



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

████████████████████
Keenan O.,¹
Complainant,

v.

Martin J. Gruenberg,
Chairman,
Federal Deposit Insurance Corporation,
Agency.

Appeal No. 0120181998

Agency No. FDICEO-18-002

DECISION

On May 29, 2018, Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a final Agency decision (FAD) dated April 27, 2018, 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was employed by a staffing firm serving the Agency as a Staffing Specialist at the Agency's Division of Administration, Human Resources (HR) Branch, Staffing Operations Section in Arlington, Virginia.

On November 20, 2017, Complainant filed an equal employment opportunity (EEO) complaint alleging that the Agency subjected him to sexual and non-sexual harassment based on his race (African-American), sex (male), color (light skinned), and reprisal for prior protected EEO activity under Title VII when, as illustrated but not limited to below, Agency HR Specialist 1 (female):

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

1. In late 2013 or 2014, asked him if he was a “slut bunny.”²
2. In Spring 2016, called him into her office and fidgeted with her bra and breasts, and when she saw his discomfort removed her false silicon nipples and said they were for the type of bra she was wearing, and added “the real nipples, you can’t handle them. You are not ready for a real woman.”
3. In Spring 2016, said she was mad at her husband and ex-boyfriends for not doing whatever she wanted, asked if he had a “big dick,” and after he immediately changed the subject, said “you are not ready for a real woman, and probably aren’t big enough for me” and asked if he knew what a “silver bullet” was, and after he said no, took it out of her purse and showed him a vibrating sex toy.
4. In Spring 2016, after saying her husband was not living up to her expectations said to Complainant she had a dream about him sitting on her desk while she was giving him a “blow job,” and said she preferred that he “hit it from the back.”
5. In Summer 2016, showed him provocative cell phone pictures of herself, and when he looked away said “don’t act like you are afraid of a real woman. You couldn’t handle this anyway.”
6. In the Winter of 2016, told him she wanted some “dick” for Christmas and that it was written all over his face that he was not happy at home.
7. On January 18, 2017, while in training with her, sent him a text that read “wake up... my cookie is... throbbing... need a touch... up. Hubbie has not been on the job,” and after he responded with a deflecting joke that she better take a break and head to her office to handle it she replied, “Hell yeah... I forgot my silver bullet today...” and got upset about his lack of interest.
8. After avoiding her with only minimal interaction from January to June 2017, communicating with her by email and very quick face-to-face meetings, in July 2017, she joked about his appearance and weight loss several times.

in August 2017, she treated him with intense animosity and resentment, as illustrated by:

9. Referring to his weight loss, called him a “crackhead” and said, “are you on that shit.”
10. Told him “I am tired of you red light-skinned n---as thinking y’all all that and not giving a fuck.”

² This was defined in the Agency’s decision as slang for an attractive person who is willing to engage in sex without expecting any financial or emotional gain.

11. Repeatedly cursed him out in her office and in his office – even in front of his coworkers.
12. While he was out of his office, came to his work area and openly cursed about him, his skin tone, and his appearance to his coworkers.
13. While he was out of the office one day, called him and yelled, asking where her case files were.
14. Was possessive of him, i.e., after he informed her he was also assisting another Agency HR Specialist who had a ton of work and a new staffing firm employee, she said “give her shit back [to the other Agency HR Specialist], you are my contractor,” and after he responded he could handle both caseloads said, “don’t play with my [his name], give that shit back.”
15. After learning that he did not return the work, cursed him out, and later when he was out for a personal matter, sent him a text that she did not want him working with her anymore because he was not serious about his work, and that his being away “royally” affected his work, which affected her work. Even after he explained via text that others on his team were covering for him (who got the work done), she replied she was not sure about his “I don’t care attitude... I guess everyone was right... About your work ethic.... Any work you are working on for me stop... and put my case files back on my desk.”
16. The next day she went to his desk and in front of his coworkers yelled insults, personal attacks, and curse words at him, including about his skin tone and “nonchalant” attitude, threatened to get him fired, and shoved the seat he was sitting in.
17. Repeatedly slandered his character, appearance, and work performance with her Agency coworkers to the extent that word got back to him.
18. Told the Agency Supervisor of Staffing and Classifications that his performance was a problem, and criticized him to his onsite staffing firm supervisor with false and unwarranted allegations.³

Complainant started serving the Agency around late 2013 as a HR Specialist. When an Agency HR Specialist receives a request to fill an Agency vacancy, the Specialist decides what tasks are completed by staffing firm HR Specialists, whose scope of work generally is to perform job analysis, draft job announcements, conduct qualifications analysis, and assist in subject matter expert review of applicants. The Agency HR Specialist then reviews the completed task for acceptance. Attachment A to FAD, at 2 (statement of Agency Supervisor of Staffing and Classifications).

³ We have redefined Complainant’s complaint to better capture his complaint.

Complainant stated that he assisted Agency HR Specialist 1 almost the entire time he served the Agency, and his day-to-day work was primarily assigned by her. He indicated that Agency HR Specialist 1 supervised him and characterized her as his “boss” on this work. Complainant stated that Agency HR Specialist 1 gave him assignments in person and by email.

