduct worship Services as assigned; to make entries of patient visits and follow-up visits in the CRIS system; and would be provided sacramental supplies, telephone and fax services."

Moreover, the record contains a copy of complainant's e-mail dated December 18, 2005 to the EEO Counselor. Therein, complainant acknowledged that she was employed with the Clinical Center under the terms of a 1-year contract. Complainant states that the Chief of the Department of Spiritual Ministry "recruited me for a one year contract here at NIH working 20 hours per week." Further, the record reflects that there is no leave afforded; no retirement benefits; and the agency does not pay social security taxes. Finally, the contract between complainant and [\*6] the agency expressly indicates that complainant is an independent contractor.

Under these circumstances, the Commission determines that the agency's final decision dismissing complainant's complaint for failure to state a claim is **AFFIRMED** for the reasons set forth herein.

Kenneth L. Ryfkogel, Complainant, v. Louis Caldera, Secretary,  
Department of the Army, Agency

Appeal No. 01A04012 Agency No. AOEWFO-0004-A0-160

U.S. EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION

August 16, 2000

**ISSUEDBY:** [\*1] For the Commission by Carlton M. Hadden, Director, Office of Federal Operations

**OPINION:**

DECISION

Complainant filed a timely appeal with this Commission from an agency decision dated April 14, 2000, dismissing his complaint of unlawful employment discrimination brought under Title VII of the Civil Rights Act of 1964 (Title VII), as amended, *42 U.S.C. § 2000e et seq.* n1 The Commission accepts the appeal pursuant to *64 Fed. Reg. 37,644, 37,659 (1999)* (to be codified at 29 C.F.R. § 1614.405).

n1 On November 9, 1999, revised regulations governing the EEOC's federal sector complaint process went into effect. These regulations apply to all federal sector EEO complaints pending at any stage in the administrative process. Consequently, the Commission will apply the revised regulations found at *64 Fed. Reg. 37,644 (1999)*, where applicable, in deciding the present appeal. The regulations, as amended, may also be found at the Commission's website at [www.eeoc.gov](http://www.eeoc.gov).

[\*2] After unsuccessful EEO counseling, complainant filed a formal complaint against the agency alleging that he was subjected to discrimination on the basis of sex n2 when he was terminated as an optometrist at an agency medical center effective December 8, 1999. Complainant claims that he was subjected to on-going harassment by supervisory personnel at the agency which resulted in his eventual termination.

n2 On appeal, complainant also claims reprisal for opposing discriminatory harassment.

The agency dismissed the complaint, finding that complainant was an independent contractor, and was not an agency employee. Specifically, the agency determined that complainant was an independent contractor of the staffing firm which contracted with the

agency to provide services to its medical center. The agency found that because complainant did not have an individual contract with the agency; was not on its payroll; and did not receive a salary or benefits from the agency, he was not an employee. The agency also noted that because [\*3] its managers did not have direct control over complainant due to his status as a contract worker, complainant was not an employee of the agency for this reason as well.

On appeal, complainant claims that he is an "employee" of both the staffing firm and the agency as "joint employers," arguing that the agency exercised extensive control over his work. Complainant makes reference to Commission's Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (December 3, 1997) (hereinafter referred to as "Guidance"), in support of his contention that he is a joint employee of the staffing firm and the agency. Complainant argues that under the Guidance, the main factor in determining employee status in his situation is control by the agency, and that the fact that he was not on the agency's payroll is irrelevant. Complainant additionally makes reference to his appeal statement to the Commission regarding his complaint against the Department of the Navy for the same termination by the staffing firm, which he indicates sets forth in detail how his working conditions with the agency satisfied the criteria for joint employment [\*4] status under the Guidance. n3

n3 The record reflects that complainant worked under contract to the staffing firm providing medical services as an optometrist at medical facilities operated by both the Department of the Army and the Department of the Navy. The staffing firm subsequently terminated his services to both agencies. Complainant filed EEO complaints against both agencies, and filed a charge of discrimination against the staffing firm, as well as another entity having a contractual relationship with the staffing firm. Additionally, complainant has filed an appeal with this Commission regarding the Department of the Navy's dismissal of his complaint on the grounds that he was not an agency employee. The appeal is pending under EEOC Appeal No. 01A03701.

In response, the agency reiterates its determination that complainant did not have the status of an agency employee, and that the complaint was properly dismissed.

The Commission's regulations provide that an agency shall accept a complaint from any aggrieved [\*5] employee or applicant for employment who believes that the agency has discriminated against him because of race, color, religion, sex, national origin, age, or disability. *64 Fed. Reg. 37,644, 37,656 (1999)* (to be codified and hereinafter referred to as EEOC Regulation 29 C.F.R. § 1614.103). In order to determine whether an individual is an employee under Title VII, "the Commission will apply the common law of agency test, considering all of the incidents of the relationship between the [complainant] and the agency . . ." *Ma and Zheng v. Department of Health and Human Services*, EEOC Appeal Nos. 01962390 and 01962389 (June 1, 1998). In *Ma*, the Commission held that "the application of the *Spirides* [*Spirides v. Reinhardt*, 613 F.2d 826, 831-32 (D.C. Cir.

1979)] test has not differed appreciably from an application of the common law of agency test." *Id.* (citation omitted).

In *Ma*, the Commission described the common law of agency test as follows:

In [*Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, (1992)], the Court adopted the factors listed in [*Community for Creative Non [\*6] - Violence v. Reid*, 490 U.S. 730, 751-752 (1989)], as part of the common-law test for determining who qualifies as an "employee" under ERISA: the hiring party's right to control the manner and means by which the product is accomplished; the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. 503 U.S. at 323-324. The Court also referenced the Restatement (Second) of Agency § 220(2)(1958) as listing non-exhaustive criteria for identifying a master-servant relationship, and *Rev. Rul. 87-41, 1987-1 Cum. Bull. 296-299* as setting forth 20 factors as guides in determining whether [\*7] an individual qualifies as a common-law "employee" in various tax law contexts. The Court emphasized, however, that the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." 503 U.S. at 324, quoting *NLRB v. United Ins. Co. Of America*, 390 U.S. 254, 258 (1968). *Ma*, EEOC Appeal No. 01962390.

The Commission has carefully considered complainant's arguments on appeal, as well as his supporting documentation, and determines that complainant was not an employee of the agency. Specifically, we determine that as a highly skilled, independently licensed, medical professional, complainant worked autonomously in providing patient care. We note that any control by the agency related merely to office routines, such as scheduling and patient referrals.

Although as a party to the contract, the agency could request reassignments; schedule changes; or even removal to better accommodate its needs, it did not have the authority to do so directly. We note also that the agency had [\*8] no authority to prohibit complainant from engaging in the private practice of optometry, a control it exercised over the doctors that it did employ. Moreover, we find the fact that complainant was not on the agency's payroll, or receiving any agency employee benefits, to be a factor in our analysis, strongly suggesting that he was not an "employee" of the agency.

Accordingly, we find that complainant was not an employee of the agency, and that the agency's decision dismissing the present case for failure to state a claim was proper. We **AFFIRM** the agency's dismissal.

***Charles Smith, Complainant, v. Dr. Francis J. Harvey, Secretary, Department of the Army, Agency***  
**Equal Employment Opportunity Commission-OFO**  
**Appeal No. 01A55755**  
**Agency No. ARHQOSA05MAR07641**  
**May 5, 2006**  
**Decision**

Complainant filed a timely appeal with this Commission from the agency's decision dated August 3, 2005, 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. In his complaint, complainant alleged that he was subjected to discrimination on the bases of race (African-American), sex (male), disability, and age (45) when on February 28, 2005, he learned that the Director, Pentagon Telecommunication Center approved his termination from his position on a project<sup>1</sup> before receiving a statement from complainant.

The agency dismissed complainant's complaint pursuant to EEOC Regulation 29 C.F.R. § 1614.107(a)(1) for failure to state a claim. Specifically, the agency determined that complainant was an independent contractor and not an agency employee entitled to pursue his claim through the federal EEO complaint process. EEOC Regulation 29 C.F.R. § 1614.107(a)(1) provides that an agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he has been discriminated against by the agency because of race, color, religion, sex, national origin, age or disabling condition. *See* 29 C.F.R. §§ 1614.103, .106(a). Accordingly, a complaint may be dismissed for failure to state a claim when the complainant is not an employee or applicant for employment with the federal government.

The Commission has applied the common law theory test to determine whether complainants are agency employees under laws enforced by the EEOC. *See Ma v. Department of Health and Human Services*, EEOC Appeal No. 01962389 & 01962390 (May 29, 1998) (citing *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-24 (1992)); *Baker v. Department of the Army*, EEOC Appeal No. 01A45313 (March 16, 2006). Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer"; (10) whether the work accumulates retirement benefits; (11) whether the "employer" pays social

security taxes; and (12) the intention of the parties. *See id.* In *Ma* the Commission noted that the common law test contains "no shorthand formula or magic phrase that can be applied to find the answer ... [A] 11 of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.*

Upon review, we find that the record supports the agency's determination that complainant was not an employee of the agency at the time of the alleged discrimination. Complainant does not dispute that he was hired by SAIC to provide information technology and program support under a contract between SAIC and the agency. As the agency mentions in its FAD, in his formal complaint, complainant identifies his employer as SAIC and not the agency. The record contains a copy of an offer of employment letter from SAIC to complainant dated October 25, 2004. Therein, SAIC identifies complainant's rate of pay and informs complainant that as an employee of SAIC, he is entitled to a benefit package. Further, the record indicates that complainant is paid directly by SAIC, who is responsible for withholding social security and other taxes from complainant's pay. The contract between SAIC and the agency refers to those individuals hired to provide information technology as contractors and not agency employees, and complainant was not required to report to an on-site supervisor. Based on the record before us, we find that the complainant is not an employee. Payment is made directly by SAIC. No leave is afforded by the agency. There are no retirement benefits, and the agency does not pay social security taxes. Therefore, the Commission finds that the matter was proper dismissed pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim.

#### **Statement of Rights -- On Appeal Reconsideration (M0701)**

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; *Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110)*, 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See

29 C.F.R. § 1614.604. *The request or opposition must also include proof of service on the other party.*

*Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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 (S0900)***

*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 (Z1199)***

*If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").*

<sup>1</sup>*The record reflects that complainant worked on a project to provide information technology and program support to the agency as part of a contract between the agency and a private company known as SAIC.*

Jose R. Vasquez, Complainant, v. Michael Griffin,  
Administrator, National Aeronautics and Space Administration,  
Agency

Appeal No. 0120080720 Agency No. NCN-07-JSC-A036CW

U.S. EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION

February 7, 2008

**ISSUEDBY:** [\*1] For the Commission by Carlton M. Hadden, Director, Office of Federal Operations

**OPINION:**

DECISION

Complainant filed a timely appeal with this Commission from the final agency decision dated October 30, 2007, dismissing his 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.* and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, *29 U.S.C. § 621 et seq.*

During the period at issue, complainant was an Engineer III through a corporate entity identified as Jacobs Sverdrop, working under an Engineering Science Contract (ESC) with the agency (hereinafter referred to as "JACOBS"). Complainant worked for the agency's Johnson Space Center (JSC) in Houston, Texas.

In the instant formal complaint, filed on June 18, 2007, complainant claimed that he was subjected to discrimination on the bases of national origin and age when:

the position that he held, EN3 (Engineer III) International Space Station (ISS) Electrical Power System (EPS) was eliminated effective March 30, 2007.

In its October [\*2] 30, 2007 final decision, the agency dismissed complainant's complaint for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1). The agency determined that complainant was not a Federal employee, and that he was instead a contractor, not covered by Title VII.

The record contains a document identified as "ESC Group Needs Tasking." The record reflects that in Box 1, JACOBS notified complainant the reason his position was eliminated. Specifically, JACOBS stated "we were notified by NASA on March 12, 2007 that the International Space Station (ISS) Electrical Power System (EPS) team supporting JSC EA4 would undergo a reduction in funding. Specifically, the support to the EPS Software Task is being eliminated at the end of March."

The record contains a document identified as "Assessment of Key Factors in Determining Jurisdiction for Persons Seeking Contingent Worker Status" prepared by the Director, Office of Equal Opportunity and Diversity. Therein, the Director stated that complainant was a contractor employee under a contract between the agency and JACOBS identified as Contract No. NNJ05HI05C. The Director stated that NASA and JACOBS "entered into the five-year Engineering [\*3] and Science Contract (ESC) to support the broad range of activities in the Engineering Directorate (EA) and the Astromaterials Research and Exploration Office (ARES) at JSC." The Director stated that complainant was employed in the position of EN3 ISS Electrical Power System (EPS) until the position elimination effective March 30, 2007. According to the Director, complainant's supervision remained the responsibility of JACOBS; and that JACOBS monitored the performance of its employees, including complainant. The Director stated that JACOBS was responsible for complainant's salary and benefits; and withheld complainant's taxes. The Director stated that JACOBS made the determination to eliminate complainant's position, not the agency. Specifically, the Director stated that during the EEO Counselor's interview with the NASA Division Chief for Energy Systems, the Division Chief stated that "NASA instructed Jacobs that they would need to reduce costs. Jacobs ultimately decided on where to take the reduction; therefore, NASA did not discharge [Complainant]." Furthermore, the record in the case reflects that during the EEO counseling process, complainant identified himself as a contractor [\*4] employee of the agency.

The Commission has applied the common law of agency test to determine whether an individual is an agency employee or applicant for employment within the meaning of Section 717(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16(a) *et. seq.* See *Ma v. Department of Health and Human Services*, EEOC Appeal No. 01962390 (June 1, 1998) (citing *Nationwide Mutual Insurance Co. et al v. Darden*, 503 U.S. 318, 323-24 (1992)). Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship [\*5] is terminated, *i.e.*, by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. In *Ma*, the Commission noted that the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer... [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.*

Furthermore, under the Commission's Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing

Firms, EEOC Notice No. 915.002 (December 3, 1997) (hereinafter referred to as the "Guidance"), we have also recognized that a "joint employment" relationship may exist where both the agency and the "staffing firm" may be deemed employers. Similar to the analysis set forth above, a determination of joint employment requires an assessment of the comparative amount and type of control the "staffing firm" and the agency [\*6] each maintain over complainant's work. Thus, a federal agency will qualify as a joint employer of an individual if it has the requisite means and manner of control over the individual's work under the *Ma* criteria, whether or not the individual is on the federal payroll. See *Baker v. Department of the Army*, EEOC Appeal No. 01A45313 (March 16, 2006).

