



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

[REDACTED]
Andrew L.,¹
Complainant,

v.

Alex M. Azar II,
Secretary,
Department of Health and Human Services,
Agency.

Appeal No. 0120182154

Hearing No. 480-2016-00451X

Agency No. HHS-OS-0035-2015

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated May 4, 2018, dismissing his complaint of unlawful employment discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Physician employed by AlignStaffing as a contractor with the Agency. He performed medical evaluations for current and prospective federal employees from various agencies at the Federal Occupational Health facility in the Chet Holyfield Federal Building in Laguna Niguel, California. Complainant was employed in this capacity from March 2010 to March 2015.

Complainant's immediate and second level supervisors were employees of AlignStaffing. The Agency provided the workplace and equipment necessary to perform his duties, including an examination room, examination table, telephone, medical records and charts, medical supplies such as bandages, gloves, syringes, laboratory analysis, and vaccines. Complainant had his own stethoscope.

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.

Complainant was paid by AlignStaffing based on hours worked and assigned by AlignStaffing. The Agency did not provide Complainant with any leave or benefits. Complainant paid his own Social Security taxes. Complainant was not assigned full time to the Chet Holyfield Federal Building unless appointments were scheduled or if the AlignStaffing Supervisor contacted Complainant to make sure he was available to conduct examinations. He averaged four hours of work per month at this facility and, during the busy season, he would be there for a full day during the week.

Complainant was terminated from his position by AlignStaffing effective April 23, 2015. The notice indicated that AlignStaffing terminated him for insubordination and job abandonment. The Agency indicated that it deferred to AlignStaffing regarding Complainant's assignment to the Agency's facility.

Complainant contacted the EEO counselor alleging discrimination. On August 11, 2015, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the basis of age (58) when:

1. Since 2011, Complainant was passed over for training on several occasions, including on March 27, 2015, Complainant became aware that he had not been provided training on how to transition from a paper-based medical records system to an electronics-based medical records system.
2. On March 24, 2015, Complainant was terminated by AlignStaffing with the Federal Occupational Health facility.

The Agency accepted the complaint for investigation. Following the investigation, Complainant requested a hearing before an EEOC Administrative Judge (AJ).

On November 8, 2017, the Agency filed a motion to dismiss the formal complaint on the grounds that Complainant was an independent contractor, and not an Agency employee. The Agency asserted that it failed to exert any control over Complainant to establish it as a joint employer for purposes of the instant EEO complaint.

On November 26, 2017, Complainant responded to the Agency's motion. Complainant pointed out other cases in which contractors were considered employees. Complainant stated that the Agency's motion was not correct. He argued that he kept his schedule open to facilitate scheduling for the Agency.

On March 19, 2018, the AJ issued her decision granting the Agency's motion to dismiss the complaint, determining Complainant could not be considered an employee of the Agency. The AJ also noted that the Agency played no role in Complainant's termination. As such, the AJ concluded that Complainant was not an employee of the Agency and was not covered by the administrative EEO complaint process. As such, the AJ dismissed the complaint. On May 3, 2018, the Agency adopted the AJ's decision dismissing the complaint. The instant appeal followed.

CONTENTIONS ON APPEAL

Complainant filed a brief in support of his appeal in which he argued that he should be considered an employee of the Agency for the purposes of this complaint.

The Agency asked that the Commission affirm its adoption of the AJ's decision dismissing the complaint.

ANALYSIS AND FINDINGS

The matter before us is whether the AJ properly dismissed Complainant's complaint because he was a contractor for the Agency, not an employee within the meaning of the 29 C.F.R. Part 1614 administrative EEO complaint process. 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)²; 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

² The EEOC Compliance Manual and other guidance documents, as well as federal-sector appellate decisions, are available online at www.eeoc.gov.

Carrier Corp. v. NLRB, 768 F.2d 778, 781 (6th Cir. 1985); see also Ma, EEOC Appeal Nos. 01962389 & 01962390.

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. 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, the record showed that everyday contact, schedule, assignments, training, responsibilities all remained with AlignStaffing. AlignStaffing provided administrative and managerial support for Complainant's position. The AlignStaffing Supervisor had to ensure Complainant met the training requirements, kept track of the training requirements, and provided him with all training. Complainant's scheduling and availability was coordinated by AlignStaffing.

Complainant also admitted very little interaction with the Agency beyond conducting the physical exams with the employees or potential employees of the Agency. In addition, the contract shows that AlignStaffing provides services to more agencies than the Agency in the case at hand.

Finally, Complainant has conceded he was terminated by AlignStaffing. Complainant failed to assert that the Agency or any Agency employee was involved with the decision by AlignStaffing to terminate his employment. The termination action indicates that it was AlignStaffing that initiated the termination on its own. The documents between the AlignStaffing management indicate that there were issues AlignStaffing had regarding Complainant's availability between August 2014 and March 2015 generally and beyond the work he conducted with the Agency. As such, AlignStaffing alone decided not to use Complainant any further.

We find that the Agency did not have sufficient control over Complainant's employment to be his common law joint employer. The only indicia of Agency control Complainant identified was that he worked on Agency premises and used some of the Agency's equipment. This is insufficient. Accordingly, we conclude that the AJ properly dismissed the case at hand.

CONCLUSION

Upon review, we AFFIRM the Agency's final action adopting the AJ's decision dismissing the complaint as a whole.

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

February 25, 2020
Date