



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

████████████████████
Archie D.,¹
Complainant,

v.

Bill Johnson,
President and Chief Executive Officer,
Tennessee Valley Authority,
Agency.

Appeal No. 2019003604

Hearing No. 490-2017-00049X

Agency No. TVA-2014-0089

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from an Agency decision, dated April 9, 2019, 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. The Commission accepts the appeal in accordance with 29 C.F.R. § 1614.405.

BACKGROUND

Complainant applied and was offered a position as an Armed Security Officer with Murray Guard, Incorporated (hereinafter “Murray”). Murray contracted with the Agency to provide approximately 160 to 180 security officers to supplement the Agency police force in approximately nineteen facilities. A Murray supervisor was assigned to each facility to oversee Murray security officers. Additionally, a Murray Account Manager was responsible for the Murray supervisors, as well as managing the Agency account generally.

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.

According to Complainant he was hired by Murray specifically to fulfill the Agency contract. Complainant had to complete numerous hours of computer training, over several days, to meet the Agency's hiring requirements.

Days after being hired, on January 4, 2014, Complainant was assigned to the Agency's Raccoon Mountain site. Approximately two months later, Complainant was removed from the Raccoon Mountain site assignment. Complainant was told that the site was closing. Complainant later learned, however, that the site did not close, and he was replaced at Raccoon Mountain with a younger, Caucasian female. Complainant reported the alleged discrimination to the Murray General Manager, and soon thereafter Murray Human Resources personnel contacted him and offered him an assignment at the Agency's Widow's Creek facility. Complainant began working at Widow's Creek on April 16, 2014.

While his assignment at Widow's Creek did not require a "sensitive security clearance", Complainant sought a clearance in the event a position became available in Chattanooga, Tennessee, a location closer to his residence. Relying upon information from Murray that the Agency was exclusively responsible for processing clearance applications, Complainant emailed an Agency official to request an application. In its response, the Agency merely observed that such clearance was not necessary for Complainant's current assignment at Widow's Creek. When Complainant clarified that he desired the clearance for a potential future assignment at the Agency Chattanooga Office Complex, the Agency did not reply.

On May 15, 2014, a supervisory position became available at the Chattanooga site. Complainant applied, but was not selected. According to Complainant, the Murray General Manager explained that he could not be given the assignment because of his "run-in with Agency police" and his lack of a sensitive security clearance.

In early June 2014, Complainant believed his Murray Supervisor (hereinafter "Supervisor-S") was subjecting him to a hostile work environment based on race. Complainant informed the Murray General Manager and the Agency's account manager. Complainant explained that he was "not comfortable working along-side [Supervisor-S] because of his genuine dislike [of] African-Americans." He asked to be transferred to Chattanooga.

In a September 8, 2014 email to Murray, the Agency's Manager-Field Operations, TVA Police and Emergency Management (hereinafter "Agency Manager") stated that while "not meant to impact his employment with [Murray] . . . would prefer [Complainant] not be assigned to a TVA facility."

The Murray General Manager informed Complainant, on September 10, 2014, that Agency was not going to grant Complainant a sensitive security clearance. Further, he was informed that he would be terminated from Murray as of October 2, 2015.

Believing that Murray and Agency officials conspired together to discriminate against him, Complainant contacted an EEO Counselor.

Informal efforts to resolve Complainant's concerns were unsuccessful. On January 20, 2015, Complainant filed a formal complaint based on race, age, and reprisal for prior protected EEO activity. The Agency framed the claims as follows:

1. on or about February 2014, Complainant was removed from his Agency assignment at Racoon Mountain and was replaced by a younger Caucasian female;
2. on or about May 7, 2014, Complainant was denied the right to complete sensitive security clearance documents;
3. on or about May 8, 2014, an Agency representative ignored Complainant's email regarding Complainant obtaining an application for a sensitive security clearance;
4. on or about May 22, 2014, Complainant obtained knowledge that he was not selected for a supervisor's position at the Agency;
5. on or about June 4, 2014, Complainant was subjected to harassment and racially offensive statements by a co-worker;
6. on or about September 10, 2014, Agency did not grant Complainant a sensitive security clearance and he received notification that he would be laid off from his position on October 2, 2014;
7. on or about October 2, 2014, Complainant was laid off from his Agency assignment; and
8. on or about October 28, 2014, Complainant obtained knowledge that his sensitive security clearance application was discontinued.

On October 5, 2016, the Agency dismissed some claims for failure to state a claim. In particular, claims (1), (2), (4), (5) and (7) were found to involve Murray employees, not Agency employees. Moreover, the Agency concluded that Complainant was not an applicant or employee of the Agency and therefore lacked standing. The Agency reasoned that Murray paid Complainant's salary and benefits, provided the tools and resources for his position, created the daily work schedule, and made the final decision to terminate Complainant. Additionally, the Agency noted that Complainant had already filed a civil action, against Murray, in the Chancery Court of Hamilton County, Tennessee, regarding the allegations set forth in the dismissed claims.

Irrespective of its determination that Complainant was not an Agency applicant or employee, the Agency continued to process claims (3), (6), and (8).² At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing. On March 20, 2019, the AJ issued a decision dismissing the complaint.

As noted above, the three claims pending before the AJ concerned the Agency's actions with respect to Complainant's efforts to obtain a sensitive security clearance (i.e. obtaining information about an application, the discontinued processing his application, and the denial of a clearance). In reviewing the claims, the AJ noted it is beyond the Commission's jurisdiction to review of the validity of a security clearance requirement or the substance of a security clearance determination. However, in the instant case, the AJ found that Complainant had sufficiently alleged that he suffered adverse actions subsequent to the denial and that "this matter is not purely related to a security clearance issue." Before considering whether Complainant was subjected to disparate treatment related to the security clearance issue, the AJ reflected upon Complainant's employment status.