Based on these legal standards and criteria, we find that the agency did not exercise sufficient control over the complainant's position to qualify as the employer or joint employer of complainant. See generally, *Baker v. Department of the Army*, EEOC Appeal No. 01A45313 (March 16, 2006). The agency's dismissal was appropriate and we **AFFIRM** the agency's final decision.

**LOAD-DATE:** February 19, 2008

Palmyra Walton, Complainant, v. Dr. Francis J. Harvey, Secretary, Department of the  
Army, Agency

Appeal No. 01A60611 Agency No. ARHQOSA05MAR07640

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

April 20, 2006

**CORE TERMS:** final decision, supervision, on-site, notice, Civil Rights Act, failure to state a claim, et seq, staffing, investigative, discriminated, terminated, whereabouts, occupation, monitoring, effective, calendar, workload, qualify, hired

**ISSUEDBY:** [\*1] For the Commission by Carlton M. Hadden, Director, Office of Federal Operations

**OPINION:**  
**DECISION**

Complainant filed a timely appeal with this Commission from the final decision of the agency dated October 21, 2005, dismissing her 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 improperly dismissed pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim.

During the relevant period, complainant was employed as a Message Review Operator, under a contract agency (CA1), at a Virginia Telecommunications Center of the agency. On March 21, 2005, complainant initiated contact with an EEO Counselor, and, on April 29, 2005, filed a formal EEO complaint, alleging that the agency discriminated against her on the bases of race (African-American), sex (female), and age (over 40) when it subjected her to a hostile work environment. Specifically, complainant [\*2] cited the following incidents to support her claim: (1) on January 13, 2005, the Operations Chief of the Telecommunications Center (OC1) questioned complainant's coworkers about her whereabouts for that day and January 12, (2) on January 18, 2005, OC1 drafted a memorandum to the Contract Program Manager for CA1 (CPM) and the Contracting Officer's Representative for the agency (COR), stating that complainant does not deserve to work within the agency due to her undependability, (3) on February 10, 2005, CPM and COR informed complainant that her tour of duty would change, effective February 24, 2005, (4) effective March 11, 2005, CA1 terminated complainant's employment, and (5) since her placement with the agency, complainant observed OC1 give preferential treatment to women who wore revealing clothing and reciprocated his flirting. In a decision dated August 3, 2005, the agency dismissed complainant's claim for failure to state a claim, stating that an employment relationship did not exist between complainant

and the agency.

The record reveals the pertinent information that follows. CA1 is a vendor that, in October 2001, entered into a contract with the agency to provide information [\*3] technology and program support at the agency's Virginia Telecommunications Center. In accordance with the contract, CA1 hired and provided employees to perform specific tasks at the agency. With regard to the employees it hired for the agency contract, CA1 determined and paid wages; withheld taxes; conveyed assignments and schedules; provided immediate supervision through an on-site Shift Team Leader n1; provided task coordination through an on-site Contract Program Manager, CPM; issued performance evaluations; and offered and administered health insurance, life insurance, and leave benefits. Conversely, in reference to the same employees, the agency provided daily monitoring of activities related to oversight of the operational environment; provided all necessary equipment, materials and supplies; reviewed resumes to determine satisfaction of at least minimum technical requirements and had the ability to subject them to review for acceptability at all times; and advised CA1 about whether the workload requirements allowed for leave or schedule changes. For agency purposes and functions, the employees had to identify themselves as contractors to others.

- - - - - Footnotes - - - - -  
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n1 We note that the October 2001 contract did not require CA1 to provide on-site immediate supervision.

- - - - - End Footnotes- - - - - [\*4] Before the Commission can consider whether the agency has discriminated against a complainant in violation of Title VII, we must first determine whether the complainant was an agency employee or applicant for employment within the meaning of Section 717(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16(a) et. seq. The Commission has applied the common law of agency test to determine whether an individual is an agency employee under Title VII. See *Ma v. Dep't of Health and Human Services*, EEOC Appeal Nos. 01962389 & 01962390 (May 29, 1998) (citing *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-24 (1992)). Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment [\*5] used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, *i.e.*, by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the

parties. *See Ma, supra.* In *Ma*, the Commission noted that the common-law test contains, "no shorthand formula or magic phrase that can be applied to find the answer . . . All of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.*

Furthermore, under the Commission's *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, EEOC Notice No. 915.002 (December 3, 1997) (hereinafter referred to as the "*Guidance*"), we have also recognized that a "joint employment" relationship may exist where both the agency and the "staffing [\*6] firm" may be deemed employers. Similar to the analysis set forth above, a determination of joint employment requires an assessment of the comparative amount and type of control the "staffing firm" and the agency each maintain over complainant's work. Thus, a federal agency will qualify as a joint employer of an individual if it has the requisite means and manner of control over the individual's work under the *Ma* criteria, whether or not the individual is on the federal payroll. *See Guidance.*

Based on the legal standards and criteria set forth herein, we find that the agency exercised sufficient control over the complainant's position to qualify as a joint employer of the complainant. *See generally, Baker v. Dep't of the Army*, EEOC Appeal No. 01A45313 (March 16, 2006). The record shows that the agency retained significant supervisory control over complainant, such that an agency manager, OC1, felt comfortable monitoring and questioning complainant's whereabouts as he did on January 13 and recommending her removal from the contract between CA1 and the agency. Shortly after complainant was removed from the October 2001 contract, she was separated from employment with CA1. [\*7] Further, notwithstanding the fact that CA1 provided wages, benefits and leave for the complainant; the record before us reveals that the agency provided the worksite, materials, equipment, and supplies, and made determinations about suitability at hiring and during the course of employment as well as about workload requirements for scheduling and leave purposes. After careful consideration of the record, we reverse the agency's final decision and remand the matter to the agency in accordance with the order below.

#### ORDER (E0900)

The agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108. The agency shall acknowledge to the complainant that it has received the remanded claims within thirty (30) calendar days of the date this decision becomes final. The agency shall issue to complainant a copy of the investigative file and also shall notify complainant of the appropriate rights within one hundred fifty (150) calendar days of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the complainant requests a final decision without a hearing, the agency shall issue a final decision within sixty (60) days [\*8] of receipt of complainant's request.

A copy of the agency's letter of acknowledgment to complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

*Larry Williams, Complainant, v. Dr. Francis J. Harvey, Secretary, Department of the Army, Agency*  
**Equal Employment Opportunity Commission-OFO**  
**Appeal No. 01A51807**  
**Agency No. ARFTBUCH04SEP03560**  
**July 7, 2005**

**Full Text**

**Decision**

Complainant filed a timely appeal with this Commission from the agency's decision dated November 22, 2004, 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. In his complaint, complainant alleged that he was subjected to discrimination on the basis of race (African-American) when he was issued a termination letter dated July 29, 2004 that became effective August 2, 2004.

The agency dismissed the claim on the grounds of (1) a failure to state a claim and (2) untimely EEO Counselor contact. Specifically, the agency determined that complainant is not an "employee" within the meaning of the EEO regulations, but rather is an independent contractor whose direct employer was CORDEV, Inc. As such, the agency concluded that he has no standing to file a discrimination complaint against the agency. Secondly, the agency found that the alleged discriminatory incident occurred on August 6, 2004, yet complainant contacted the EEO Counselor on September 24, 2004. Although complainant argued that did not know of the forty-five day time limit and believed he had more time, the agency maintained that, even if true, he is deemed to know of the forty-five day time frame from the posters which were visibly posted at complainant's workplace.

Complainant submits no statement on appeal. The agency requests that we affirm its FAD.

The Commission has applied the common law of agency test to determine whether a complainant is an agency employee under Title VII. *See Ma v. Dep't of Health & Human Servs.* EEOC Appeal No. 01962390 (June 1, 1998); *Lonegan v. Dep't of Veterans Affairs*, EEOC Request No. 05970406 (July 10, 2000) (applying the test from *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 750-51 (1989) and *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992)). Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision, (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is

terminated, i.e., by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. *See id.*

In *Ma*, the Commission noted that the common law test contains, "no shorthand formula or magic phrase that can be applied to find the answer ... [A] 11 of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.* The Commission in *Ma* also noted that prior applications of the test established in *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979), using many of the same elements considered under the common law test, was not appreciably different from the common law of agency test. *See id.*

Upon review, we find that the record supports the agency's determination that complainant was not an employee of the agency at the time of the alleged discrimination. Complainant does not dispute that he was hired by CORDEV, Inc. to perform under government contract No. DAAB32-99-C-1014 as the Site Manager and the senior CORDEV employee. In fact, in his formal complaint, he admits that he is a contractor working under CORDEV, Inc. See Formal Complaint. The agency explained that "under section H, Special contract Requirements, per contract clause 52.000-4028, Contract Personnel Administration (ATS), CORDEV had full responsibility and control of all its employees working under this contract at Fort Buchanan." Memorandum from Army General Attorney to EEO Office, dated 10/28/04. Furthermore, without dispute from complainant, the agency maintained that it did not evaluate contract employee performance. *See id.* (citing contract clauses C.4.9, C.4.10 and C.4.10.3). "Management at CORDEV, Inc. retained control over work performance and disciplinary actions against any CORDEV employee[s]." *Id.*

Complainant's salary was also directly paid by the CORDEV, Inc. rather than by the agency. *See id.* Moreover, although the U.S. Army furnished contractors with office space and office equipment, CORDEV, Inc. provided the equipment, such as vehicles, uniforms, tools, etc., necessary for them to carry out their job functions. *See id.* Complainant has failed to refute the agency's position that it was CORDEV, Inc. that provided him with vacation time, medical insurance and retirement plans. Additionally, complainant has not refuted the agency's assertion that CORDEV, Inc. had sole authority to terminate her employment. We further find that the agency was not a joint employer of complainant in light of it not having sufficient control over the means and manner of complainant's work. See Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002 (December 3, 1997). Based on the record, we find that complainant was not an agency employee.

We also find that the agency was correct to dismiss the complaint as untimely. EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination be brought to the attention of the EEO Counselor within forty-five days of the effective date of the action. The Commission has adopted a "reasonable suspicion" standard (as

opposed to a "supportive facts" standard) to determine when the forty-five day limitation period is triggered. *See Howard v. Dep't of the Navy*, EEOC Request No. 05970852 (Feb. 11, 1999). Thus, the time limitation is not triggered until a complainant reasonably suspects discrimination, but before all the facts that support a charge of discrimination have become apparent.

EEOC Regulations provide that the agency or the Commission shall extend the time limits when the individual shows that he was not notified of the time limits and was not otherwise aware of them, that he did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence he was prevented by circumstances beyond his control from contacting the Counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

The Commission agrees with the agency that complainant lacked due diligence in the enforcement of his rights. The alleged discriminatory incident occurred on August 6, 2004. Complainant did not contact an EEO Counselor about the incident until September 24, 2004. This is clearly beyond the forty-five day time period. Complainant offers no argument in defense of his delay. He simply states that he believed the time frame to be another. However, the agency maintains that an EEO poster is on display in complainant's former workplace, and as such, complainant should have known of the deadline for contacting the Counselor. Complainant does not deny that the poster was on display.

For the reasons set forth herein, the agency's decision to dismiss the complaint is **AFFIRMED**.

#### **Statement of Rights -- On Appeal Reconsideration (M0701)**

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the

absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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 (S0900)**

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 (Z1199)**

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

***Wellington J. Williams, Complainant, v. Stephen L. Johnson, Acting Administrator,  
Environmental Protection Agency, Agency  
Equal Employment Opportunity Commission-OFO  
Appeal No. 01A44018  
Agency No. 2002-0113-R8  
July 7, 2005***

**Full Text**

**Decision**

Complainant filed a timely appeal with this Commission from the agency's decision dated February 27, 2004, 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. In his complaint, complainant alleged that he was subjected to discrimination on the bases of race (African-American), color (black), disability, age (D.O.B. unknown), and reprisal for prior EEO activity when he was terminated from the Senior Environmental Employment (SEE) Program effective January 26, 2001.

On March 6, 2001, complainant filed an appeal with the Commission on the instant matter. The Commission remanded the case back to the agency for further processing. *Williams v. Environmental Protection Agency*, EEOC Appeal No. 01A12690 (June 20, 2002). The agency was ordered to provide complainant with EEO Counseling and allow complainant to file a formal complaint. *Id.* The Commission ordered that if complainant filed a formal complaint the agency was ordered to supplement the record with sufficient information to determine whether complainant was an employee of the agency. *Id.*

Complainant completed EEO Counseling and filed a formal complaint dated September 18, 2002. The agency conducted an initial investigation to determine whether complainant was a federal employee. The agency determined that complainant was not a federal employee and dismissed the complaint. Complainant now appeals from that decision. EEOC Regulation 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complainant from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by the agency because of race, color, religion, sex, national origin, age or disabling condition. See 29 C.F.R. §§ 1614.103, 106(a). Accordingly, a complaint may be dismissed for failure to state a claim when the complainant is not an employee or applicant for employment with the federal government.

The Commission has applied the common law of agency test to determine whether complainants are agency employee under laws enforced by the EEOC. *See Ma v. Department of Health and Human Services*, EEOC Appeal No. 01962390 (June 1, 1998)

(citing *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-24 (1992)). Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision, (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. *See id.*

In *Ma*, the Commission noted that the common law test contains, "no shorthand formula or magic phrase that can be applied to find the answer ... [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.* The Commission in *Ma* also noted that prior applications of the test established in *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979), using many of the same elements considered under the common law test, was not appreciably different from the common law of agency test. *See id.*

The Commission's Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002 (Dec. 3, 1997) (hereinafter, Guidance), addresses the application of Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and the Equal Pay Act (EPA) to individuals placed in job assignments by temporary employment agencies and other staffing firms, i.e., "contingent workers." The term "contingent workers" generally refers to workers who are outside an employer's "core" work force, such as those whose jobs are structured to last only a limited period of time, are sporadic, or differ in any way from the norm of full-time, long-term employment. Contingent workers may be hired by "staffing firms" which may include a temporary employment agency or a contract firm. *See* Guidance. Regarding contract firms, the Guidance notes that under a variety of arrangements, a firm may contract with a client to perform a certain service on a long-term basis and place its own employees, including supervisors, at the client's work site to carry out the service. *Id.* Examples of contract firm services include security, landscaping, janitorial, data processing, and cafeteria services. *Id.* The Guidance also notes that like a temporary employment agency, a contract firm typically recruits, screens, hires, and sometimes trains its workers. *Id.* The contract firm sets and pays the wages when the worker is placed in a job assignment, withholds taxes and social security, and provides workers' compensation coverage. *Id.* The primary difference between a temporary agency and a contract firm is that a contract firm takes on full operational responsibility for performing an ongoing service and supervises its workers at the client's work site. *Id.*

In the Guidance, we also recognize that a joint employment relationship may exist where both the agency and the staffing firm may be deemed employers. *Id.* A determination of joint employment requires an assessment of the comparative amount and type of control the "staffing firm," and the agency each maintain over complainant's work. *Id.* Thus, a federal agency will qualify as a joint employer of an individual if it has the requisite means and manner of control over the individual's work under the Ma criteria, whether or not the individual is on the federal payroll. *Id.*

The record shows that complainant was enrolled in the SEE Program sponsored by the American Association of Retired Persons (AARP).<sup>1</sup> The SEE Program was later transferred to the National Older Workers' Career Center (NOWCC). Complainant was interviewed by a representative from the AARP, contacted by an agency representative regarding his selection to the position and advised by the AARP that he would work for 20 hours per week in the agency's Region VIII Indoor Air and Radon Program. Complainant's position was expected to be funded from August 21, 2000 through August 31, 2001. However, complainant learned on January 3, 2001, that his position would no longer be funded due to budget constraints. Complainant was advised that he would be terminated effective January 26, 2001.