Including Complainant, the Staffing Firm had eight employees who provide HR recruitment services to the Agency. It also had 12 employees onsite who did payroll work for the Agency, and an onsite supervisor. The staffing firm employees who provided HR recruitment services were in the E Building and on a different floor than Agency HR Specialists, who were in the D Building. Staffing firm employees did not participate in Agency staff meetings and other special or celebratory events.

Complainant complained to his staffing firm that he was subjected to sexual and racial harassment by Agency HR Specialist 1. In accordance with its procedures, the staffing firm hired a law firm to investigate, and sent a letter of concern to the Agency, and requested it cooperate with the investigation. In its summary report of investigation, the law firm found as follows. Complainant first reported racial discrimination and sexual harassment in September 2017. HR Specialist 1 was his primary Agency HR Specialist and Agency contact person. The report found that HR Specialist 1 sexually harassed Complainant from her position of “FDIC supervisor,” concluding that on numerous occasions, she engaged in sexually suggestive and provocative conversations, offered sex, solicited sex and probed into the private sex life of Complainant, while offering unsolicited commentary on her own sex life. The report also found that Agency HR Specialist 1 engaged in racial discrimination against Complainant when she used derogatory terms such as “High Yellow” and “Light Red-Skinned Nigga,” which was corroborated by two witnesses. The report concluded that the preponderance of the evidence showed that Agency HR Specialist 1 violated federal law by subjecting Complainant to sexual harassment and racial discrimination, and indicated that the staffing firm was currently working with the Agency to ensure that it was aware of the severity of the situation.

The Agency’s Labor/Employee Relations Unit also investigated Complainant’s allegations, and noted the staffing firm denied access to interview its employees as witnesses, failed to provide materials requested concerning its investigation, and only provided superficial information. The Agency Supervisor of Staffing and Classifications relayed to the EEO counselor that she directed Agency HR Specialist 1 to cease all communications with Complainant, and he no longer supports Agency HR Specialist 1. Complainant continues to serve the Agency.

The Agency dismissed Complainant’s complaint for failure to state claim. It reasoned that under common law Complainant is not an employee of the Agency nor does it jointly employ him. The instant appeal followed.

ANALYSIS AND FINDINGS

The matter before us is whether the Agency properly dismissed Complainant's complaint for failure to state a claim on the basis that he was not its employee. EEOC Regulation 29 C.F.R. § 1614.103(a) provides that complaints of employment discrimination shall be processed in accordance with Part 1614 of the EEOC regulations. EEOC Regulation 29 C.F.R. § 1614.103(c) provides that within the covered departments, agencies and units, Part 1614 applies to all employees and applicants for employment therewith.

In Serita B. v. Department of the Army, EEOC Appeal No. 0120150846 (November 10, 2016), the Commission recently reaffirmed its long-standing position on "joint employers" and noted it is found in numerous sources. See, e.g., EEOC Compliance Manual Section 2, "Threshold Issues," Section 2-III(B)(1)(a)(iii)(b) (May 12, 2000) (Compliance Manual)⁴; EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (Dec. 3, 1997) (Enforcement Guidance), "Coverage Issues," Question 2; Ma v. Dep't of Health and Human Servs., EEOC Appeal Nos. 01962389 & 01962390 (May 29, 1998). We reiterate the analysis set forth in those decisions and guidance documents in this decision.

The term "joint employer" refers to two or more employers that each exercise sufficient control of an individual to qualify as the worker's employer. Compliance Manual, Section 2-III(B)(1)(a)(iii)(b). To determine whether the Agency has the right to exercise sufficient control, EEOC considers factors derived from common law principles of agency. See Enforcement Guidance, "Coverage Issues," at Question 2. EEOC considers, *inter alia*, the Agency's right to control when, where, and how the worker performs the job; the right to assign additional projects to the worker; whether the work is performed on Agency premises; whether the Agency provides the tools, material, and equipment to perform the job; the duration of the relationship between the Agency and the worker whether the Agency controls the worker's schedule; and whether the Agency can discharge the worker. EEOC Compliance Manual, Section 2-III(A)(1) (citing Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-24 (1992)); EEOC v. Skanska USA Bldg., Inc., 550 F.App'x 253, 256 (6th Cir. 2013) ("Entities are joint employers if they 'share or co-determine those matters governing essential terms and conditions of employment'") (quoting Carrier Corp. v. NLRB, 768 F.2d 778, 781 (6th Cir. 1985); see also Ma, EEOC Appeal Nos. 01962389 & 01962390.

The language of the contract between the agency and the staffing firm is not dispositive as to whether a joint-employment situation exists. In determining a worker's status, EEOC looks to what actually occurs in the workplace, even if it contradicts the language in the contract between the staffing firm and the agency.

⁴ The EEOC Compliance Manual and other guidance documents, as well as federal-sector appellate decisions, are available online at www.eeoc.gov.

