



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Simone J.,¹
Complainant,

v.

Christine Wormuth,
Secretary,
Department of the Army,
Agency.

Appeal No. 2023004500

Agency No. ARCEWILM22MAY02358

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated June 27, 2023, dismissing a 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. For the reasons discussed herein, we REVERSE the Agency's final decision dismissing Complainant's complaint.

ISSUES PRESENTED

Whether the Agency's final decision properly dismissed Complainant's complaint for failure to state a claim.

BACKGROUND

During the period at issue, Complainant worked as a Project Manager and Alternate Quality Control Manager for Trend Construction Inc., performing

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.

construction services for the Agency in North Carolina pursuant to a contract between the Agency and W-T Federal Joint Venture.²

On July 13, 2022, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the basis of sex (female) when:

On March 2, April 4, April 13, and April 19, 2022, the Agency's Quality Assurance Representative, an Agency employee, harassed her on the basis of sex.³

The Agency issued an initial final decision, dated September 1, 2022, dismissing Complainant's complaint for failure to state a claim reasoning that Complainant lacked standing to bring the complaint because she was not an Agency employee.

Complainant filed an appeal with the Commission's Office of Federal Operations (OFO). In Simone J. v. Dep't of the Army, EEOC Appeal No. 2023000012 (March 14, 2023), OFO vacated the Agency's final decision dismissing Complainant's complaint and remanded the matter to the Agency for a supplemental investigation as to whether the Agency is a joint employer for EEO purposes. OFO reasoned that the record was not sufficiently developed to make a reasonable determination as to whether the Agency was a joint employer for the purpose of using the 29 C.F.R. Part 1614 complaint process.

On remand, the Agency conducted a supplemental investigation and obtained declarations from Agency officials and officials with Trend Construction Inc.

² Trend Construction Inc. is part of W-T Federal Joint Venture.

³ Complainant alleges that the Agency's Quality Assurance Representative (alleged harasser) made various derogatory comments on the basis of her sex including, but not limited to: "I wish it would go back to the way it used to be, there are too many women in construction nowadays," "to hell, with her, I write her evaluations," "she doesn't know what in the hell she's doing.." Complainant alleged that some of these statements were made in the presence of Agency personnel and personnel of the contractor. The record contains signed statements from contractor personnel corroborating Complainant's claims pertaining to some of the statements at issue. According to the EEO Counselor's Report, the alleged harasser stated that he did not recall making these statements.

The Agency subsequently issued a new final decision dismissing Complainant's complaint for failure to state a claim. The Agency reasoned that the Agency does not exercise sufficient control over Complainant to be deemed her joint employer for EEO purposes.

The instant appeal followed.

Complainant, through her attorney, requests reversal of the Agency's final decision. Complainant asserts that the Agency exhibited sufficient control to be deemed a joint employer in this matter. Specifically, Complainant states that she "was in constant contact with and subordinate to [the alleged harasser]. As the Quality Assurance Representative for the project, [the alleged harasser] had the authority to reject the work done by Complainant, and (as threatened) to give her a negative evaluation if she didn't go along with his harassment...Most importantly, [the Agency] has the authority under the contract...to demand that [the contractor] remove Complainant from the project." Complainant's Brief at 18.

In response, the Agency requests that we affirm its final decision. The Agency reiterates its reasoning in its final decision that the Contractor paid Complainant (as well as deducted taxes), provided her with medical insurance, and provided her with the equipment and materials to perform her job. Agency Response Brief at 3-4. Based on the foregoing, the Agency asserts that it does not have sufficient control over Complainant to qualify as her joint employer. The Agency asserts that it does not have the power to remove Complainant from employment with the Contractor. Agency Brief at 8. Finally, the Agency asserts that it promptly reassigned the alleged harasser and that he and Complainant no longer work together.⁴ Agency Brief at 10-11.