Complainant states that prior to starting his position with the agency he received paperwork that indicated that he was not a federal employee and had limited duties. Complainant states that as a SEE enrollee he did outreach for the agency's Radon/Indoor Air programs. Complainant states that he was responsible for staffing public information booths at conventions of Homebuilders and Realtors. Complainant also set up meetings with HUD, state agencies, housing authorities and nonprofit organizations. Complainant states that as a general rule he decided how to carry out his assignment and did not receive day to day supervision. Complainant also received his salary through the SEE Program.

Upon review of the record, we find that the evidence shows that complainant was not an employee of the agency. The SEE Program representative was responsible for interviewing and placing complainant in the agency, determining his hours of duty and level of pay, therefore, complainant was a participant in the SEE Program and not an employee of the federal government. Moreover, complainant knew that his position was a temporary grant funded position which did not afford him with the same opportunities and rights as a federal employee. In addition, we find that the agency was not a joint employer of complainant since it did not have sufficient control over the means and manner of complainant's work.

Accordingly, the agency's decision dismissing the complaint for failure to state a claim was proper and is AFFIRMED.

**Statement of Rights -- On Appeal Reconsideration (M0701)**

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which 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.

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the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

<sup>1</sup>According to the agency, in the Environmental Programs Assistance Act of 1984, Congress directed the agency to administer the SEE Program. The agency is authorized to award grants or cooperative agreements to eligible nonprofit organizations. The recipients of the grant funds offered employment opportunities in environmental programs to persons at least 55 years of age.

*Lealon E. Wyatt, Jr., Complainant, V. Glenn L. McCullough, Jr., Chairman,*  
*Tennessee Valley Authority, Agency*  
**Equal Employment Opportunity Commission-OFO**  
**Appeal No. 01A44308**  
**Agency No. 0310-2004024**  
**July 26, 2005**

**Related Index Numbers****Ruling**

The EEOC dismissed a disability claim from a worker employed by a company under contract to the Tennessee Valley Authority. The worker was not an employee of the agency, so he had no standing to bring the complaint.

**Meaning**

Workers under contract to a federal agency may not be able to assert EEO claims if they suspect discrimination. Under 29 CFR 1614.103, a complaint does not state a claim if the complainant is not a federal employee.

**Case Summary**

The agency hired a company to remove fly ash from one of its facilities. The company's foreman discharged one of the workers for allegedly failing a drug test. The worker filed an EEO complaint, claiming that his dismissal was discriminatory on the basis of disability (spastic colon). The EEOC observed that the worker was not actually an agency employee, and that under Section 1614.103, a complaint does not state a claim if the complainant is not a federal employee. Because the worker was not a federal employee, the EEO dismissed the complaint for failure to state a claim.

Under the agency's drug policy, a first-time positive drug test result leads to a three-year restriction on agency hiring and contract work. The worker argued that because of the agency's three-year ban on hiring and contract work, it exercised sufficient control over his future employment to render him an agency employee. The commission was not persuaded, stating that according to precedent, a drug policy action is insufficient to transform the worker into an agency employee.

**Full Text****Decision**

Complainant filed an appeal with this Commission from the May 10, 2004 agency decision, dismissing his complaint for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1) on the grounds that complainant was not an employee of the agency. The

agency also dismissed the complaint on the alternative grounds that complainant failed to contact an EEO Counselor within the 45-day requisite time limitation period.

In his complaint, complainant alleged that he was discriminated against on the bases of age (64) and disability (spastic colon) when he was terminated by the agency on July 2, 2003, and notified by agency police that he was restricted from agency sites for three years beginning July 2, 2003.

In dismissing the complaint for failure to state a claim, the agency stated that complainant was not an agency employee but worked for TransAsh, an agency contractor. The agency stated that it did not have control over complainant such that he could be found to be an agency employee. The agency also noted that the agency's drug and alcohol policy, specifically Item A of Section 8, governed Resulting Actions for Confirmed Positive Test Results for Contractors and provided that first-time positive test results will normally lead to immediate removal from the agency worksite and to a three-year restriction on agency hiring and contract work.

On appeal, complainant alleged that TransAsh terminated him and replaced him with a younger employee. He asserts also that he was an agency employee because of the control the agency has over his past, current and future employment and because the agency's conduct constitutes an agency relationship with TransAsh.

EEOC Regulation 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complainant from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by the agency because of race, color, religion, sex, national origin, age or disabling condition. *See* 29 C.F.R. §§ 1614.103, .106(a). Accordingly, a complaint may be dismissed for failure to state a claim when the complainant is not an employee or applicant for employment with the federal government.

The Commission has applied the common law of agency test to determine whether a complainant is an agency employee under laws enforced by the EEOC. *See Ma and Zheng v. Department of Health and Human Services*, EEOC Appeal No. 01962390 (June 1, 1998) (*citing Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-24 (1992)). Specifically, the Commission will look to the following non-exhaustive list of factors: (1) the extent of the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision, (3) the skill required in the particular occupation; (4) whether the "employer" or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or by the job; (7) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the "employer"; (10) whether the

worker accumulates retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. *See id.*

In *Ma*, the Commission noted that the common law test contains, "no shorthand formula or magic phrase that can be applied to find the answer ... [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.* The Commission in *Ma* also noted that prior applications of the test established in *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979), using many of the same elements considered under the common law test, was not appreciably different from the common law of agency test. *See id.*

The Commission's Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002 (Dec. 3, 1997) (hereinafter, Guidance), addresses the application of Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and the Equal Pay Act (EPA) to individuals placed in job assignments by temporary employment agencies and other staffing firms, i.e., "contingent workers." The term "contingent workers" generally refers to workers who are outside an employer's "core" work force, such as those whose jobs are structured to last only a limited period of time, are sporadic, or differ in any way from the norm of full-time, long-term employment. Contingent workers may be hired by "staffing firms" which may include a temporary employment agency or a contract firm. *See* Guidance. Regarding contract firms, the Guidance notes that under a variety of arrangements, a firm may contract with a client to perform a certain service on a long-term basis and place its own employees, including supervisors, at the client's work site to carry out the service. *Id.* Examples of contract firm services include security, landscaping, janitorial, data processing, and cafeteria services. *Id.* The Guidance also notes that like a temporary employment agency, a contract firm typically recruits, screens, hires, and sometimes trains its workers. *Id.* The contract firm sets and pays the wages when the worker is placed in a job assignment, withholds taxes and social security, and provides workers' compensation coverage. *Id.* The primary difference between a temporary agency and a contract firm is that a contract firm takes on full operational responsibility for performing an ongoing service and supervises its workers at the client's work site. *Id.*

In the Guidance, we also recognize that a joint employment relationship may exist where both the agency and the staffing firm may be deemed employers. *Id.* A determination of joint employment requires an assessment of the comparative amount and type of control the "staffing firm," and the agency each maintain over complainant's work. *Id.* Thus, a federal agency will qualify as a joint employer of an individual if it has the requisite means and manner of control over the individual's work under the *Ma* criteria, whether or not the individual is on the federal payroll. *Id.*

The record contains a copy of a complaint which complainant filed with the Humphreys Circuit Court in Tennessee, wherein complainant alleged that he was employed as an equipment operator for TransAsh and that on July 2, 2003, the TransAsh foreman-

supervisor terminated him. The record reveals that complainant was removed by TransAsh because he tested positive for drug test results. The record reveals also that the agency had contracted with TransAsh for the disposal of fly ash from its Johnsonville Fossil plant. The record further reveals that pursuant to a contract between TransAsh and the agency, TransAsh was responsible for personnel employed to perform the disposal work. The record reveals that TransAsh was also responsible for evaluating the content of the fly ash, determining a proper site for disposal, obtaining any permits, leases, and rights required for disposal, developing a phased approach for removal, providing all equipment and personnel required to remove the fly ash, excavating and hauling the fly ash to the disposal site, maintaining all haul roads, and keeping all records. The record reflects that TransAsh was responsible for providing all equipment and training to perform the disposal work. The record reveals that complainant received no salary, leave, or insurance benefits from the agency and that the agency made no payments to complainant under the contract or withheld any monies from complainant's paycheck for tax or other purposes. The record reflects that TransAsh was responsible for complying with all local, state and federal laws concerning their employees.

Under the circumstances of this case, we find that complainant was not an employee of the agency, either solely or jointly with TransAsh, a private company, and therefore has no standing in this matter. Complainant was a heavy equipment operator employed by TransAsh which had a contract with the agency. TransAsh exercised the right to control complainant and complainant was not supervised or fired by the agency but by TransAsh. TransAsh directed complainant's work and provided the equipment. In addition, there is no evidence that complainant had Social Security contributions paid for by the agency or that he received federal insurance, leave, workers' compensation or retirement benefits from the agency. Moreover, the existence of the agency's drug and alcohol policy which provided for the removal of the employee of an agency contractor did not transform complainant into an employee of the agency. *See Powell v. Department of the Army*, EEOC Request No. 05930076 (August 2, 1993) (agency not an employer although it provided licensing and certification functions for family child care providers and set safety prerequisites for care providers).

Accordingly, the agency's dismissal of the complaint is AFFIRMED.<sup>1</sup>

#### **Statement of Rights -- On Appeal Reconsideration (M0701)**

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. *See* 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. *See* 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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 (S0900)**

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 (Z1199)**

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. *See* Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

<sup>1</sup>Because of our disposition, the alternative grounds for dismissal need not be addressed.

**Regulations Cited**

**29 CFR 1614.107(a)(1)**

**29 CFR 1614.103**

**Cases Cited**

**EEOC Appeal No. 01962390**

**503 U.S. 318**

**613 F.2d 826**

**EEOC Request No. 05930076**

**EEOC Notice No. 915.002**

**TAB 6**

## CASE STUDIES UTILIZING FACTOR ASSESSMENTS

The Equal Employment Opportunity Commission's Office of Review and Appeals decides whether "contingent workers" are considered employees of the agency for the purpose of accessing the federal sector EEO discrimination formal complaint process. The following case summaries identify the EEOC factors considered, information obtained, and analyses performed to reach findings for each case. In reviewing these case summaries you should note the following:

- 1) How many of the factors were considered;
- 2) For each factor considered, what documentary and statement sources were likely used to establish the facts; and
- 3) What analyses were performed to resolve conflicts between documents or statements to reach conclusions?

Finally, in reviewing the case summaries, please take note of how conflicting information is resolved. For example, for most factors, applicable information contained in the contract or agency/contractor work plan is identified. This contractual information may at times conflict with actual witness statements and work documents such as work assignment sheets, appraisals, or disciplinary records. When such conflicts occur, the EEOC will examine the amount of control the agency exercised over the worker based on the actual worker/agency relationship, rather than only relying on the four corners of the contract. The actual worker/agency relationship is paramount.

### ***CASE 1 - Theresa D. Chamberlain, Complainant, v. Dr. Francis J. Harvey, Secretary, Department of the Army, Agency, Appeal No. 01A61315, June 26, 2006***

Chamberlain worked as an occupational therapist at an Army medical facility. A contractor CM/SE employed Chamberlain for this work. In addition to paying Chamberlain and withholding taxes, CM/SE provided Chamberlain insurance and retirement benefits. These facts demonstrated that CM/SE employed Chamberlain. The issue that remained, however, was whether the Department of the Army maintained sufficient control over Chamberlain's employment such that it could also be considered Chamberlain's employer, in other words a "joint employer" of Chamberlain.

The EEOC found that the Army's level of control over Chamberlain's employment was sufficient to qualify the agency as an employer. Therefore, CM/SE and the Department of Army were considered "joint employers".

In support of this ruling the EEOC noted the following:

1. Although the agency denied any management authority, the record showed that an agency official exercised considerable supervisory authority over the complainant. This official:
  - conducted verbal counseling with complainant, negotiated alternative work hours in order to accommodate Chamberlain,
  - disciplined complainant when he felt that her attendance record was unsatisfactory, and "stated he should have terminated her some time ago."
2. The agency provided training, supervision, workspace and equipment, and maintained careful records of complainant's work hours and absences.
3. The agency's employment policy for Occupational Therapists read, in relevant part, "[t]his contract is a personal services contract and intended to create an employer-employee relationship between the Government and the individual [Health Care Providers]."

The EEOC concluded that the Department of the Army was a "joint employer" of Chamberlain since it: a) provided her agency specific training as well as all equipment, supplies, and the workspace she used to fulfill her work duties; b) directed and monitored her duties and attendance, including the negotiation of an alternative work schedule; and c) conducted verbal counseling and discipline.

***CASE 2 - Nancy Baker, Complainant v. Dr. Francis J. Harvey, Secretary, Department of the Army, Appeal No. 01A45313, March 16, 2006***

On three separate occasions, Baker applied but was not selected for a Licensed Practical Nurse (LPN) contract position offered through Dyncorp Technical Services LLC, a contractor to the Department of Army. The contract between Dyncorp and the Army identified the LPN as "contract personnel" and specifically provided that "contract personnel are employees of the contractor and under its administrative supervision and control." Dyncorp provided wages, benefits and leave for the LPN. Notwithstanding these facts, for the following reasons the EEOC ruled that the Department of the Army retained sufficient control over the LPN to qualify as a joint employer.

1. The Army controlled the selection process for the LPN position.
  - Dyncorp forwarded the resumes or applications of prospective candidates to the Army, which approved or disapproved the candidates.
  - Dyncorp sent correspondence along with Baker's resume to the Army's representative identifying Baker as a viable candidate for the LPN position.