The AJ observed that Complainant applied to a position with Murray, not the Agency. Murray hired Complainant and provided him with his facility assignments. It was Murray that removed him from Raccoon Mountain and later assigned him to Widow's Creek. Complainant himself referred to himself as a contractor, an employee of Murray. He also admitted that all instructions came from Murray and not directly from the Agency. While acknowledging that in response to the report of investigation, Complainant asserted that he was supervised by the Agency's Supervisor of TVA Police Training and Contract Security Service Manager, the AJ was not persuaded. Complainant's belief that his Murray supervisors were "directed and controlled by TVA," yet uncertain how that process worked, similarly failed to sway the AJ.

Even after considering the September 8, 2014 email from Agency Manager, which only preceded the notification of Complainant's lay-off by days, the AJ concluded that "based on all the circumstances in the relationship between the parties, TVA lacked the means and control sufficient to qualify as Complainant's employer." The AJ found that because Complainant was not an Agency employee or applicant³ the entire complaint was dismissed.

On April 9, 2019, the Agency issued a decision fully implementing the AJ's decision. Complainant filed the instant appeal.

² Although the Agency re-numbered the accepted claims as (1), (2), and (3), we shall maintain the original numbering for clarity.

³ The AJ stated that the supervisory position Complainant applied to was with Murray, not the Agency.

ANALYSIS AND FINDINGS

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.

In Serita B. v. Department of the Army, EEOC Appeal No. 0120150846 (November 10, 2016), the Commission reaffirmed its long-standing position on “joint employers” and noted it is found in numerous sources. See, e.g., EEOC Compliance Manual Section 2, “Threshold Issues,” Section 2-III(B)(1)(a)(iii)(b) (May 12, 2000) (Compliance Manual)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.

Agencies often conclude that an individual is not an employee based solely on the fact that the individual performs work pursuant to a contract between the federal government and an outside organization and the outside organization, not the federal government, controls the pay and benefits of that individual. See, e.g., Helen G. v. Dep’t of the Army, EEOC Appeal No. 0120150262 (Feb. 11, 2016); Nicki B. v. Dep’t of Educ., EEOC Appeal No. 0120151697 (Feb. 9, 2016). These elements are just two of the factors relevant to joint employment under the Commission’s long-standing position and it is not at all surprising that they would be present when an individual working under a federal contract for a federal agency raises a complaint of discrimination.

The term “joint employer” refers to two or more employers that each exercise sufficient control of an individual to qualify as the worker’s employer. Compliance Manual, Section 2-III(B)(1)(a)(iii)(b). To determine whether the Agency has the right to exercise sufficient control, EEOC considers factors derived from common law principles of agency. See Enforcement Guidance, “Coverage Issues,” at Question 2. EEOC considers, *inter alia*, the Agency’s right to control when, where, and how the worker performs the job; the right to assign additional projects to the worker; whether the work is performed on Agency premises; whether the Agency provides the tools, material, and equipment to perform the job; the duration of the relationship between the Agency and the worker whether the Agency controls the worker’s schedule; and whether the Agency can discharge the worker.

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

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 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.

In the instant case, we must first note the Agency’s error in dismissing *some claims* of the complaint, on October 5, 2016, on the grounds that Complainant was not an Agency employee or applicant. The record clearly reflects that Complainant raised all claims in the Agency’s EEO process based on his belief that the Agency, in conjunction with Murray, discriminated against him. Further, regarding the issue of standing, Complainant’s ability to use the EEO process, applies to the *entire* complaint. By erroneously dismissing part of the complaint in October 2016 and the remainder in April 2019, for the same reason (i.e. Complainant was not an Agency employee or applicant), the Agency has caused unnecessary delay and misuse of resources.

The record reflects that Complainant applied for a position with Murray to fulfill its contract with the Agency. Murray decided where to assign Complainant, first at the Agency’s Raccoon Mountain, then to a non-Agency assignment, and later to the Agency’s Widow’s Creek facility. It was a Murray supervisor whom Complainant alleged was creating a hostile work environment. When Complainant reported the behavior, he did so to a Murray official and signed the correspondence as “TVA Contract Security Officer”. Similarly, other documents in the record, including the formal complaint, illustrate that Complainant considered himself to be a contractor. While Complainant contends vaguely that Murray supervisors were directed and controlled by the Agency, he does not dispute that he was not directly supervised by Agency employees. Further, in order to obtain a sensitive security clearance, as a Murray employee, Complainant could not directly apply with the Agency. Instead, Murray had to make the request on his behalf.⁵ We agree with the AJ, that although the Agency Manager’s email, requesting Complainant no longer be assigned to Agency facilities, was closely followed by Murray’s announcement to Complainant that he would be laid-off⁶, this factor alone does not outweigh the other circumstances which reflect a contractor/client relationship.

Therefore, we find that the AJ’s decision to dismiss the formal complaint was proper.

CONCLUSION

The Agency’s decision to fully implement the AJ’s dismissal is **AFFIRMED**.

⁵ Contrastingly, an Agency employee merely required his or her manager to submit a request and justification which was then reviewed by the Agency’s Access Services.

⁶ An internal Murray document, dated May 5, 2014, stated that reductions of approximately 20% would be occurring with their Agency assignments.

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 (S0610)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

October 30, 2019

Date