



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

[REDACTED]
Herschel T.,¹
Complainant,

v.

James F. Bridenstine,
Administrator,
National Aeronautics and Space Administration,
Agency.

Appeal No. 2020003134

Agency No. NCN-19-LARC-00207

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from an Agency final decision, dated March 25, 2020, dismissing his 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. The Commission accepts the appeal in accordance with 29 C.F.R. § 1614.405.

BACKGROUND

From August 2009 through March 2019, Complainant was a Senior Programmer with Science Systems and Applications, Inc. (SSAI), a corporation that provides science, engineering, and IT professionals for a variety of clients, including the Agency. Specifically, Complainant was assigned to work on the Agency's Clouds and Earth's Radiant Energy System (CERES) project at its Langley Research Center campus in Hampton, Virginia.

On March 27, 2019, Complainant was terminated from his employment. Believing his removal was discrimination based on sex (male), Complainant filed a formal EEO complaint on October 3, 2019.

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.

On March 25, 2020, the Agency issued a final decision dismissing the complaint for failure to state a claim. The Agency reasoned that Complainant was an independent contractor, not an Agency employee, and therefore lacked standing to file an EEO complaint. The final decision referenced Commission guidance on the numerous factors to consider in assessing employment status. In two brief paragraphs, without elaboration or analysis, the Agency stated that Complainant was employed by SSAI, supervised by SSAI employees, investigated for misconduct by SSAI, and terminated by SSAI. Complainant filed the instant appeal.

On appeal, Complainant argues that the Agency was involved with his hiring, assigned him work, interacted with him, and influenced his termination. According to Complainant, before SSAI hired him, he was flown from California to Virginia to interview with the NASA manager who headed the CERES project as well as Agency Manager-D. Complainant contends that it was only after obtaining their approval that SSAI hired him. He said he interacted directly with NASA employees, and never received instructions from SSAI managers. Complainant asserts that SSAI employees only signed his timesheets and evaluations.

In response, the Agency elaborates upon its final decision and submits arguments reflecting analysis of additional factors. The Agency argues that Complainant worked from SSAI's Hampton, Virginia offices, with equipment and materials provided by SSAI. Further, Complainant was "a technical expert with little need for a supervisor", indicating contractor status. While the Agency informed SSAI about a "negative interaction" between Complainant and a NASA employee, it contends it was SSAI who conducted an inquiry and terminated Complainant.

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);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.

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. 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 observe that the record contains various deficiencies. While the complaint file provided by the Agency contains a copy of the EEO complaint, the EEO Counselor's Report, the termination letter from SSAI, and a memorandum from the Agency's Office of Chief Counsel, these documents are inadequate to support the Agency's determination that it should not be considered Complainant's joint employer for EEO purposes. The record, for example, does not even include a copy of the relevant contract between the Agency and SSAI.² There is no position description for Complainant's job. A one-page document reflects seven questions posed to an Agency manager (hereinafter "Manager-D"), which Complainant identifies as one of his supervisors. When asked if he is Complainant's supervisor, Manager-D answers "no" and names two SSAI employees. However, in the next question, Manager-D states that he does give Complainant assignments. The remaining questions go to the merits of Complainant's complaint, rather than his contractor/employee status. There are no statements addressing the day-to-day actions, duties, and responsibilities of Complainant's job. Without such information, the Commission is unable to determine whether the Agency exerted sufficient control over Complainant to be considered a joint-employer. See Alan F. v. Dep't of Agriculture, EEOC Appeal No. 0120161089 (March 5, 2018) (Agency decision, based on contract between complainant and contracting company, vacated when document was "silent regarding the day-to-day interactions and control over Complainant").

² The record does contain an Agency document entitled: "NPDV Search Results" for SSAI, showing "17 contracts found". These search results, however, provide very limited information regarding contracts awarded to SSAI over the last five year, with the "place of performance" identifying "Lanham, MD". There is no indication these search results relate to Complainant's assignment to the CERES project in particular.

CONCLUSION

Accordingly, the Agency's final decision to dismiss the complaint is **VACATED**. The matter is **REMANDED** to the Agency for a supplemental investigation regarding the relevant facts necessary to determine whether the Agency can be considered Complainant's joint employer for the purpose of using the 29 C.F.R. Part 1614 EEO complaint process.

ORDER

Within sixty (60) calendar days of the date of this decision, the Agency shall take the following actions:

1. The Agency shall conduct a supplemental investigation to obtain additional evidence consistent with this decision which may be relevant in determining whether the Agency was Complainant's joint employer for the purposes of Complainant have standing to state a claim under the 29 C.F.R. Part 1614 EEO complaint. This investigation shall include, but not be limited to, affidavits from Agency officials, SSAI officials and Complainant, as well as relevant documentary evidence, concerning the Agency's right to control the terms and conditions of Complainant's employment, as well as the circumstances surrounding the decision to terminate his employment.
2. Upon completion of the supplemental investigation, the Agency shall provide Complainant with a copy of the supplemental investigative report and issue a new final decision either accepting the complaint for investigation on its merits or dismissing the complaint again for lack of standing with a meaningful analysis of the appropriate facts using this decision as a guideline. If the Agency dismisses the complaint, it shall provide Complainant appeal rights to the Commission.
3. A copy of the supplemental investigation and the subsequent acceptance letter or new final agency decision dismissing the complaint shall be provided to the Compliance Officer at the location referenced below.

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 (M0617)

The Commission may, in its discretion, reconsider this appellate decision if the 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 his or her request for reconsideration, and any statement or brief in support of his or her request, via the [EEOC Public Portal, which can be found at https://publicportal.eeoc.gov/Portal/Login.aspx](https://publicportal.eeoc.gov/Portal/Login.aspx).

Alternatively, complainant can submit his or her 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, 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 his or her 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(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

October 15, 2020

Date