- The Army disapproved the employment of Baker stating that Baker's resume "shows clearly that she is NOT someone we want and that [the Regimental Surgeon] does not believe a woman should fill the position over a male."
  - Dyncorp's role in the selection process was limited to "identifying potential candidates only" and that it did not "have the authority to unilaterally employ any personnel without specific instruction and/or approval from the customer [the Army]."
2. The Army retained supervisory control over the LPN position.
- A Dyncorp Physician's Assistant (PA) along with an Army employed Flight Surgeon, supervised the LPN.
  - The Flight Surgeon retained supervisory authority over both the PA and the LPN. As the senior medical personnel, the Army Flight Surgeon retained ultimate authority and accountability for tasks assigned to, and work performed by the PA and LPN, and any other subordinate medical staff.
3. All work the LPN performed was on agency premises using agency equipment and supplies.
- The EEOC concluded that these factors were sufficient to sustain a finding that the Army exercised sufficient control over the LPN to render it a joint employer. Therefore, EEOC ruled that Baker may be deemed an applicant for employment of the Army for the purpose of invoking the protection of Title VII.

**CASE 3 - *Christine M. Crogan v. Dr. Francis J. Harvey, Secretary, Department of the Army*, Appeal No. 01A62300, August 28, 2006**

Crogan was employed by Westaff (USA), Inc., a national staffing firm as a Warehouse Specialist located at the Army's Ft. McCoy. On December 28, 2005, Crogan filed a formal EEO complaint with the Army alleging she had been discriminated against on the basis of her sex (female) when, from June to September 2005, she was sexually harassed and subjected to a hostile work environment. Crogan asserted that she contacted management at Westaff regarding the incidents. Crogan was terminated on September 22, 2005.

Westaff paid Crogan. The Army's contract with Westaff and Crogan's Statement of Work provided that the supervision and control of Crogan's work rested with Westaff. No one from the Army supervised her work. For the following reasons the EEOC found that the Army exercised sufficient control over Crogan's position to qualify as a joint employer of Crogan.

- Westaff managers testified that contrary to the contract and work statement, Crogan's "immediate supervisors were Army personnel stationed at Ft. McCoy." There was no on-site Westaff supervisor.
- Record demonstrated that Army officials directed Crogan's daily work, provided her with the requisite training to do the job, monitored her time and attendance, approved her leave, and prepared her performance evaluations.
- Army supervisors reprimanded Crogan for directing work-related concerns to Westaff, instructing her that all such concerns should be addressed to agency management.
- Army officials periodically threatened Crogan's job, stating that she was "one phone call away," implying that a call from the agency to Westaff would result in termination.

Taking into account all of the above factors, the EEOC concluded that the Army exercised sufficient control over Crogan's position to qualify as a joint employer.

**CASE 4 - *James R. Mooney v. Michael Chertoff, Secretary, Department of Homeland Security*, Appeal No. 01A45921, March 16, 2005**

Mooney alleged that he was subjected to discrimination on the bases of race (Caucasian) and disability when:

- 1) In October 2003, an agency Supervisory employee directed him to immediately go and provide technical support to an outlying station without regard to his physical disability;
- 2) On December 12, 2003, when his Northrop Grumman Corporation supervisor issued a Performance Improvement Plan (PIP).
- 3) On an on-going basis, SPA spoke to peers, subordinates, and employees in Spanish.

At the time of his complaint Mooney worked at the agency as a Systems Technician under a contract Northrop Grumman had with the agency. Northrop Grumman paid Mooney's wages, benefits, and leave. The EEOC found for the following reasons that the agency exercised sufficient control over the Systems Technician to qualify as a joint employer with Northrop Grumman.

1. The agency retained supervisory control over Mooney's position.
  - looking at Mooney's length of time in his position, and the skills required revealed that Mooney began working at the Del Rio Border

Patrol in June 1996, as a System Technician. In the almost eight years that he had worked, five different contracting companies held the Legacy/INS contract for the position, and Mooney always retained his position.

- Mooney's duties included, but were not limited to, maintenance of the Del Rio Sector Novell computer network. This included file servers, computer installation, desktop maintenance, workstation configuration and end user support.
- the person who supervised Mooney had been the agency's Automated Data Processing (ADP) Department supervisor since 1999. The supervisor directed all the ADP operations for government employees and contractors, and assigned Mooney work assignments via e-mail and verbal instructions. All computer related support calls were directed exclusively to the supervisor's office. The supervisor instructed all ADP government and contract employees that he would "personally determine who handled what work assignment, in what order, and in what time frame." The supervisor also submitted comments and recommendations for Mooney's performance appraisal.
- Mooney never contacted his contracting company's regional manager for clarification on work assignments. He directed all of his questions to the agency supervisor for further guidance.

2. All work performed by the Systems Technician was performed on agency premises using Agency equipment and supplies.

Based on the foregoing, the EEOC concluded that the agency retained sufficient control over the Systems Technician position to qualify as a joint employer. Accordingly, for purposes of exercising his rights under Title VII and the Rehabilitation Act, Mooney was found to be an employee of the agency.

**CASE 5 - *Sandra Maynard v. Gordon R. England, Secretary, Department of the Navy*, Appeal No. 01A20699, June 25, 2002**

On March 15, 2000, Maynard accepted a part time position as an Environmental Analyst with Flex-Tech Professional Services, Inc., a contract service provider for the Naval Air Station (NAS). Flex-Tech's contract called for it to provide the Navy with personnel to manage all aspects of the Natural Resources and Cultural Resources Program. Under the contract, Maynard worked at the agency's NAS Corpus Christi in the Public Works (PW) Department, providing environmental analysis services. Maynard worked closely with an agency supervisory Environmental Engineer. NASA's

supervisory Environmental Engineer was designated as a "Customer Representative" (SEECR) to oversee its "contract" personnel.

On January 9, 2001, funding for Maynard's position had been exhausted and as a result, Maynard was terminated. Believing that she was a victim of discrimination, Maynard contacted an EEO Counselor and subsequently filed an EEO complaint on August 2, 2001.

Maynard's work was negotiated for a set period, to be performed at a specified location. The agency SEECR closely supervised Maynard. The SEECR, not Flex-Tech, recruited, interviewed and selected Maynard for her position. Flex-Tech had little, if any input into Maynard's day-to-day assignments.

The Flex-Tech employment contract shows that it employed Maynard part time, providing wages, benefits, and leave. Nonetheless, the agency, via the SEECR controlled essentially all aspects of Maynard's day-to-day work. The SEECR assigned Maynard to an office near her own, and provided Maynard with all of her assignments. Maynard did not work independently. She received supervision from no one other than the SEECR.

The EEOC concluded that given the relationship between Maynard and the SEECR, and the cooperative process used by the agency and Flex-Tech regarding personnel actions, the agency exerted the degree of control necessary to qualify it as a joint employer with Flex-Tech. Therefore, Maynard was considered an "employee" of the agency for the purpose of invoking Title VII protection.

**CASE 6 - *Cecelia A. Fields v. David Bibb, Acting Administrator, General Services Administration*, Appeal No. 01A51814, April 14, 2006**

Fields' complaint concerned her termination. Prior to her termination in May 2002, Fields performed clerical and secretarial work exclusively at the agency's Charleston office. She had a long-term, continuous relationship with the agency performing since 1993. The agency initially hired Fields as a federal employee. When the agency decided to use contractors for the same work, Fields was released from federal employment with the agency but continued to work for the agency as a contract employee at the behest of the agency. She worked under a contract awarded to Lionel.

The agency argued that Fields was not an employee of the Agency. In support of this the agency noted that Lionel paid Fields' wages, benefits and leave; and that the contract between Lionel and the agency stated that there was no direct employee/employer relationship between contractor employees and the federal government. Despite the contractual language the EEOC ruled that the following demonstrated that the agency retained sufficient control over the Fields to qualify as a joint employer.

1. Although the contract called for Lionel to control or oversee Field's performance, Lionel did not have an office in Charleston, nor did Fields' supervisor at Lionel ever meet with Fields.

2. The agency personnel Fields primarily worked for most was the agency's Property Manager. The agency property manager:
  - a. assigned Fields' work and provided Fields direction.
  - b. secured and approved a raise for Fields while Fields was working with Lionel.
  - c. gave Fields a letter of warning with a copy to Lionel
3. The agency supplied the office and equipment for her work.
4. Fields worked in part on contracting and procurement, a core function of the Charleston office.
5. Fields had set reporting hours of 8:00 to 4:30 Monday through Friday. Both leave slips and Fields' statement show that the Property Manager approved Fields' leave requests
6. The agency terminated Fields' services by telling Lionel it was dissatisfied with her. When asked about who decided to end Fields' job at the Charleston office, the President of Lionel responded that there was no decision, rather, the customer – property manager of the agency – asked that Fields be removed, and Lionel did so.

**CASE 7 - *Larry R. Cornelius v. Condoleezza Rice, Secretary, Department of State*, Appeal No. 01A62520, August 22, 2006**

Cornelius is a uniformed security officer assigned to the agency's headquarters in Washington, D.C. Cornelius was an employee of Inter-Con Uniformed Protection Services (Inter-Con), an agency contractor who provided uniformed protective services for all agency facilities. Cornelius contacted the EEO Counselor regarding the actions of the Deputy Project Manager, also an employee of Inter-Con. In his complaint, Cornelius alleged that the actions the Deputy Project Manager took constituted discrimination against him on the bases of race, disability, age, and reprisal (prior protected EEO activity).

For the following reasons, EEOC concluded that Cornelius was not an employee of the agency.

1. The contractor, Inter-Con, determined and directly paid Cornelius' salary.
2. Inter-Con provided Cornelius with leave and other benefits.
3. Inter-Con had authority to control the means and manner of Cornelius' work.
4. The alleged discriminating official was an employee of Inter-Con.

Cornelius asserted that the mission of Inter-Con's security staff, i.e., to protect national security, demonstrated that the staff effectively acted as the agency's police force. The EEOC ruled that this fact was not sufficient to establish that Cornelius was a federal employee.

***CASE 8 - Wellington J. Williams v. Stephen L. Johnson, Acting Administrator, Environmental Protection Agency, Appeal No. 01A44018, July 7, 2005***

Williams alleged that he was subjected to discrimination when he was terminated from the Senior Environmental Employment (SEE) Program effective January 26, 2001. The American Association of Retired Persons (AARP) sponsored the SEE program. A representative from AARP interviewed Williams. AARP advised Williams that he would work 20 hours per week in the agency's Region VIII Indoor Air and Radon Program. Williams' position was expected to be funded from August 21, 2000 through August 31, 2001. However, Williams learned on January 3, 2001, that his position would no longer be funded due to budget constraints. Williams was advised he would be terminated effective January 26, 2001.

Prior to starting his position with the agency Williams received paperwork that indicated he was not a federal employee and had limited duties. Williams received his salary through the SEE program. As a SEE enrollee he did outreach for the agency's Radon/Indoor Air programs. Williams stated that he was responsible for staffing public information booths at conventions of Homebuilders and Realtors. Williams also set up meetings with HUD, state agencies, housing authorities and nonprofit organizations. Williams stated that as a general rule he decided how to carry out his assignment and did not receive day-to-day supervision.

The EEOC ruled that Williams was not an employee of the agency. In addition to the foregoing, EEOC found the following:

1. The SEE Program representative was responsible for interviewing and placing Williams in the agency, determining his hours of duty and level of pay, therefore, Williams was a participant in the SEE Program and not an employee of the federal government.
2. Williams knew that his position was a temporary grant funded position, which did not afford him with the same opportunities and rights as a federal employee.
3. The agency was not a joint employer of Williams since it did not have sufficient control over the means and manner of William's work.

**CASE 9 - *Lealon E. Wyatt, Jr. v. Glenn L. McCullough, Jr., Chairman, Tennessee Valley Authority*, Appeal No. 01A44308, July 26, 2005**

Wyatt alleged he was discriminated against on the bases of age and disability (spastic colon) when he was terminated by the agency on July 2, 2003, and notified by agency police that he was restricted from agency sites for three years beginning July 2, 2003. Wyatt acknowledged in a complaint filed with the Humphreys Circuit Court in Tennessee that he was employed as an equipment operator for TransAsh and that on July 2, 2003, the TransAsh foreman-supervisor terminated him because he tested positive for drugs.

The agency had contracted with TransAsh for the disposal of fly ash from its Johnsonville Fossil plant. Pursuant to a contract between TransAsh and the agency, TransAsh was responsible for personnel employed to perform the disposal work. TransAsh was also responsible for evaluating the content of the fly ash, determining a proper site for disposal, obtaining any permits, leases, and rights required for disposal, developing a phased approach for removal, providing all equipment and personnel required to remove the fly ash, excavating and hauling the fly ash to the disposal site, maintaining all haul roads, and keeping all records. TransAsh was also responsible for providing all equipment and training to perform the disposal work, and for complying with all local, state and federal laws concerning their employees. Wyatt received no salary, leave, or insurance benefits from the agency and the agency made no payments to Wyatt under the contract or withheld any monies from Wyatt's paycheck for tax or other purposes.

EEOC ruled that Wyatt was not an employee of the agency, either solely or jointly with TransAsh. In its ruling EEOC emphasized the following:

1. Wyatt was a heavy equipment operator. He was employed by TransAsh, which had a contract with the agency.
2. TransAsh exercised control over Wyatt's work by directing his work and providing the equipment to perform his job.
3. Wyatt was not supervised or fired by the agency, but by TransAsh.
4. The agency did not pay Social Security contributions for Wyatt, nor did Wyatt receive federal insurance, leave, workers' compensation or retirement benefits from the agency.
5. The existence of the agency's drug and alcohol policy, which provided for the removal of the employee of an agency contractor, did not transform Wyatt into an employee of the agency.

**CASE 10 - *Larry Williams v. Dr. Francis J. Harvey, Secretary, Department of the Army*, Appeal No. 01A51807, July 7, 2005**

Williams alleged that he was subjected to discrimination on the basis of race when he was issued a termination letter dated July 29, 2004 that became effective August 2, 2004. CORDEV, Inc. hired Williams to perform under government contract No. DAAB32-99-C-1014 as the Site Manager and the senior CORDEV employee. Under section H, Special contract Requirements, per contract clause 52.000-4028, Contract Personnel Administration (ATS), CORDEV had full responsibility and control of all its employees working under this contract at Fort Buchanan.

The agency maintained that it did not evaluate contract employee performance. It cited contract clauses C.4.9, C.4.10 and C.4.10.3, which provided: "Management at CORDEV, Inc. retained control over work performance and disciplinary actions against any CORDEV employee[s]." Id.

