



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

[REDACTED]
Irina T.,¹
Complainant,

v.

Janet L. Yellen,
Secretary,
Department of the Treasury
(Internal Revenue Service),
Agency.

Appeal No. 2020000651

Hearing No. 531-2019-00260X

Agency No. IRS-18-0168-F

DECISION

On October 23, 2019, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's September 26, 2019 final order concerning an equal employment opportunity (EEO) complaint alleging 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

During the relevant time, Complainant was employed by Security Walls, LLC (hereinafter "SW"). In June 2016, she was assigned to a contract entered by SW and the Agency for security services.² Specifically, Complainant was a Site Supervisor assigned with overseeing the daily duties of the armed security guard workforce at the Agency's IRS facility in New Carrollton Federal Building in Lanham, Maryland.

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.

² According to Complainant she spent approximately one year at the Agency's Washington D.C. location and about seven months at the Maryland location.

Complainant was responsible for the overall function of security guard operations, including payroll, maintaining records of training and ensuring that the contract requirements were met. Complainant's SW managers included the IRS Project Manager (hereinafter SW-Manager), as well as the SW-Owner. She was also assigned work by the Agency's Physical Security Specialist/Security Quality Inspector (hereinafter "SQI"). Also involved with the execution of the parties' contract was the Agency's Contract Officer Representative/Program Manager of Security Guard Programs (hereinafter "COR").

On October 13, 2017, the Agency underwent an ID media change which resulted in a large number of personnel entering the facility for ID media issues. Consequently, SQI orally instructed Complainant to permit some individuals to enter without proper identification or an escort. Complainant, however, responded "[t]hat's not in the post orders" and declined to have her guards follow this ad hoc instruction.

Later that day, SQI brought the exchange to the attention of SW-Manager and COR in an email. He stated that Complainant had disobeyed his order, causing "an unnecessary delay in accomplishing the mission at hand." Further, SQI stated that, "[i]f the security force refuse[s] to follow ad hoc instructions given by this office, then a change must take place!!!" SQI also submitted a Report of Infraction regarding Complainant's alleged "non-performance of duty." By email dated October 18, 2017, COR notified SW that they wanted Complainant replaced stating her "...actions pose a greater risk to our organizational needs, demonstrates a lack of professional conduct that is not consistent with the terms of the contract." SW apologized and agreed to the change. On October 19, 2017, SW-Owner called Complainant and informed her that she could not return to the Agency facility and that the Agency had requested her removal from the contract.³

Believing that SQI's actions were discriminatory, Complainant contacted an EEO Counselor. Informal efforts to resolve Complainant's concerns were unsuccessful. Subsequently, on February 9, 2018, Complainant filed a formal complaint alleging that she was subjected to sexual harassment⁴ which culminated in her termination from the Agency on October 19, 2017.

Specifically, in her formal complaint, Complainant described being sexually harassed by SQI on two occasions immediately preceding her removal from the Agency contract. According to Complainant, on October 4, 2017, while in the Security Operations Center she received a call on her cell phone. When she tried to leave to take the call, SQI blocked the door. When Complainant asked him several times to move, he simply replied, "[m]ake me".

³ In November 2017, SW reassigned Complainant to a position in Huntsville, Alabama working for another Agency.

⁴ To the Agency's credit, the record reflects that irrespective of Complainant's status as a contractor or an employee it conducted an internal investigation into her sexual harassment claims in December 2017.

Complainant then turned to the officers standing in the Center and asked, “[d]o you have my back?” and SQI moved out of the way. The second incident, on October 13, 2007, allegedly occurred during a meeting between the two in Complainant’s basement office. According to the formal complaint, SQI asked Complainant to his house for dinner and, after she responded “No”, he started making suggestions of a sexual nature. For example, “[c]ome over here and sit on my lap.” She continued to say “No” and then, in her words, “[g]et out of my office ‘using profanity’”. After he left, Complainant stated that SQI later called about work but, she was so upset about the earlier incident that she just yelled for him to put it in writing. Feeling “sick to my stomach and angry”, Complainant stated she left work early that day. In Complainant’s view, her removal a week later was retaliation for denying SQI’s advances.

In correspondence dated February 20, 2018, the Agency accepted the complaint for investigation. However, in so doing, the Agency also included the question of whether it was a “joint employer” as a matter to be investigated.

After an investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. On March 22, 2018, the Agency filed a Motion to Dismiss and Complainant filed her opposition. On August 28, 2019, the AJ assigned to the case dismissed the formal complaint on the grounds that the Agency was not Complainant’s joint employer.

