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

[redacted]
Yun C.,[1]
Complainant,

v.

Dan Coats,
Director,
Office of the Director of National Intelligence,
Agency.

Appeal No. 0120182012

Agency No. 2018-005

DECISION

On May 23, 2018, Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a final Agency decision (FAD) dated April 30, 2018, 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 Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was employed by Staffing Firm 1 serving the Agency as a Resource Analyst - Level IV at the Agency's Office of the Chief Financial Executive (CFE). Complainant had started working for Staffing Firm 1 in August 2006, and served in various positions in the intelligence community. She started serving the Agency on September 19, 2016.

On January 25, 2018, Complainant filed an equal employment opportunity (EEO) complaint alleging that the Agency subjected her to a hostile work environment and terminated her service based on her race/color (Black), disability, and sex (female) when:

[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. she was asked to train two-coworkers who received overtime, but she was not allowed to receive overtime;

2. on August 23, 2017, the Agency Deputy Chief of Manpower said to her that she hoped she did not feel she was a "slave driver;"

3. in September 2017, the Agency Deputy Chief said to her that Complainant was her slave and she knew Complainant thought she was the worst "master" she ever had;

4. the Agency Deputy Chief would touch her even though she asked her not to do so;

5. from September 2016 to October 2017, the Agency Chief of Manpower reported falsehoods about her to Staffing Firm 1, resulting in Staffing Firm 1 rating her horribly;

6. from September 2016 to October 2017, people unidentified in the record excluded her from work/spreadsheet updates and assignments and her work was deleted out of the system after she stayed to complete tasks;

7. around March and April 2017, Agency management informed Staffing Firm 1 that she was arriving late even though this was for doctor visits after an automobile accident; and

8. Agency management gave negative feedback about her to Staffing Firm 1, resulting in the termination of her service to the Agency on October 5, 2017.

The Agency dismissed Complainant's complaint for failure to state a claim. It reasoned that Complainant was an employee of Staffing Firm 1, not the Agency.[2] 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 she 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.

[2] In its FAD, the Agency did not identify the name or address of office the EEOC uses to receive appeals by mail in the federal sector process, which is in the letterhead of this decision. Instead, the Agency gave a street address on the fourth floor, which is the incorrect location to file an appeal with this office. The correct street address suite number for the Office of Federal Operations to receive courier deliveries is 5SW12G. Complainant used a notice of appeal form which we assume the Agency provided her. The address thereon to file an appeal is 10 years out of date. We ask the Agency to correct our appellate addresses it provides.

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)[3]; 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. 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

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

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.

Here, prior to issuing its FAD, the Agency gathered information from Complainant and Staffing Firm 1 on the issue of the Agency's control over Complainant's employment. Staffing Firm 1 wrote that before Complainant started serving the Agency, it determined she was qualified and forwarded her resume to the Agency for review and approval, which points to joint employment.

The Agency controlled the means and manner of Complainant's performance. She had an Agency supervisor, and Staffing Firm 1 wrote that she was on a staff augmentation contract without any defined contract deliverables, that the Agency specified her work assignments, assigned her work, and she took direction from Agency personnel for her day-to-day tasks. Complainant worked on Agency premises using Agency equipment. Complainant stated that her government supervisor evaluated her work, although her performance evaluation was prepared by the staffing firm. Staffing Firm 1 wrote that while it did not specifically request feedback from the Agency on Complainant's performance, unsolicited Agency feedback was incorporated into the performance evaluation done by the staffing firm.

Both the Agency and Staffing Firm 1 had control or the right to control Complainant's schedule. Complainant indicated that while she submitted her leave requests to Staffing Firm 1, which would act on them, she notified the Agency of her impending leave. Staffing Firm 1 wrote that both it and the Agency monitored Complainant's hours, and the Agency required Staffing Firm 1 employees to give the Agency notice of planned absences in advance. While Complainant stated that she determined her work hours, she wrote that she discussed them with the Agency, and Staffing Firm 1 wrote that the Agency and Complainant coordinated her work hours and schedule to confirm her planned work hours and schedule were acceptable to the Agency.

Complainant started serving the Agency on September 19, 2016, and stopped on October 5, 2017, a significant duration, and was originally expected to continue serving the Agency at least to the end of the contract she was on between the Agency and Staffing Firm 1 – March 31, 2018.

In September 2017, Staffing Firm 1 notified Complainant that she would be involuntarily terminated effective October 25, 2017. Staffing Firm 1 later explained that the Agency eliminated her position, along with five others, from the contract.

Staffing Firm 1 wrote that it cut off Complainant's service with the Agency on October 5, 2017, because on the same day the Agency asked that she immediately be removed from the contract for time and attendance issues. Staffing Firm 1 further wrote that it then placed Complainant on part-time on-call status to allow her opportunities to find another position with Staffing Firm 1, but she chose not to seek them and left Staffing Firm 1 on December 31, 2017. By the time Complainant filed her EEO complaint on January 25, 2018, she was employed with another staffing firm.

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 her joint employer for the purpose of the 29 C.F.R. Part 1614 EEO complaint process.[4]

ORDER (E0618)

The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108.[5] 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

[4] In its FAD, the Agency concedes that Complainant was an employee of Staffing Firm 1. Given this, some of the control factors the Agency analyzed in the FAD are not relevant since they do not shed light on whether the Agency jointly employed Complainant under common law, e.g., the level of expertise of her work, the basis of her pay by the staffing firm (paid bi-weekly), and whether there was an intent to create employment relationship with the Agency.

[5] On issue 1, the Agency should ask Complainant to clarify from whom she expected to receive approval for overtime – Staffing Firm 1, the Agency, or both. If Complainant expected to receive approval solely from Staffing Firm 1, the Agency need not further investigate issue 1 because the Agency would not be involved in the matter. On issue 6, the Agency should ask Complainant in part to identify who was involved and for whom they worked.

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