CORDEV directly paid Williams' salary. CORDEV provided Williams with vacation time, medical insurance and retirement plans.

Although the U.S. Army furnished contractors with office space and office equipment, CORDEV, Inc. provided the equipment, such as vehicles, uniforms, tools, etc., necessary for them to carry out their job functions.

CORDEV had sole authority to terminate Williams' employment. Based on the foregoing, EEOC concluded that the agency was not an employer or joint employer of Williams in light of not having sufficient control over the means and manner of Williams' work.

**CASE 11 - *X-abian Montsho Jahi v. Carlos M. Gutierrez, Secretary, Department of Commerce*, Appeal No. 01A50035, November 29, 2005**

Based on the following the EEOC ruled that Jahi was not an agency employee:

1. Jahi worked as a Special Police Officer for Coastal International Security, Inc. Coastal hired, paid, granted employee benefits, and terminated Jahi.
2. Coastal retained ultimate disciplinary and supervisory authority over Jahi. Coastal provided an on-site Program Manager who was responsible for ensuring that the Special Police Officers were performing their duties as specified in the contract.
3. Coastal's Project Manager, a non-federal employee, confirmed that he was responsible for issuing Jahi's wages and collecting federal, state, and social security taxes from his wages. The Project Manager also noted that he was responsible for all special police officers' performance on the contract, including issuing work schedules, directing assignments, approving leave, and terminating employees.

4. Jahi did not receive federal retirement benefits, accrue sick or annual leave or participate in the Thrift Savings Program.
5. Finally, the record contains a November 24, 2003 letter from the Director of Human Resources at Coastal informing Jahi that Coastal had completed a comprehensive investigation of the allegation that Jahi failed to inspect a vehicle. The letter informed Jahi that the investigation revealed that he did not stop a vehicle in order to conduct an inspection, which violated post orders and verbal instructions of the Project Manager. As a result, the letter stated that Jahi's employment as a security officer with Coastal was terminated.

**CASE 12 - *Charles E. Lawhorn, Phelps D. Vann v. Thomas E. White, Secretary, Department of the Army*, Appeal Nos. 01A23281, 01A23301, October 29, 2002**

Raytheon Aerospace, LLC, employed Complainants to work as heavy equipment operators under a contract with the agency. Raytheon terminated complainants and they filed individual employment discrimination complaints.

Complainants contended that for the following reasons they should have been considered employees of the agency:

1. Agency officials “call[ed] the shots” with respect to job descriptions, rates of compensation, layoffs, and terminations of Raytheon contract employees.
2. The agency was responsible for a hostile work environment by making disparaging remarks about minorities, and prohibiting them from using the break room.
3. Complainant Vann claimed that agency management reviewed their time sheets every day, and complained about any irregularities to their Raytheon supervisor.
4. Agency officials made “binding decisions” regarding job duties and performance, and communicated their demands directly to the employees without the intervention of a Raytheon supervisor.
5. Complainants were required to submit time sheets to the agency officials, who critiqued the amount of time they took to perform each task.
6. The agency had exclusive control over the worksite and facilities, as evidenced by the complainants’ exclusion from the break room.

The EEOC ruled that despite the above, Complainants were not to be considered Agency employees as a result of the following:

1. The Complainants signed “at will” employment agreements with Raytheon. The agreement stated that pay rates may vary if the employees are transferred to a different function.
2. Raytheon paid employees an hourly rate established by calculations based on a “Nationwide Wage Determination” from the Department of Labor. The number of hours worked were controlled by “work orders” from the agency to Raytheon. Raytheon withheld taxes from their paychecks, provided their benefits, and approved all leave requests.
3. The complainants reported to and received work assignments from a Raytheon Worksite supervisor; the complainants' primary duties involved driving repaired vehicles to ensure their road-worthiness. The complainants were evaluated by Raytheon officials without input from agency officials.
4. Since the complainants' duties involved testing agency materials, the agency provided the equipment for them to test. Any reimbursable expenses were paid by the agency to Raytheon – Raytheon was responsible for reimbursing the complainants individually.
5. The complainants were offered a transfer to a different Raytheon work location. Both refused to relocate, and received a written counseling letter for their refusals.

The EEOC concluded that although both complainants claimed that the agency “called the shots” regarding their employment, the Commission found otherwise. The complainants reported to a Raytheon supervisor, were paid by Raytheon, and received all leave and benefits from Raytheon. Although they contended that agency officials directly criticized their performance, attendance, and leave, their formal complaints state that the officials expressed dissatisfaction through their Raytheon supervisor. They never received discipline from the agency, but did receive discipline, and ultimately notice of their termination from the Raytheon supervisor. The Raytheon supervisor was stationed at the worksite with the complainants, and no evidence indicated that the agency had any involvement with their selection. The complainants also did not have the same access to agency facilities, such as the break room, as did agency employees. In sum, the agency did not maintain the means and manner of control over the complainants' day-to-day work necessary to be considered a “joint employer.” The complainants were employees of Raytheon Aerospace, LLC, not the agency.

**CASE 13 - *Stanton V. Parsons v. Gordon R. England, Secretary, Department of the Navy*, Appeal No. 01A14943, July 3, 2002**

Parsons was a Customer Training Specialist at the agency's F/A-18E/F Weapons System and Aircrew Training at the Naval Air Station in Lemoore, California. He worked through a corporate entity

identified as Boeing Company. He claimed that as a result of the influence of the Navy, Boeing terminated him.

The agency argues that as a contractor employee it was not responsible for the alleged discrimination. The agency noted the following:

1. A Boeing Unit Manager for Aircrew Training was Parsons' on-site, first-line supervisor.
2. The contractor exercised exclusive control over every detail of how Parsons performed his job.
3. The contractor paid Parsons salary and provided him with vacation and retirement benefits.
4. The agency had no control over the hiring and firing of contractor employees, and that only the contractor had this control.
5. The contractor provided the training and equipment necessary for Parsons' position.
6. The contractor, not the agency, exercised its employment authority over Parsons when he could not obtain his security clearance. On January 2, 2001, the contractor provided Parsons with an Advance Notification of Layoff because he was unable to obtain a security clearance. On April 10, 2001, the contractor reinstated its layoff notice and advised Parsons that he should seek a position within Boeing that did not require a security clearance.
7. The agency had no involvement in either the security clearance decision or Parsons' employment status with the contractor.

Based on the foregoing as confirmed by records the EEOC concluded that Parsons was not an employee of the agency.

### **Additional Cases Showing Factors Assessed and Indicia in the Record**

**CHARLES SMITH v. ARMY** (MAY 5, 2006). Deemed Federal employee: NO.

*Complaint: terminated from position*

Factors used: 1) extent of employer's right to control the means and manner of worker's performance; 2) kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist w/o supervision; 3) skill required in occupation; 4) whether the employer or the individual furnishes the equipment used and the place of work; 5) the length of time the individual has worked; 6) method of payment, whether by time or job; 7) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation; 8) whether annual leave is afforded; 9) whether the work is an integral part of the business of the "employer"; 10) whether the work accumulates retirement benefits; 11) whether the "employer" pays social security taxes; 12) intention of the parties. (These are from *Ma v. Dept. of Health & Human Services*, EEOC Appeal Nos. 01962390 and 01962389 (May 29, 1998)—OFO decisions use these instead of the *Darden* factors cited in their enforcement guidance, which also applies to private sector).

Indicia relied on in the record:

- 1) Complainant does not dispute that he was hired by SAIC to provide IT and program support under a contract between SAIC and the agency—in his formal complaint, he identifies SAIC and not the agency as his employer
- 2) Record had copy of offer letter from SAIC to complainant which "identifies the rate of pay, informs employee as an employee of SAIC he is entitled to a benefits package."
- 3) Record indicates that complainant is paid directly by SAIC, who is responsible for w/h social security and other taxes from his pay.
- 4) Contract, which refers to those individuals hired to provide IT support as contractors and states that he would not report to an on-site supervisor.
- 5) (Unknown source) "Agency does not afford leave, benefits not provided."

**CHARLES FEREBEE v. NAVY** (NOVEMBER 6, 2007). Deemed Fed employee: NO.

*Complaint: FISC Norfolk failed to investigate his complaints of discrimination filed on July 1, 2006 and August 8, 2006; he was subject to a hostile work environment with respect to assignments of duties.*

Complainant actually claimed to be a joint employee.

Factors used: see above.

Indicia in record:

- 1) “Complainant was a Warehouse Specialist through a corporate entity identified as Management Consulting, Inc. [MANCON], a subcontractor of Prolog, Inc.”
- 2) Statement of Work (Contract No. N00189-06-D-0052), “Record further reflects that contractor personnel of MANCON “performing services under this order will be controlled, directed and supervised at all times by management personnel of the contractor.”
- 3) MANCON Hampton Roads Regional Manager’s response to agency questionnaire, stating “complainant’s supervision remained the responsibility of MANCON; and that MANCON monitored the performance of its employees, including complainant, effected any disciplinary actions and dealt with conduct issues. RM further stated that MANCON paid complainant’s salary and provided him with benefits and leave; and withheld taxes.”
- 4) “During the EEO counseling process, complainant identified himself as a contractor employee of the agency.”

**JOHN BLAKE v. VETERANS AFFAIRS** (JANUARY 14, 2008). Deemed Fed employee: NO.

*Complaint: contract with the agency terminated.*

Factors used: see above.

Indicia:

- 1) Record “supports...complainant was employed by Sterling Medical as a lab technician and given assignments through that company.”
- 2) Supervised by Regional Lab Supervisor, also an employee of Sterling Medical.
- 3) Sterling Medical provided equipment, paid complainant by the hour.
- 4) Agency affirmed that he did not receive a paycheck from the agency, and no taxes withheld.

**JOSE VASQUEZ v. NASA** (FEB. 7, 2008). Deemed Fed Employee: NO.

*Complaint: position he held was eliminated.*

Factors used: See above.

Indicia:

- 1) Complainant was engineer through a corporate entity identified as Jacobs Sverdrup, working under an Engineering Science Contract with the agency.

- 2) Document “ESC Group Needs Tasking.” In Box 1, JACOBS notified Complainant “we were notified by NASA on March 12, 2007 that the International Space Station (ISS) Electrical Power System (EPS) team supporting JSC EA4 would undergo a reduction in funding. Specifically, the support to the EPS Software Task is being eliminated at the end of March.”
- 3) Document “Assessment of Key Factors in Determining Jurisdiction for Persons Seeking Contingent Worker Status” prepared by Director, Office of EO and Diversity.” Director stated that complainant was a contractor working under contract No. NNJO5HI05C. “According to the Director,” complainant’s supervision remained the responsibility of JACOBS; JACOBS monitored the performance of its employees, including complainant. The Director stated that JACOBS was responsible for complainant’s salary and benefits and withheld taxes. JACOBS made the determination to eliminate complainant’s position, not NASA, reporting that during the counselor’s interview with NASA’s Division Chief for Energy Systems, the Division Chief stated that NASA instructed Jacobs that they would need to reduce costs. Jacobs ultimately decided on where to take the reduction; therefore, NASA did not discharge complainant.”
- 4) “Record indicates” that during counseling process, complainant identified himself as a contractor employee of the agency.

**TIFFANY PENDER v. NAVY** (JANUARY 11, 2008). Deemed Fed Employee: NO.

*Complaint: subjected to harassment regarding work assignment and procedure by a coworker; escorted out of the building by her MANCON supervisor and terminated from her contractor position.*

Factors: See above.

Indicia:

- 1) Statement of Work between the agency and MANCON (Contract No. W91CRB-06-D-0041). “According to the contract, MANCON would provide supply and logistics support from Sept. 25, 2006 through Sept. 24, 2007...contractor personnel performing services under this order will be controlled, directed and supervised by all times by management personnel of the contractor.”
- 2) “Record reflects” that MANCON responsible for complainant’s salary and benefits and withheld taxes.
- 3) Copy of MANCON HR specialist’s response to the agency questionnaire concerning complainant’s complaint. According to the specialist, complainant’s supervision remained the responsibility of MANCON; and MANCON monitored the performance of its employees, including complainant, affected any disciplinary actions and dealt with conduct issues.”
- 4) “Furthermore, the record in the case indicates that during the EEO counseling process, complainant identified herself as a contractor employee of the agency.”

**PALMYRA WALTON v. ARMY** (APRIL 20, 2006). Deemed Fed Employee: YES.

*Complaint: hostile work environment, monitoring of leave use and absence, agency personnel changed tour of duty and told her directly; employment terminated.*

Factors: See above.

Indicia:

- 1) CA1 is a vendor that entered into a contract with the agency to provide IT and program support at the agency's Virginia Telecommunications Center...CA1 hired and provided employees to perform specific tasks at the agency.
- 2) With regard to the employees it hired for the agency contract, CA1 determined and paid wages, withheld taxes, conveyed assignments and schedules, provided immediate supervision through an on-site Shift Team Leader, provided task coordination through an on-site Contract Program Manager CPM; issued performance evaluations, and offered and administered health insurance, life insurance and leave benefits.
- 3) Conversely, in reference to the same employees, the agency provided daily monitoring of activities related to oversight of the operational environment; provided all necessary equipment, materials and supplies; reviewed resumes to determine satisfaction of at least minimal technical requirements and had the ability to subject them to review for acceptability at all times; and advised CA1 about whether the workload requirements allowed for leave or schedule changes.
- 4) Contractors are required to identify themselves as contractors to others within the agency.
- 5) A footnote finds that the contract did not require CA1 to provide on-site supervision.
- 6) "Record shows" that agency retained significant supervisory control over complainant— monitoring and questioning whereabouts of complainant on January 13 and recommending her removal from the contract.
- 7) Agency made determinations about suitability at hiring and during the course of employment as well as workload requirements for leave and schedule purposes.

**LOIS CORWYE v. ARMY** (MARCH 23, 2006). Deemed Fed Employee: NO, but had to be remanded for more info.

*Complaint: terminated from secretary position due to "racially motivated mistreatment" by coworkers*

Factors: See above.

