



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

[REDACTED]
Belinda M.,¹
Complainant,

v.

Carlos Del Toro,
Secretary,
Department of the Navy,
Agency.

Appeal No. 2024004466

Agency No. 24-42158-00794

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated June 25, 2024, 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. Upon review, the Commission finds that Complainant's complaint was improperly dismissed pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim.

ISSUES PRESENTED

Whether the Agency properly dismissed Complainant's formal complaint for failure to state a claim because she is not an employee or applicant with the Agency.

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.

BACKGROUND

During the period at issue, Complainant was a contract "runner" at the Agency's Norfolk Naval Shipyard in Portsmouth, Virginia. Complainant worked under a contract between the Agency and Marine Systems Corporation. Complainant was assigned to the Agency's "Code 200" office and moved documents between other Codes. Complainant worked primarily with the manager for the John Warner Project (Project Manager), an Agency employee. Project Manager was supervised by the Code 200 Branch Head (Branch Head) who was also an Agency employee. With some frequency, Complainant ran documents to Code 133, where one of the Agency employees was a Quality Assurance Specialist (Co-worker).

On May 9, 2024, Complainant filed the instant formal complaint alleging that the Agency subjected her to discrimination based on race (African-American), sex (female), and in reprisal for prior EEO-protected activity when:

- 1) Since February 2023, Complainant has been subjected to physical advances and sexual gestures from Co-worker, including Co-worker moving his chair in order to stare at Complainant, as well as trying to measure her with a tape measure without her consent;
- 2) In April 2023, Complainant was made aware of the sexually explicit comments Co-worker was making about her and her body out loud in front of others, including, but not limited to, "I would f**k the s**t out of her;"
- 3) On July 28, 2023, Co-worker held the door for Complainant and said "I'll open the door for you so I can see you walk up the stairs," and made noises and comments about her butt as Complainant went up the stairs in front of him, despite Complainant objecting to his actions and sounds;
- 4) On August 16, 2023, when Co-worker slid his chair into Complainant's view and gestured for her to come over before stating "I asked her [another co-worker] if you were married because you're such a beautiful woman," despite admitting to being married himself;
- 5) On August 16, 2023, Co-worker was angry during the investigation following Complainant's complaint of sexual misconduct to Project Manager and Co-worker called around to different coworkers saying he wanted to "find her and talk to her," in addition to other comments threatening his coworkers;

- 6) On February 20, 2024, Complainant walked into Code 133 without any forewarning or notice from Project Manager or Branch Head, and saw Co-worker back at his old desk;
- 7) On March 1, 2024, Branch Head finally pulled Complainant aside and informed her of Co-worker's return to Code 133, stating "[Coworker's] supervisor feels that he has learned his lesson;"
- 8) On March 1, 2024, Branch Head instructed Complainant to continue performing her duties as normal in Code 133, despite Co-worker returning to the Code 133, even though Complainant expressed her discomfort in doing so due to Co-worker's behavior before and during the investigation; and
- 9) Since March 1, 2024, Project Manager and Branch Head have not made any adjustments to help ease Complainant's fear and anxiety in performing her job duties, two-three times a day, Monday through Saturday, in Code 133.

On June 25, 2024, the Agency issued a final decision dismissing the complaint for failure to state a claim under 29 C.F.R. § 1614.107(a)(1). The Agency determined that Complainant was a contractor but not an employee or applicant who had standing to pursue an EEO complaint against the Agency. In other words, the Agency determined that it was not Complainant's joint employer.

The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant, through Counsel, contends that the Agency did not sufficiently support its decision to dismiss her complaint, because its investigation into her employment status was lacking and biased against Complainant. Counsel stated that EEO Investigator did not expressly interview Complainant or Project Manager about the joint employer factors. Counsel further complained that the Agency did not include a copy of its contract with Marine Systems Corporation under which Complainant worked. According to Complainant's Counsel, the Agency's finding that it was not a joint employer improperly relied on two interviews, wherein the EEO Specialist asked questions which elicited self-serving answers from the Contracting Officer Representative (COR) and Branch Head.

Next, the Complainant's Counsel argues that evidence of record showed that the Agency exerted sufficient control over the Complainant such that it should be considered a joint employer. Counsel stated that Complainant received direct day-to-day supervision from Project Manager who had identified Complainant as his subordinate. Counsel asserted that Complainant had to seek approval for leave from Project Manager. Complainant's Counsel asserts further that the Agency could effectively terminate Complainant's employment by revoking her access to its facilities.