The AJ reasoned that SW paid Complainant and provided her with health insurance, leave and benefits. Acknowledging that Complainant worked at an Agency facility, with Agency equipment, the AJ nevertheless focused on the Agency’s inability to directly terminate her. The AJ reasoned that the Agency could only request that Complainant be replaced by contacting and coordinating with SW. Additionally, the AJ cited language from the contract executed between the Agency and SW, noting: “The Government shall not exercise any supervision or control over the contract service providers performing the services herein.”

The Agency issued a final action implementing the AJ’s decision to dismiss the formal complaint. Complainant filed the instant appeal.

ANALYSIS AND FINDINGS

Procedural Dismissal

The matter before us is whether the AJ properly dismissed the formal complaint, pursuant to 29 C.F.R. § 1614.107(a)(1), because she was a contractor, and not an Agency employee within the meaning of the administrative EEO process. Specifically, 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. The regulation goes on to state that within the covered departments, agencies and units, Part 1614 applies to all employees and applicants for employment. See EEOC Regulation 29 C.F.R. § 1614.103(c).

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)⁵; 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 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

⁵ The EEOC Compliance Manual and other guidance documents, as well as federal-sector appellate decisions, are available online at www.eeoc.gov.

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, several factors indicate an employee/employer relationship between Complainant and the Agency. The parties do not dispute that Complainant's work was done at the Agency's facilities and with Agency equipment. While SQI disputes supervising Complainant, he attested to assigning her work. The record also indicates daily interactions and coordination between Complainant and other Agency security officials.

Other factors suggest that the Agency was not Complainant's joint employer. Complainant was paid by SW, who also provided her with leave and health insurance. Also, there was a SW-Manager onsite at the Agency. Finally, Complainant was informed of her removal from the Agency assignment by SW-Owner.

Some aspects of the record, however, do not as easily denote Complainant's status as an employee or contractor, such as her relationship with SQI, the contract language, and the circumstances surrounding her removal. The AJ's decision noted that the contract language expressly stated that a Site Supervisor "must have the capability to act and make decisions independently."

As noted above, SQI denied that Complainant was under his supervision. Yet, when Complainant failed to follow his oral instructions, exercising her “independence” by observing that his ad hoc instruction was not in writing, he contacted both her SW and Agency managers to report the perceived infraction and seek her removal from the Agency assignment. SQI’s claims that he was not involved with the decision to remove Complainant conflict with the statements from both the Agency’s COR and SW-Owner. COR attested that SQI requested Complainant’s removal and that she informed SW of the “of the contract infraction and advised of the recommendation to remove [Complainant] from serving [as] site Supervisor.” Similarly, SW-Owner confirmed that she informed Complainant of the Agency’s desire and her lack of input in the decision.

The AJ and the Agency rely on the contract to establish Complainant’s contractor status. A review of the contract pages included in the record, however, indicate otherwise.⁶ A portion of the document entitled “Standards of Conduct” allows the Agency to “request the Contractor immediately remove any employee from any or all locations where the contractor has contracts with the IRS...” for a variety of reasons. The list of actions, behaviors, or conditions that are “cause for immediate removal from performing the contract” include, for example: quarreling, abusive or offensive language, using or possessing reading materials, using personal electronic equipment while on duty, eating or drinking at duty station, or “not displaying a respectful and helpful attitude in all endeavors.” Quite simply, the contract reveals that the Agency has *broad latitude* in removing an individual. Additionally, irrespective of the merits of Complainant’s sexual harassment claims, the alleged incidents reflect daily interactions between her and Agency officials that would indicate some measure of Agency control. Consequently, we find that these aspects of Complainant’s employment suggest the Agency was her joint employer.

The Commission finds the record shows sufficient control by the Agency over Complainant’s employment to be considered a joint employer for purposes of the EEO complaint process. The AJ erred in dismissing the complaint on the ground that Complainant lacked standing to have her discrimination claims adjudicated through the 29 C.F.R. Part 1614 EEO complaint process.

CONCLUSION

The decision to dismiss the complaint is **REVERSED** and the case is **REMANDED** from the point processing ceased in accordance with this decision and the **ORDER** below.

⁶ The instant record contains several pages of what appears to be a 157-page contract, for the time period of October 2013 through September 2014, with an option to extend this base period with two one-year options. The events at issue occurred in October 2017, beyond the time frame of the contract provided.

ORDER

Within thirty (30) calendar days of the date this decision is issued, the Agency shall submit a renewed request for a hearing on behalf of Complainant, as well as the complaint file and a copy of this decision to the Hearings Unit of the appropriate EEOC field office. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

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 (M0920)

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 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>

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, 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 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).

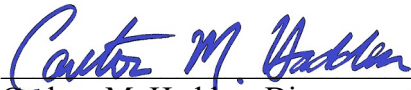
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

July 21, 2021

Date