Indicia:

- 1) Initial record had no assessment of Factors, so had to be remanded.
- 2) MOU with Franchise Business Activity (FedSource)

- 3) Task Order with FedSource setting forth various services Army Corps Engineers needed performed—filing, organizing correspondence, work processing, faxing, answering phone.
- 4) FedSource obtained services from Kelly Services.
- 5) Agency terminated task order with FedSource when it no longer needed services.
- 6) COTR with FedSource and Chief of Regulatory Branch provided affidavits stating that the service provider/contractors were assigned an Agency Project Officer (APO). APOs given guidelines by FedSource which states that the APOs were not the supervisors of the service providers. Complainant's supervision responsibility of Kelly. Kelly monitored performance, effected discipline and dealt with conduct issues. APOs told to report any problems to the service contractor. Complainant identified in computer as a contractor.
- 7) Complainant filed weekly timecards with Kelly, who paid her by the hour.
- 8) Kelly issued paychecks, withheld tax and FICA, provided benefits.
- 9) Complainant told agency she was taking leave, but had to contact Kelly to make a leave request.

**PHU NGUYEN v. DEPT. OF STATE** (MAY 31, 2006). Deemed Fed Employee: unable to determine, remanded.

*Complaint: Harassment by Task Manager, not addressed by Project Director.*

Factors: see above.

Indicia:

- 1) Agency “stated” that complainant was a contractor employee of Systems Science Corp. International (SSCI), which is a subcontractor of Creative Information Technology Inc (CITI). These two entities had a teaming agreement to “provide maintenance support of the agency’s Passport Systems.” Agency “determined” that SSCI controlled means and manner of complainant’s performance; paid complainant’s salary; provided him with benefits and approved all of his leave requests.
- 2) Copy of “Genera 1 Teaming Agreement” between SSCI and CITI.
- 3) Copies of SSCI Time Sheets.
- 4) Lacking agency analysis concerning factors in Common law of agency test, especially means and manner.

**THERESA CHAMBERLAIN v. ARMY** (JUNE 26, 2006). Deemed Fed Employee: YES.

*Complaint: told had to change hours to stay employed; terminated*

Factors: See above.

Indicia:

- 1) EEO Counselor's report, in which agency official admitted "negotiating" an alternate work schedule, conducting verbal counselings and progressive discipline and stated that "he" should have terminated complainant some time ago.
- 2) Memorandum from agency official recommending her removal from employment and she was removed the next day.
- 3) Choctaw Medical listed complainant on payroll, withheld taxes, provided insurance and retirement benefits.
- 4) "Record demonstrates" that agency provided training, supervision, workspace, equipment and maintained careful records of complainant's work hours and absences.
- 5) The contract stated that it was a personal services contract "intended to create an employer-employee relationship."

**ROBIN DUNN v. DEPT. OF ENERGY** (AUGUST. 14, 2006) Deemed Fed Employee: NO.

*Complaint: sexual harassment*

Factors: See above.

Indicia:

- 1) Complainant does not dispute that she was hired as a contract employee under a contract between the agency and WSRC.
- 2) Copy of the contract, stating, "WSRC shall be responsible for the employment of all professional, technical, skilled and unskilled personnel engaged by WSRC in the work hereunder, and for the training of personnel. Persons employed by WSRC shall be and remain employees of WSRC and shall not be deemed employees of the agency or the Government; however, nothing herein shall require the establishment of any employer-employee relationship between WSRC and consultants or others whose services are utilized by WSRC for the work hereunder."
- 3) "Record indicates" that complainant paid by WSRC, they withheld tax.
- 4) Affidavit from WSRC manager indicating that WSRC determined complainant's performance ratings, promotions, salaries, and benefits and that the agency provided no input as to whom WSRC hired or terminated, and all work directly supervised by WSRC.

**JOSEPH MAJEWSKI v. ARMY** (AUG. 28, 2006) Deemed Fed Employee: YES.

*Complaint: hostile work environment, sexual harassment. (Another contractor coworker also successfully filed on many of the same incidents.)*

Factors: See above.

Indicia:

- 1) A “statement contained in the record” by Westaff USA saying “complainant’s immediate supervisors were Army personnel stationed at Ft. McCoy.”
- 2) Complainant, “through counsel” indicates that “agency officials directed complainant’s daily work, provided him with the requisite training to do the job, monitored his time and attendance, approved his leave, and prepared his performance evaluations.” THE AGENCY HAS PROVIDED NO PROOF TO THE CONTRARY.
- 3) Allegations by complainant that agency officials “reprimanded him” for directing work-related concerns to Westaff, instructing him that all such concerns should be addressed to agency management, and alleged that periodically officials would threaten his job, saying he was ‘one phone call away’ implying that a call from the agency to Westaff would result in termination.

**STEVEN GLOVER v. ARMY** (JULY 21, 2006) Deemed Fed Employee: NO.

*Complaint: COTR “influenced” a hiring manager for a contractor not to hire him for a private project.*

Factors: See above.

Indicia:

- 1) Agency determination that complainant was an employee of ITT Industries, contractor personnel supervised him and appraised job performance, paid salary and benefits and withheld taxes.
- 2) Complainant identified job as “Civil Contractor” and indicated his duty organization is ITT Industries.
- 3) Record contains copy of offer letter from ITT to complainant identifying rate of pay and informs him that as an employee of ITT, he would work on the Fort Bragg project.
- 4) Affidavit from HR manager for ITT which states that his work was supervised by ITT employees, who also prepared his performance appraisals and paid salary and benefits and had the right to terminate his employment at any time with or without cause.
- 5) Record showed complainant applied for a job with follow-on contractor LSG but was not selected.

**ALBERT ANTONIO v. NAVY** (FEBRUARY 16, 2007) Deemed Fed Employee: REMANDED.

*Complaint: authority to carry a weapon rescinded by Security Office.*

Factors: See above.

Indicia:

- 1) Agency “stated” that complainant employed as part-time security guard for ITT Industries under contract No. N00604-97-R-0001. NO COPY OF CONTRACT.
- 2) “Note” from ITT HR manager “verifying complainant’s employment with the company and attaching excerpts from the Statement of Work” concerning the right of the government to prohibit contractor personnel from bearing arms at any time.
- 3) Agency fails to adequately describe whether the agency and/or the contractor controlled the day to day work of complainant.

**CECILIA FIELDS v. GSA** (APRIL 14, 2006) Deemed Fed Employee: YES.

*Complaint: racial harassment.*

Factors: usual plus additional factors of whether agency can assign additional work, who sets the hours, and whether the employee can hire and retain assistants.

Indicia:

- 1) Complainant was formerly a civilian, and has always worked in this building. Became a contractor when her job was contracted out (A-76?)
- 2) Agency “concedes” its Charleston office recommend keeping complainant on a contract with Lionel Henderson Co.
- 3) Federal supervisor claimed to have secured a raise for complainant.
- 4) Lionel Henderson Co. doesn’t have an office in the town where the work was done, and their manager had never met complainant.
- 5) Federal Supervisor gave a Letter of Warning to the complainant with a copy to Lionel.
- 6) Leave slips were signed by the federal manager.
- 7) Contract stated that there was no employer/employee relationship between agency and contractors and that they would be supervised by Lionel Henderson staff, but this “not controlling.”

**PATRICIA BROWN v. ARMY** (JUNE 29, 2006) Deemed Fed Employee: YES, based on incomplete record.

Entire case reversed processing, for lack of any determination on factors or evidence as to who paid her, etc.

**TAB 7**

## **SAMPLE ODEO CONTINGENT WORKER DETERMINATIONS**

### **Sample 1**

This is an example of how ODEO will typically draft a jurisdictional analysis. Beyond the basic questionnaire, this analysis contains follow-up questions which are always strategic in gathering important information.

### **Sample 2**

This sample demonstrates the information EEOC looks for and relies upon in making its contingent worker determinations on appeals.

**Sample 1**

Office of Diversity and Equal Opportunity

*Cert Mail No.*

Dewey, Esquire  
Dewey, Cheetam & Howe, LLC  
1111 Driveway Street  
Little Known, USA

Re: Buck Rogers #1 v. Charles F. Bolden, Jr., Administrator, NASA  
Agency Docket No. NCN-XX-XXXX-042

The Office of Diversity and Equal Opportunity has received your complaint of discrimination filed on (Insert Date)<sup>1</sup> for consideration pursuant to Title 29, Part 1614 of the Code of Federal Regulations (CFR). Based on a review of your complaint and the EEO Counselor's Report, we affirm the jurisdictional analysis recommendation made by the Center that you cannot be considered a NASA employee for the purpose of filing a formal discrimination complaint. Therefore, your complaint is dismissed.

Both at the time of the actions giving rise to your present complaint and currently, you are an employee of Contractor Y (formerly y). Contractor Y performs under subcontract to Contractor X (X) to provide lab support for the Parts, Packaging and Assembly Technologies Office.

The U.S. Equal Employment Opportunity Commission (EEOC) defines "contingent workers" as individuals "who are outside an employer's core work force, such as those whose jobs are structured to last only a limited period of time, are sporadic, or differ in any way from the

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<sup>1</sup> Complainant initially contacted ODEO in mid June requesting verification of receipt of the formal complaint. After ODEO verified that the complaint had not been received, it was discovered that Complainant had inadvertently submitted the complaint to the EEOC. Complainant submitted proof of mailing and timeliness issue was waived, granting the complainant an extension.

norm of full-time, long-term employment.” Further, the contingent workforce also includes individuals “who are hired and paid by a ‘staffing firm,’ such as a temporary employment agency or contract firm, but whose working conditions are controlled in whole or in part by the clients to whom they are assigned.” EEOC noted that the “threshold question is whether a staffing firm worker is an ‘employee’ or an ‘independent contractor.’” EEOC has delineated certain factors that a fact-finder should consider in determining whether the individual is considered an employee for purposes of the Federal discrimination statutes.

In Ma v. Department of Health and Human Services, EEOC Appeal No. 01962390 (June 1, 1998) the EEOC has considered such factors as: (1) the extent of the employer’s right to control the means and manner of the worker’s performance; (2) the kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the “employer” or the individual furnishes the equipment used and the place of work; (5) the length of time the individual has worked; (6) the method of payment, whether by time or the job; (7) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation; (8) whether annual leave is afforded; (9) whether the work is an integral part of the business of the “employer”; (10) whether the worker accumulates retirement benefits; (11) whether the “employer” pays social security taxes; and (12) the intention of the parties. Maynard v. Department of the Navy, EEOC Appeal No. 01A20699 (June 25, 2002); Lopez v. Department of the Navy, EEOC Appeal No. 01A03036 (February 23, 2001).

The EEOC also has recognized that “joint employment” relationships may be created whereby both the Federal agency and a staffing or contract firm may be considered “employers.” See EEOC’s Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice 915.002 (12-03-97). This appears to be your representation here. Consequently, “[s]imilar to the analysis set forth above, a determination of joint employment requires an assessment of the comparative amount and type of control the ‘staffing firm’ and the agency each maintained over complainant’s work.” Maynard, EEOC Appeal No. 01A20699.

The EEOC has noted that the “threshold question is whether a staffing firm worker is an ‘employee’ or an ‘independent contractor.’” Of the factors that the fact-finder should consider, the most important is whether the “right to control the means and manner of [the individual’s] work performance rests with the firm and/or its client rather than with the worker.” See EEOC’s Enforcement Guidance, *supra*.

Therefore, the relevant issue in this determination is whether NASA controlled the means and manner of your work. Review of the evidence demonstrates that NASA did not exercise “supervisory control” over your position. Your employer, Perot Systems, maintained supervisory control of the means and manner of your position. Perot Systems pays your

salary, provides your benefits and pays your social security taxes. Your daily tasks were assigned by Mr. Doe, the Contractor Y Operations Manager. Your performance appraisals were issued by Contractor Y Manager, Mr. Nu, who served as your off-site supervisor. Therefore, despite interacting on a daily basis with civil servants to achieve your objectives of your duties, NASA did not provide the means and manner by which you performed your responsibilities.

Therefore, we affirm that you were a contract worker and not an “employee” of NASA for purposes of Title VII.

### **Conclusion**

For the reasons set forth above, we find that you are not an employee for the purposes of formal complaint processing pursuant to the Federal sector employment discrimination regulations. Accordingly, your complaint is dismissed.

The dismissal of your complaint is a final agency decision appealable in writing to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, within 30 calendar days of the date you receive this letter.

### **RIGHT TO APPEAL TO THE OFFICE OF FEDERAL OPERATIONS**

With regard to your right to appeal to EEOC, Section 1614.403 states in pertinent part:

- (a) The complainant, agency, agent, grievant or individual class claimant (hereinafter appellant) must file an appeal with the Director, Office of Federal Operations, Equal Employment Opportunity Commission, at P. O. Box 77960, Washington, DC 20013, or by personal delivery or facsimile [(202) 663-7022]. The appellant should use [the enclosed] EEOC Form 573, Notice of Appeal/Petition, and should indicate what is being appealed.
- (b) The appellant shall furnish a copy of the appeal to the opposing party at the same time it is filed with the Commission. In or attached to the appeal to the Commission, the appellant must certify the date and method by which service was made on the opposing party.
- (c) If an appellant does not file an appeal within the time limits of this subpart, the appeal shall be dismissed by the Commission as untimely.
- (d) Any statement or brief on behalf of a complainant in support of the appeal must be submitted to the Office of Federal Operations within 30 days of filing the notice of appeal. Any statement or brief on behalf of the agency in support of its appeal must be submitted to the Office of Federal Operations within 20 days of filing the notice of appeal. The Office of Federal

Operations will accept statements or briefs in support of an appeal by facsimile transmittal, provided they are no more than 10 pages long.

With respect to the filing of an appeal, Section 1614.402(b) provides:

If the complainant is represented by an attorney of record, then the 30-day time period provided in paragraph (a) of this section within which to appeal shall be calculated from the receipt of the required document by the attorney.

In all other instances, the time within which to appeal shall be calculated from the receipt of the required document by the complainant.

### **RIGHT TO CIVIL ACTION**

With respect to claims of retaliation and discrimination based on age, race, color, religion, sex, handicap, and national origin, you have the right to file a civil action in an appropriate U.S. District Court. If you choose to file a civil action, you may do so:

- within 90 calendar days of receipt of this final decision if no appeal has been filed;
- after 180 calendar days from the filing date of your complaint if an appeal has not been filed and a final decision has not been issued;
- within 90 calendar days of receipt of the Commission's final decision on appeal; or
- after 180 calendar days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.

Please be advised that courts in some jurisdictions have interpreted the Civil Rights Act of 1991 in a manner suggesting that a civil action must be filed WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision. To ensure that your civil action is considered timely, you are advised to file it WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision or to consult an attorney concerning the applicable time period in the jurisdiction in which your action would be filed.