Citing Commission precedent, Counsel insisted that Complainant's regular interaction with Co-worker supported her position that the Agency qualified as a joint employer and was liable for the alleged harassment. Counsel noted that Co-worker's harassment of Complainant was witnessed and heard by employees in Code 133. Counsel further stated that Complainant reported the matter to Project Manager. Counsel also wrote that the Agency's reaction suggested that Complainant was considered an employee in that the Agency removed Co-worker from Code 133 while it conducted an internal investigation. After the internal investigation concluded, the Agency returned Co-worker to Code 133 and Branch Head instructed Complainant to continue to resume working there in the presence of her alleged harasser.

In its opposition brief, the Agency maintained that it did not exercise sufficient control over Complainant to be considered her joint employer. The Agency denied that Project Manager or Branch Head were Complainant's supervisors. Instead, the Agency described Complainant's position as a "resource" provided by its contract with Marine Systems Corporation such that the Agency did not select Complainant and it did not control her pay, her leave, her work hours or her assigned workspace. The Agency stated that Complainant's work was not of such a skill-level that her work was integral to the Agency. The Agency further asserted that the Marine Systems Corporation contract document was not necessary to prove its position. The Agency noted that, while represented by her attorneys, Complainant could have submitted additional evidence in support of her joint employer argument but did not do so.²

² The Agency also moved to strike attorney-client privileged communications from Complainant's appellate brief that had been erroneously included in the Agency's case file. We decline to address the Agency motion to strike the documents at issue were not considered in reaching our decision.

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

Here, the issue is whether the Agency properly dismissed Complainant's complaint for failure to state a claim on the basis that Complainant was not its employee. 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 covered departments, agencies, 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 "Threshold Issues" at Section 2-III(B)(1)(a)(iii)(b) (May 1, 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" at 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 at 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. Compliance Manual at 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 codetermine 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).

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 Questions 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. Enforcement Guidance "Coverage Issues" at Question 2.

It is undisputed that the Complainant used Agency equipment and worked in Agency facilities. On the other hand, Complainant did not dispute that her compensation and benefits came from Marine Systems Corporation as opposed to the Agency. Other statements of record were either contested or inconsistent. The COR and Branch Head stated that the Agency had no control over where, when and how Complainant performed as a runner. Meanwhile, Complainant stated that she reported directly to Project Manager and that her day-to-day assignments came from Agency personnel. When Project Manager was interviewed about Complainant's underlying sexual harassment allegations, he told the EEO Counselor that Complainant was his subordinate. Moreover, Branch Head stated that if a runner was no longer needed, then whether to terminate or reassign would be coordinated with the COR. The COR, in turn, indicated that Marine Systems Corporation was entirely in charge of discharging its contract workers.

Here, the record is not sufficiently developed to support the Agency's final decision that it was not a joint employer for the purposes of the 29 C.F.R. Part 1614 EEO complaint process. The Agency's joint employer analysis did not evidence the extent to which Marine Systems Corporation had partial or de facto control and supervision over Complainant.

The Agency's final decision relied on unsworn interview statements which referenced the contract with Marine Systems Corporation but did not include a copy of that contract. Notably, there was no statement from Project Manager, nor a statement from a Marine Systems Corporation representative that directly addressed who had the rights to control the means and manner of Complainant's work.

CONCLUSION

Based on the foregoing, we VACATE the Agency's final decision dismissing Complainant's complaint and we REMAND this matter for a supplemental investigation in accordance with the ORDER below.

ORDER

Within sixty (60) calendar days from the date this decision is issued, the Agency is ORDERED to take the following actions:

1. Conduct a supplemental investigation to obtain evidence consistent with this decision and relevant in assessing whether the Agency is a joint employer for EEO purposes. The evidentiary record shall include, but is not limited to, affidavits from Agency management officials, including the Project Manager who allegedly had to approve Complainant's leave requests, and to the extent possible, an affidavit from Marine Systems Corporation detailing who had actual de facto control of Complainant's position and day-to-day work.
2. The Agency shall supplement the record with a copy of the contract between Marine Systems Corporation and the Agency. The Agency shall then provide Complainant with an opportunity to provide a response to the supplemented evidence.
3. Once the supplemental investigation is completed, the Agency shall either issue a new final decision dismissing the formal complaint, with an appropriate analysis of relevant facts with appeal rights to the Commission, or a letter accepting Complainant's complaint for investigation.

4. A copy of the supplemental investigation and new dismissal letter or letter of acceptance shall be provided as set forth below in the section entitled "Implementation of the Commission's Decision."

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

December 10, 2024

Date