⁴ In a declaration under penalty of perjury, Complainant asserts that a named official with the contractor advised an Agency official that the alleged harasser's comments constituted sexual harassment. Complainant asserts that "[an Agency] representative told me that she had also been subjected to [the named alleged harasser's] discriminatory conduct in the past and that he had made their life a living hell. I was also told that I was not the only person with a complaint against [the alleged harasser] due to conduct and that there had been several other complaints about his behavior." The record also contains a declaration from an Agency official stating that she was contacted in April 2022, by an official with the Contractor regarding a "communication issue and apparent personality conflict between [Complainant] and [the Agency's Quality Assurance Representative]..."

STANDARD OF REVIEW

The Agency's decision to dismiss a complaint is subject to de novo review by the Commission, which requires the Commission to examine the record without regard to the factual and legal determinations of the previous decision maker and issue its decision based on the Commission's own assessment of the record and its interpretation of the law. 29 C.F.R. § 1614.405(a). The Commission should construe the complaint in the light most favorable to the complainant and take the complaint's allegations as true. See Cobb v. Department of the Treasury, EEOC Request No. 05970077 (March 13, 1997). Thus, all reasonable inferences that may be drawn from the complaint's allegations must be made in favor of the complainant.

ANALYSIS

EEOC Regulation 29 C.F.R. § 1614.103(a) provides that complaints of 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 department, agencies, and units, Part 1614 applies to all employees and applicants for employment.

In Serita B. v. Dep't of the Army, EEOC Appeal No. 0120150846 (Nov. 10, 2016), the Commission reaffirmed its longstanding position on "joint employers" and noted that 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); 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, however, 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. 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 (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).

We acknowledge that some factors of Complainant's employment indicate Trend Construction Inc. retained control over her position. The record contains a signed questionnaire from the Senior Program Manager (SPM) for Trend Construction Inc. The SPM states that Trend Construction pays Complainant's salary and provides her medical insurance. In addition, the SPM asserts that Trend Construction provides the equipment, materials, and supplies to Complainant for her position.

However, there are numerous other factors related to Complainant's employment indicating that the Agency exhibited joint control over Complainant's position. The SPM for the contractor indicates that Complainant's performance is "ultimately" evaluated by officials with Trend Construction Inc.. However, he also indicates that the Agency feedback is factored into these evaluations. Specifically, the SPM for Trend Construction states "[Complainant's] relationship with [the Agency], as well as [the Agency's] overall evaluation of the [contractor's] performance of individual task orders are considered and factored into her performance evaluations. Any comments from [Agency] officials would be considered and addressed during evaluations."

Complainant also alleges that the alleged harasser, an Agency employee, stated, in reference to her "to hell with her, I do her evaluation."⁵

Complainant also asserts that she was in "constant contact" with the alleged harasser who served as the Agency's Quality Assurance Representative overseeing the project she was working on.⁶ Complainant further asserts that the Agency had the power to remove her from the contract. The questionnaire completed by the SPM for Trend Construction Inc. corroborates this assertion. The record contains a portion of the contract which provides in pertinent part:

[t]he Government reserves the right to require the Contractor to make changes in the Contractor Quality Control (CQC) Plan and operations including removal of personnel, as necessary, to obtain the quality specified.

Based on the foregoing, we find that the Agency exercised sufficient control over Complainant's position to qualify as a joint employer in this matter.

In its response brief, the Agency asserts that it exercised prompt corrective action by reassigning the alleged harasser and thus, Complainant and the alleged harasser no longer interact. However, we find that these assertions go to the merits of Complainant's complaint (rather than to the issue of whether the Agency should be deemed a joint employer in this matter) and thus these matters will be addressed during an investigation on the merits of Complainant's complaint.⁷

⁵ The record contains signed statements from contractor personnel asserting that the alleged harasser made this statement.

⁶ The SPM for Trend Construction, Inc. set forth that "[Complainant] is also accountable to [Agency] representatives, including the Quality Assurance Representative.

⁷ Complainant, in her formal complaint, is seeking various remedies, including, but not limited to, compensatory damages, attorney's fees, a notice to employees regarding the alleged discrimination and EEO training for management officials.

CONCLUSION

Accordingly, we REVERSE 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.

ORDER (E0224)

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 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, or a copy of the final agency decision ("FAD") if Complainant does not request a hearing.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

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.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. 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).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(f).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0124)


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 their 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

February 13, 2025
Date