You are further notified that if you file a civil action, YOU MUST NAME THE PERSON WHO IS THE OFFICIAL AGENCY HEAD AS THE DEFENDANT. Agency means the national organization, and not the local office or installation in which you might work. DO NOT NAME JUST THE AGENCY. You must also state the official title of the Agency head. Failure to provide the NAME OR OFFICIAL TITLE of the Agency head may result in the loss of any judicial redress to which you may be entitled. The head of the National Aeronautics and Space Administration is **Charles F. Bolden, Jr., Administrator**.

Filing a civil action will terminate EEOC's processing of your appeal.

Should you have any questions regarding the above, EO Officer is available to assist you.

Brenda Manuel  
Associate Administrator  
for Diversity and Equal Opportunity

Enclosure

cc:

Center/EEO Officer

Complainant #1 w/enclosure

## Sample 2

Office of Diversity and Equal Opportunity

*Cert. Mail No.*

Mr. Complainant Two

1111 Someplace

Hometown, USA

Re: Buck Rogers #2 v. Charles F. Bolden, Jr., Administrator, NASA

Agency Docket No. XXX-XX-XXX-0XX

The Office of Diversity and Equal Opportunity has received your complaint of discrimination filed on June 18, 2007, for consideration pursuant to Title 29, Part 1614 of the Code of Federal Regulations (CFR). Based on a review of your complaint and EEO Counselor's Report, your claim of discrimination is delineated as follows:

Because of your age (DOB: XX/XX/XXXX), and national origin (Faraway Land), the position that you held (Engineer III) International Space Station (ISS) Electrical Power System (EPS), was eliminated effective March 30, 2007.

Your claim, as delineated above, is dismissed pursuant to 29 CFR § 1614.107(a)(1), for failure to state a claim. According to the record, you were a salaried employee of Contractor B (B), Engineering Science Contract (ESC) group, and worked in collaboration with NASA civil servants. Based on a review of your complaint, your EEO Counselor's Report, and the additional evidence you submitted, we affirm the jurisdictional analysis conducted by **Insert name of Center**. Therefore, you are not deemed a Federal civil servant for purposes of formal EEO complaint processing and your complaint is dismissed.

The U.S. Equal Employment Opportunity Commission (EEOC) has applied the common law 'agency' test to determine whether a contract employee (otherwise known as a contingent worker) such as yourself is entitled to have his/her discrimination complaint processed as if he or she were a Federal civil servant. *See Ma and Zheng v. Department of Health and Human Services*, EEOC Appeal Nos. 01962390, 01962389 (May 29, 1998). In so doing, the EEOC has promulgated myriad factors intended to assist agencies to first determine if a

contingent worker is deemed an employee; and second, to determine if the agency maintains control over the means and manner of the employee's daily work.

Based upon an analysis of the factors affecting jurisdiction of your case, it has been determined that a NASA civil servant did *not* maintain control over the means and manner of your daily work, nor did one exercise "supervisory control" over your position. Your immediate manager was B's Manager Ms. Janie Doe and your group lead was B's Lead Mr. Follow Me. Therefore, the day-to-day functions of your position, your work hours, payroll and benefits were controlled by B's employees. Your performance appraisals were also issued by B and you stated that when you received a "Development Needed" requirement to take courses to "develop skills in effective communication" from Follow Me, you complained to your immediate manager, Janie Doe.

You further contend you are a contingent worker because Mr. Help Me, NASA's EPS Manager, affected your supervision and position by reporting to and directing Mr. Follow Me. You state that Mr. Help Me singled you out because of your accent and national origin. However, in your statement to Ms. Personnel, B's Human Resources Manager, dated (**Insert Date**), you stated that it was your understanding that your position was eliminated because your team was being eliminated. In that letter, you did not contest the reason for the layoff; rather, you stated that since you had more time in the position and experience than other team members, the layoff should have followed seniority rules, thereby leaving you in that position and terminating another staff person.

Moreover, you also allege that Mr. Help Me refused to allow you to attend meetings that were pertinent to your position, which hindered you claim your ability to fully perform your duties. However, you also stated that Mr. Help Me gave you a reason for denying your attendance at the meetings. You indicate that Mr. Help Me informed you that several employees indicated they would resign from Contractor AA if you were allowed to participate because they felt threatened by comments you made at a previous meeting. This does not indicate that Mr. Help Me was acting in a supervisory capacity over you. Rather, Mr. Help Me was acting in his capacity as manager of the project.

Because of the highly technical nature of your assignment, it is apparent that you functioned in a more collaborative manner than one that entails close supervision by a NASA civil servant. The collaborative relationship between you and Mr. Help Me is analogous to that which has been addressed by the EEOC in the case of Floro v. Secretary of Army, EEOC Appeal No. 01A12454 (July 10, 2002). In Floro, the Commission determined that the collaborative nature of the relationship between the contractor employee and the agency failed to demonstrate the requisite control of the means and manner of the contractor's employment to allow for jurisdiction to be conferred. Hence, it was determined that the agency lacked jurisdiction to process the Title VII claim.

The evidence affirms that Mr. Help Me did not provide administrative supervision over you; instead Jacobs maintained supervisory control over your position while you worked collaboratively with NASA employees. In fact, in the letter to Ms. Personnel cited above, you also referred to Mr. Help Me as your former customer, not as your supervisor or one with managerial capacity over you. Accordingly, consistent with the EEOC's finding in Floro, your claim is properly dismissed for failure to state a claim.

The dismissal of your complaint is a final agency decision appealable in writing to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, within 30 calendar days of the date you receive this letter.

### **RIGHT TO APPEAL TO THE OFFICE OF FEDERAL OPERATIONS**

With regard to your right to appeal to EEOC, Section 1614.403 states in pertinent part:

- (a) The complainant, agency, agent, grievant or individual class claimant (hereinafter appellant) must file an appeal with the Director, Office of Federal Operations, Equal Employment Opportunity Commission, at P. O. Box 77960, Washington, DC 20013, or by personal delivery or facsimile [(202) 663-7022]. The appellant should use [the enclosed] EEOC Form 573, Notice of Appeal/Petition, and should indicate what is being appealed.
- (b) The appellant shall furnish a copy of the appeal to the opposing party at the same time it is filed with the Commission. In or attached to the appeal to the Commission, the appellant must certify the date and method by which service was made on the opposing party.
- (c) If an appellant does not file an appeal within the time limits of this subpart, the appeal shall be dismissed by the Commission as untimely.
- (d) Any statement or brief on behalf of a complainant in support of the appeal must be submitted to the Office of Federal Operations within 30 days of filing the notice of appeal. Any statement or brief on behalf of the agency in support of its appeal must be submitted to the Office of Federal Operations within 20 days of filing the notice of appeal. The Office of Federal Operations will accept statements or briefs in support of an appeal by facsimile transmittal, provided they are no more than 10 pages long.

With respect to the filing of an appeal, Section 1614.402(b) provides:

If the complainant is represented by an attorney of record, then the 30-day time period provided in paragraph (a) of this section within which to appeal shall be calculated from the receipt of the required document by the attorney.

In all other instances, the time within which to appeal shall be calculated from the receipt of the required document by the complainant.

### **RIGHT TO CIVIL ACTION**

With respect to claims of retaliation and discrimination based on age, race, color, religion, sex, handicap, and national origin, you have the right to file a civil action in an appropriate U.S. District Court. If you choose to file a civil action, you may do so:

- within 90 calendar days of receipt of this final decision if no appeal has been filed;
- after 180 calendar days from the filing date of your complaint if an appeal has not been filed and a final decision has not been issued;
- within 90 calendar days of receipt of the Commission's final decision on appeal; or
- after 180 calendar days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.

Please be advised that courts in some jurisdictions have interpreted the Civil Rights Act of 1991 in a manner suggesting that a civil action must be filed WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision. To ensure that your civil action is considered timely, you are advised to file it WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision or to consult an attorney concerning the applicable time period in the jurisdiction in which your action would be filed.

You are further notified that if you file a civil action, YOU MUST NAME THE PERSON WHO IS THE OFFICIAL AGENCY HEAD AS THE DEFENDANT. Agency means the national organization, and not the local office or installation in which you might work. DO NOT NAME JUST THE AGENCY. You must also state the official title of the Agency head. Failure to provide the NAME OR OFFICIAL TITLE of the Agency head may result in the loss of any judicial redress to which you may be entitled. The head of the National Aeronautics and Space Administration is **Charles F. Bolden, Jr., Administrator**.

Filing a civil action will terminate EEOC's processing of your appeal.

**RIGHT TO COURT APPOINTED COUNSEL**

If you decide to file a civil action under Title VII or under the Rehabilitation Act, and if you do not have or cannot afford the services of an attorney, you may request that the court appoint an attorney to represent you and that the court permit you to file the action without payment of fees, costs, or other security. **The granting or denial of the request is within the sole discretion of the court.** Please note that the right to a court appointed attorney does not extend to those filing civil actions under the ADEA. Moreover, filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action **MUST BE FILED WITHIN EITHER THIRTY (30) OR NINETY (90) CALENDAR DAYS** of the date you receive the Commission's decision.

Should you have any questions regarding the above, the Center EO Officer is available to assist you.

Brenda R. Manuel

Associate Administrator

for Diversity and Equal Opportunity

Enclosure

cc:

Center/EEO Office

Office of Diversity and Equal Opportunity

*Cert. Mail No.*

Robert J. Barnhart, Director

Control and Compliance Division

Office of Federal Operations

Equal Employment Opportunity Commission

P.O. Box 77960

Washington, DC 20507

Re: Buck Rogers No. 2 v. Charles F. Bolden, Jr., Administrator, NASA

Agency Docket No. NCN-00-NASA-000

EEOC Appeal No.

On July 6, 2010, the National Aeronautics and Space Administration (NASA or the Agency) received Buck Roger's (Appellant) letter of June 28, 2010, appealing the January 29, 2010, decision issued by NASA Headquarters Office of Diversity and Equal Opportunity. In accordance with 29 CFR § 1614.403, NASA has enclosed Appellant's complaint file for the present complaint. The following constitutes the Agency's opposition to Appellant's request for reconsideration.

## **I. BACKGROUND**

During the period at issue, Appellant, a contractor, was an employee with Contractor Y. QSS provides laboratory support for the NASA Technologies Office. Appellant filed a formal complaint on September 15, 2009, wherein he claimed that he was subjected to retaliation for protected activity (filing prior EEO complaints) when a contract proposal that he submitted was rejected by Agency officials at the NASA Center.

In a final agency decision dated January 29, 2010, NASA dismissed Appellant's complaint for failure to state a claim pursuant to 29 CFR § 1614.107(a)(1). The Agency applied the common law of agency test defined in Ma v. Department of Health and Human Services, EEOC Appeal No. 01962390 (June 1, 1998), and determined that Appellant was not an Agency employee or a "contingent worker." Specifically, the Agency found that it did not exercise sufficient control over Appellant's position to qualify as the employer or joint employer of Appellant.

Appellant then appealed the dismissal of his complaint to the Equal Employment Opportunity Commission (EEOC) simultaneously with NASA.

## **II. APPELLANT'S APPEAL**

In his appeal comments, Appellant seeks to demonstrate jurisdiction by relying solely upon an internal work instruction. Appellant argues that the mandatory work instruction document shows an improper connection between the government and the contractor. Appellant claims that the work instruction enables the NASA Branch Head to control assignment of the lab manager position in the laboratory, and therein the Branch Head had the capability to exercise direct supervisory control over Appellant and affects the means and manner of [his] employment. According to Appellant, the degree of control exercised by the Branch Head satisfies the standards set forth by the Commission for him to be permitted to have access to the formal EEO complaint process.

In his appeal comments, Appellant provides little facts to clarify or support his central argument, which is that NASA management provided control over his day-to-day function. Appellant argues that NASA management dictated whether he would be promoted within his company or not; that NASA management hired, or influenced the hiring of other employees; and that NASA management controls his work function, but he provides no factual background to support these allegations.

Not only is this evidence absent from the record and is only being raised here for the first time, but as will be demonstrated below, this evidence is insufficient to prove that that NASA management controlled the means and manner of his employment.

## **III. AGENCY RESPONSE**

With respect to the arguments raised by Appellant on appeal regarding his belief that the Agency has jurisdiction over him as a contingent worker this is not the first time that this issue has been brought before this forum. In the case of Buck Rogers v. NASA, Appellant sought reversal of the Agency's dismissal of his formal complaint of discrimination due to his failure to state a claim. In that case, the Agency determined that Appellant, an employee of an Agency contractor, was not entitled to processing of his complaint through the Federal sector EEO process. The Agency came to its conclusion following an extensive evaluation

of the factors set forth in Ma v. Department of Health and Human Services, EEOC Appeal No. 01962390 (June 1, 1998). In that case, the Commission found as follows:

Upon review, we find that the record supports the agency's determination that complainant was not an employee of the agency at the time of the alleged discrimination. ...When weighing all the factors together, we find that the agency showed that complainant was an independent contractor and not an agency employee. Therefore the matter was properly dismissed pursuant to 29 CFR § 1614.107(a)(1) for failure to state a claim. Accordingly, the agency's decision is hereby affirmed.

It is important to note that all of the personnel and interactions extant in the prior complaint are present in the immediate claim as well. However, the Agency nonetheless retained an external EEO counselor to undertake an extensive *de novo* inquiry of the facts and circumstances surrounding Appellant's present claim to determine whether jurisdiction existed. . After an extensive review, the Agency has come to the same conclusion, which had been previously affirmed by Office of Federal Operations (OFO) in 2008. Despite the arguments set forth by Appellant, there is no evidence to demonstrate that NASA management dictates or even influences the day-to-day function of his position. For example, Appellant contends that NASA management NASA Branch Head "controls Mr. Felt's position in the laboratory, and thereby exercises direct supervisory control over Mr. Felt and affects the means and manner of his employment." (Comments at 2). However, it stands to reason that some NASA manager oversees the contract, in order to assure that the Agency's needs and objectives are being fulfilled. Nevertheless, that plenary oversight responsibility is not tantamount to direct control of Appellant's daily work responsibilities. There is, for example, no proof that a NASA manager dictates his time, daily assignments, or even provides performance appraisals. Hence, the Agency, in its correspondence, provided the following explanation:

However, according to the record, Company Y controls when, where and how its workers perform their jobs. Company Y maintains the responsibility for setting hours and providing all benefits to its employees.