Baker v. Dep't of the Army, EEOC Appeal No. 01A45313 (Mar. 16, 2006) (while contract between staffing firm and agency provided that contract personnel were employees of staffing firm under its administrative supervision and control, agency actually retained supervisory authority over the contract workers).

On the factor of the right to control when, where, and how the worker performs the job and to assign additional projects, complete agency control is not required. Rather, the control may be partial or joint and still point to joint employment. Shorter v. Dep't of Homeland Sec., EEOC Appeal No. 0120131148 (June 11, 2013) (where both staffing firm and agency made assignments, this pointed to joint employment); Complainant v. Dep't of the Navy, EEOC Appeal No. 0120143162 (May 20, 2015), request for reconsideration denied, EEOC Request No. 0520150430 (Mar. 11, 2016) (where staffing firm wrote and issued complainant's appraisal with input from agency, this pointed toward joint employment). Likewise, where both the agency and staffing firm provided tools, material, and equipment to perform the job, this pointed to joint employment. Elkin v. Dep't of the Army, EEOC Appeal No. 0120122211, 2012 WL 5818075 (Nov. 8, 2012). Similarly, where a staffing firm terminates a worker after an agency communicates it no longer wants the worker's services, this supports a finding that the agency has joint or de facto power to discharge the worker. See, e.g., Complainants v. Dep't of Justice, EEOC Appeal Nos. 0120141963 & 0120141762 (Jan. 28, 2015); see also Skanska USA Bldg., Inc., 550 Fed. App'x at 254, 256 (where defendant removed staffing firm's workers from job site without challenge from staffing firm, and after such removals staffing firm generally fired worker, this pointed to joint employment); Butler v. Drive Auto. Indus. of America, Inc., 793 F.3d 404, 414-15 (4th Cir. 2015). The EEOC considers an entity's right to control the terms and conditions of employment, whether or not it exercises that right, as relevant to joint employer status. Enforcement Guidance, "Coverage Issues," at Question 2, Example 5 (where an entity reserves the right to direct the means and manner of an individual's work, but does not generally exercise that right, the entity may still be found to be a joint employer).

In assessing the right to control, EEOC does not consider any one factor to be decisive and emphasizes that it is not necessary to satisfy a majority of the factors. In particular, the fact that an individual performs work pursuant to a contract between the federal government and an outside organization and is paid and provided with benefits by that organization, on its own, is not enough to show that joint employment does not exist. Rather, the analysis is holistic; all the circumstances in the individual's relationship with the agency should be considered to determine if the agency should be deemed the worker's joint employer. Enforcement Guidance, "Coverage Issues," at Qs. 1 and 2. In sum, a federal agency will qualify as a joint employer of an individual if it has the requisite right to control the means and manner of the individual's work, regardless of whether the individual is paid by an outside organization or is on the federal payroll. See id., at Q. 2.

Complainant started serving the Agency in late 2013, a significant duration.

Under the contract between the Agency and the staffing firm, prior to filling a position serving the Agency, the staffing firm was required to submit the resume of the proposed candidate for the Agency's review and approval, and the Agency had the right to interview the candidate.

In one of two declarations submitted with his appellate sur-reply, Complainant stated that prior to being hired by the staffing firm, he was interviewed by the Agency Supervisor of Staffing and Classifications. This joint right of control in the hiring process points to joint employment.

We also find that the weight of the evidence favors a finding that the Agency jointly controlled the means and manner of Complainant's performance. The Agency Supervisor of Staffing and Classifications stated that Agency HR Specialists decide what work to assign to staffing firm HR Specialists, and that the work is reviewed by the Agency HR Specialist for approval. Complainant clarified that his day-to-day work was primarily assigned by Agency HR Specialist 1, either in person or by email. While the Agency Oversight Manager for the Agency's contract with the staffing firm generally stated that the staffing firm's onsite supervisor manages the workloads of staffing firm staff, he did not contradict Complainant's representation about how he was assigned work. Further, Complainant worked on Agency premises using Agency equipment. While Complainant worked in a separate area reserved for staffing firm employees, the record shows that Agency HR Specialist 1 had ready access to the area which she used, and would ask Complainant to come to her office.

Based on the legal standards and criteria set forth in our previous decisions and guidance, we find that the Agency possessed sufficient control over Complainant's position to qualify as his joint employer for the purpose of the 29 C.F.R. Part 1614 EEO complaint process.

The FAD is REVERSED.

ORDER (E0618)

The Agency is ordered to process the remanded claims 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 was issued. 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 was issued, 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.

As provided in the statement entitled "Implementation of the Commission's Decision," the Agency must send to the Compliance Officer: 1) a copy of the Agency's letter of acknowledgment to Complainant, 2) a copy of the Agency's notice that transmits the investigative file and notice of rights, and 3) either a copy of the complainant's request for a hearing, a copy of complainant's request for a FAD, or a statement from the agency that it did not receive a response from complainant by the end of the election period.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0618)

Under 29 C.F.R. § 1614.405(c) and § 1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

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. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission.

Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. 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 agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). 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 (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.**

The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

November 6, 2018

Date