Appellant further contends that the contract EEO counselor, who was assigned to perform the contingent worker analysis for the Agency, was biased. Appellant's bald statement is not borne out by the evidence of record. The Agency has also attached a copy of the contingent worker analysis to show how extensive a review was conducted. This analysis included, among other things, the following observation from Appellant's Company Y direct supervisor:

Work assignments come into the lab via an electronic request system from a variety of users, including NASA personnel and employees of a variety of

contractors working on the XYZ contract. I am responsible for initially reviewing work requests and determining the type of services required and the engineer(s) best able to perform these services based on type of skill needed, skill level and availability. I estimate the number of hours it will take to perform the requested work and determine any equipment needed to do the job. I provide this information to the NASA Task Monitor, who will approve or disapprove the work. If the work is approved, I ensure that all related paperwork is completed and processed. I forward the project, along with any physical items needed in order to perform the work (such as particular part or item to be analyzed tested) to the engineer previously identified as best able to perform the work.

It is based on this evidence, which was corroborated by Appellant's direct Company Y supervisors as well as NASA managers that led to the determination that NASA does not control the means and manner of his employment as he contends. This is the evidence of record, and it is consistent with previously established findings both by NASA and the EEOC.

#### **IV. CONCLUSION**

Based on the evidence of record, it has been properly determined that Appellant is not entitled to processing of his EEO complaint through the Federal sector EEO process. Therefore, his complaint was properly dismissed. Hence, NASA respectfully requests that the Commission affirm its dismissal.

If the contingent worker files a Formal Complaint, ODEO will review the EO Counselor's report and will determine whether the underlying documentation and recommendation provided by the Center EO Office and OCC/OGC supports jurisdiction.

1. If ODEO finds that jurisdiction exists, and there are no other regulatory grounds for dismissal, the complaint will be forwarded for formal complaint processing, including investigation, pursuant to 29 C.F.R. Part 1614 *et seq.* Complainant at that point will be entitled to the same rights and responsibilities under the applicable processing regulations as are available to any Federal employee.
2. If ODEO finds no jurisdiction, ODEO will dismiss the formal complaint for lack of jurisdiction and advise the contingent worker of applicable appeal rights to EEOC.

3. The complainant will have the right to file an appeal with the EEOC Office of Federal Operations, or file a civil action.

Linda M. Jackson, Director

Complaints Management Division

**TAB 8**

## Factor-by-Factor Case Citations

For the first 14 of the 15 factors, citations are provided for leading cases with relevance for analyzing that factor.

### **Factor 1**

**Did the firm (or NASA) have the right to control when, where, and how the contingent worker performed the job, or did the aggrieved employee have the right?**

Tiffany Pender v. Navy, EEOC Appeal No. 0120080392 (January 11, 2008); Charles Ferebee v. Department of the Navy, EEOC Appeal No. 0120073212 (November 6, 2007); Robin Dunn v. Department of Energy, EEOC Appeal No. 01A62654 (August 14, 2006); Christine M. Crogan v. Department of the Army, EEOC Appeal No. 01A62300 (August 28, 2006); Joseph Majewski V. Department of the Army EEOC Appeal No. 01A62842 (August 28, 2006); Larry R. Cornelius v. Department of State, EEOC Appeal No. 01A62520 (August 22, 2006); Theresa D. Chamberlain v. Department of the Army, EEOC Appeal No. 01A61315 (June 26, 2006); Cecelia A. Fields v. General Services Administration, EEOC Appeal No. 01A51814, April 14, 2006; Lois Corwye v. Department of the Army, EEOC Appeal No. 01A51277 (March 23, 2006); Nancy Baker v. Department of the Army, EEOC Appeal No. 01A45313 (March 16, 2006); X-abian Montsho Jahi v. Department of Commerce, EEOC Appeal No. 01A50035 (November 29, 2005); Lealon E. Wyatt, Jr. v. Tennessee Valley Authority, EEOC Appeal No. 01A44308 (July 26, 2005); Wellington J. Williams v. Environmental Protection Agency, EEOC Appeal No. 01A44018 (July 7, 2005); Charles E. Lawhorn, Phelps D. Vann v. Department of the Army, EEOC Appeal Nos. 01A23281, 01A23301 (October 29, 2002); Stanton V. Parsons v. Department of the Navy, EEOC Appeal No. 01A14943 (July 3, 2002); and Sandra Maynard v. Department of the Navy, EEOC Appeal No. 01A20699 (June 25, 2002).

### **Factor 2**

**Does the work require a high level of expertise?**

Beeta Biladi-Ghanad v. International Broadcasting Bureau, EEOC Appeal No. 01A63551 (September 22, 2006); Charles Smith v. Department of the Army, EEOC Appeal No. 01A55755 (May 5, 2006); and Kenneth L. Ryfkogel v. Department of the Army, EEOC Appeal No. 01A04012 (August 16, 2000).

**Factor 3**

**Which entity furnishes the tools, materials, and equipment (is it the firm, NASA, or the contract worker)?**

Lealon Tiffany Pender v. Department of the Navy, EEOC Appeal No. 0120080392 (January 11, 2008); Charles Ferebee v. Department of the Navy, EEOC Appeal No. 0120073212 (November 6, 2007); Theresa D. Chamberlain v. Department of the Army, EEOC Appeal No. 01A61315 (June 26, 2006); Cecelia A. Fields v. General Services Administration, EEOC Appeal No. 01A51814 (April 14, 2006); Lois Corwye v. Department of the Army, EEOC Appeal No. 01A51277 (March 23, 2006); E. Wyatt, Jr. v. Tennessee Valley Authority, EEOC Appeal No. 01A44308 (July 26, 2005); Larry Williams v. Department of the Army, EEOC Appeal No. 01A51807 (July 7, 2005); and Stanton V. Parsons v. Department of the Navy, EEOC Appeal No. 01A14943 (July 3, 2002).

**Factor 4**

**Was the work performed on the premises of the firm or NASA?**

Theresa D. Chamberlain v. Department of the Army, EEOC Appeal No. 01A61315 (June 26, 2006); Cecelia A. Fields v. General Services Administration, EEOC Appeal No. 01A51814 (April 14, 2006); Lois Corwye v. Department of the Army, EEOC Appeal No. 01A51277 (March 23, 2006) and Sandra Maynard v. Department of the Navy, EEOC Appeal No. 01A20699 (June 25, 2002).

**Factor 5**

**Was there a continuing [employer-employee] relationship between the contract worker and the firm or was such relationship with NASA? Did the contract worker previously work for NASA?**

Cecelia A. Fields v. General Services Administration, EEOC Appeal No. 01A51814 (April 14, 2006).

**Factor 6**

**Does the firm (or NASA) have the right to assign additional projects to the contract worker? What does the contract say about the assignment of work?**

Charles Ferebee v. Department of the Navy, EEOC Appeal No. 0120073212 (November 6, 2007); Christine M. Crogan v. Department of the Army, EEOC Appeal No. 01A62300 (August 28, 2006); Nancy Baker v. Department of the Army, EEOC Appeal No. 01A45313 (March 16, 2006); Cecelia A. Fields v. General Services Administration, EEOC Appeal No. 01A51814, April 14, 2006; Joseph Majewski V. Department of the Army, EEOC Appeal No. 01A62842 (August 28, 2006); Robin Dunn v. Department of Energy, EEOC Appeal No. 01A62654 (August 14, 2006); Lois Corwye v. Department of the Army, EEOC Appeal No. 01A51277 (March 23, 2006); Charles E. Lawhorn, Phelps D. Vann v. Department of the Army, EEOC Appeal Nos. 01A23281, 01A23301 (October 29, 2002); and Sandra Maynard v. Department of the Navy, EEOC Appeal No. 01A20699 (June 25, 2002);

### **Factor 7**

#### **Did the firm or NASA set the hours of work and the duration of the job?**

John Blake v. Department of Veterans Affairs, EEOC Appeal No. 0120073484 (January 14, 2008); Beeta Biladi-Ghanad v. International Broadcasting Bureau, EEOC Appeal No. 01A63551 (September 22, 2006); Christine M. Crogan v. Department of the Army, EEOC Appeal No. 01A62300 (August 28, 2006); Theresa D. Chamberlain v. Department of the Army, EEOC Appeal No. 01A61315 (June 26, 2006); Palmyra Walton v. Department of the Army, EEOC Appeal No. 01A60611 (April 20, 2006); Cecelia A. Fields v. General Services Administration, EEOC Appeal No. 01A51814 (April 14, 2006); and Lois Corwye v. Department of the Army, EEOC Appeal No. 01A51277 (March 23, 2006); Wellington J. Williams v. Environmental Protection Agency, EEOC Appeal No. 01A44018 (July 7, 2005).

### **Factor 8**

#### **Is the worker paid by the hour, week, or month rather than for the agreed cost of performing of a particular job?**

John Blake v. Department of Veterans Affairs, EEOC Appeal No. 0120073484 (January 14, 2008); Beeta Biladi-Ghanad v. International Broadcasting Bureau, EEOC Appeal No. 01A63551 (September 22, 2006); Steven Glover v. Army, EEOC Appeal No. 01A61631 (July 21, 2006); Charles Smith v. Army, EEOC Appeal No. 01A55755 (May 5, 2006); Palmyra Walton v. Department of the Army, EEOC Appeal No. 01A60611 (April 20, 2006); X-abian Montsho Jahi v. Department of Commerce, EEOC Appeal No. 01A50035 (November 29, 2005); Wellington J. Williams v. Environmental Protection Agency, EEOC Appeal No. 01A44018 (July 7, 2005); James P. Garity v. Department of Justice, EEOC Appeal No. 01A31430 (March 12, 2004); and

Charles E. Lawhorn, Phelps D. Vann v. Department of the Army, EEOC Appeal Nos. 01A23281, 01A23301 (October 29, 2002).

### **Factor 9**

**Does the contract worker have a role in hiring and paying assistants?**

Nancy Baker v. Department of the Army, EEOC Appeal No. 01A45313 (March 16, 2006).

### **Factor 10**

**Is the contract worker's duties part of the regular business of the firm or NASA?**

Cecelia A. Fields v. General Services Administration, EEOC Appeal No. 01A51814 (April 14, 2006).

### **Factor 11**

**Is the contract worker engaged in his/her own distinct occupation or business?**

Edar Y. Rogler v. Department of Health and Human Services, EEOC Appeal No. 01A63657 (October 11, 2006); Kenneth L. Ryfkogel v. Army, EEOC Appeal No. 01A04012 (August 16, 2000); Lois Corwye v. Department of the Army, EEOC Appeal No. 01A51277 (March 23, 2006); and Susan R. Prather-Soppeck v. Air Force, EEOC Appeal No. 01990137 (December 22, 2000).

### **Factor 12**

**Does the employer provide the worker with benefits such as insurance, leave, or workers' compensation?**

Jose Vasquez v. NASA, EEOC Appeal No. 0120080720 (February 7, 2008); Charles Ferebee v. Department of the Navy, EEOC Appeal No. 0120073212 (November 6, 2007); Joseph Majewski V. Department of the Army, EEOC Appeal No. 01A62842 (August 28, 2006); Steven Glover v. Army, EEOC Appeal No. 01A61631 (July 21, 2006); Palmyra

Walton v. Department of the Army, EEOC Appeal No. 01A60611 (April 20, 2006); Lois Corwey v. Department of the Army, EEOC Appeal No. 01A51277 (March 23, 2006); X-abian Montsho Jahi v. Department of Commerce, EEOC Appeal No. 01A50035 (November 29, 2005); Lealon E. Wyatt, Jr. v. Tennessee Valley Authority, EEOC Appeal No. 01A44308 (July 26, 2005); Larry Williams v. Department of the Army, EEOC Appeal No. 01A51807 (July 7, 2005) Charles E. Lawhorn, Phelps D. Vann v. Department of the Army, EEOC Appeal Nos. 01A23281, 01A23301 (October 29, 2002); and Stanton V. Parsons v. Department of the Navy, EEOC Appeal No. 01A14943 (July 3, 2002).

### **Factor 13**

**Is the worker considered an employee of the employer for tax purposes (i.e., the employer withholds federal, state and Social Security taxes)?**

Jose Vasquez v. NASA, EEOC Appeal No. 0120080720 (February 7, 2008); Charles Ferebee v. Department of the Navy, EEOC Appeal No. 0120073212 (November 6, 2007); Beeta Biladi-Ghanad v. International Broadcasting Bureau, EEOC Appeal No. 01A63551 (September 22, 2006); Joseph Majewski V. Department of the Army, EEOC Appeal No. 01A62842 (August 28, 2006); Larry R. Cornelius v. Department of State, EEOC Appeal No. 01A62520 (August 22, 2006); Charles Smith v. Army, EEOC Appeal No. 01A55755 (May 5, 2006); Palmyra Walton v. Department of the Army, EEOC Appeal No. 01A60611 (April 20, 2006); and Stanton V. Parsons v. Department of the Navy, EEOC Appeal No. 01A14943 (July 3, 2002).

### **Factor 14**

**Who can discharge the contract worker (the firm or the agency)?**

Jose Vasquez v. NASA, EEOC Appeal No. 0120080720 (February 7, 2008); John Blake v. Department of Veterans Affairs, EEOC Appeal No. 0120073484 (January 14, 2008); Beeta Biladi-Ghanad v. International Broadcasting Bureau, EEOC Appeal No. 01A63551 (September 22, 2006); Christine M. Crogan v. Department of the Army, EEOC Appeal No. 01A62300 (August 28, 2006); Robin Dunn v. Department of Energy, Appeal No. 01A62654 (August 14, 2006); Palmyra Walton v. Department of the Army, EEOC Appeal No. 01A60611 (April 20, 2006); Cecelia A. Fields v. General Services Administration, EEOC Appeal No. 01A51814 (April 14, 2006); Charles Smith v. Army, Appeal No. 01A55755 (May 5, 2006); Theresa D. Chamberlain v. Department of the Army, EEOC Appeal No. 01A61315 (June 26, 2006); Lois Corwey v. Department of the

Army, EEOC Appeal No. 01A51277 (March 23, 2006); Nancy Baker v. Department of the Army, EEOC Appeal No. 01A45313 (March 16, 2006); X-abian Montsho Jahi v. Department of Commerce, EEOC Appeal No. 01A50035 (November 29, 2005); Lealon E. Wyatt, Jr. v. Tennessee Valley Authority, EEOC Appeal No. 01A44308 (July 26, 2005); Larry Williams v. Department of the Army, EEOC Appeal No. 01A51807 (July 7, 2005); Charles E. Lawhorn, Phelps D. Vann v. Department of the Army, EEOC Appeal Nos. 01A23281, 01A23301 (October 29, 2002); Sandra Maynard v. Department of the Navy, EEOC Appeal No. 01A20699 (June 25, 2002); and Stanton V. Parsons v. Department of the Navy, Appeal No. 01A14943 (July 3, 2002).