



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Alfredo S.,¹
Complainant,

v.

John E. Whitley,
Acting Secretary,
Department of the Army,
Agency.

Appeal No. 2021001400

Agency No. ARUSAOCTG20OCT00007

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from an Agency decision, dated November 17, 2020, dismissing a formal complaint alleging 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

Complainant, an employee of Lockheed Martin Corporation (hereinafter “LM”), worked as a Gunsmith/Armorer for the U.S. Army Special Operations, 1st Capability Integration Group (1st CIG) located at Fort Belvoir, Virginia. Complainant’s job responsibilities included the following: “ensuring the security and accountability of weapons and associated accessories.” Complainant also inspected, repaired, and tested weapons, in addition to performing other tasks.

On October 7, 2020, Complainant filed a formal EEO complaint alleging the Agency discriminated against him based on race (Caucasian), color (white), and religion (Christian) when, in June 2020, he was subjected to a hostile work environment as a result of a confrontation with an Agency employee (“Soldier-S”), culminating in his employment being terminated on July 23, 2020.

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 November 17, 2020, the Agency issued a final decision dismissing the formal complaint. Without describing any relevant facts, case law, or analysis the Agency simply stated:

I have reviewed all of the information in the file and have decided to dismiss the complaint in its entirety (claims a. and b.) Title 29 Code of the Federal Register, Part 1614.107(a)(1) requires that the Agency dismiss a complaint that fails to state a claim under 29 C.F.R. 1614.103. Your client failed to state a claim under 29 C.F.R. 1614.103(c), as he is not an Agency employee or applicant for employment with the Department of the Army.

Complainant filed the instant appeal.

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. 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)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.

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.

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

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, as noted above, the Agency's sparse final decision does not include any relevant facts, any reference to the factors to be considered, or analysis. In its final decision, the Agency simply concludes that Complainant is not an Agency employee and therefore the complaint fails to state a claim. It is the burden of the Agency to have evidence or proof in support of its final decision. See Marshall v. Dep't of the Navy, EEOC Request No. 05910685 (Sept. 6, 1991). It is clear that the Agency has not even touched on any supportive evidence in its decision.

This is not the first time a dismissal for lack of standing, by *this* Agency, has been found to be deficient. A review of previous Commission decisions, regarding an individual's employee status, demonstrates the inadequate support for such dismissals has been repeatedly brought to the Agency's attention. In such instances, the Agency's decision has been reversed by the Commission. See Townsley v. Dep't of the Army, EEOC Appeal No. 0120142750 (Jan. 28, 2014); Complainant v. Dep't of the Army, EEOC Appeal No. 2019000440 (Dec. 18, 2019) (where Agency decision lacked any analysis of employee status and limited record did not even include a copy of contract, Commission rejected Agency's efforts to submit arguments for the first time on appeal that were absent from its decision noting that to do so would be unfair to Complainant); Georgia Z. v. Dep't of the Army, EEOC Appeal No. 2021000668 (Feb. 23, 2021) (Commission found even if it considered analysis proffered for first time on appeal by Agency, it still lacked an assessment of the facts against the relevant factors and the record did not support the conclusion that the Agency was not a joint employer).

Yet again, in the instant case, the Agency references Ma v. Dep't of Health and Human Servs., EEOC Appeal Nos. 01962389 & 01962390 (May 29, 1998) and Serita B. v. Department of the Army, EEOC Appeal No. 0120150846 (November 10, 2016) for the first time on appeal.

In addressing some of the factors, the Agency argues that LM “had all human resources authority over Complainant”, as well as an onsite LM supervisor. It also broadly asserts that LM assigned work to Complainant. The Agency, however, acknowledges that Complainant’s work was performed at an Army facility, using Agency tools to repair military weapons systems. Further, as to revoking Complainant’s access/security clearance to the facility following the June incident, the Agency argues that the Commission has previously found that such action by an Agency did *not* result in finding joint employer status. Finally, the Agency asserts that LM is a large, international company and that it was LM that chose to terminate Complainant rather than reassign him to another LM location.

On appeal, Complainant’s attorney, citing the numerous factors and relevant facts, argues that the Agency exerted sufficient control over Complainant to be considered a joint employer. Complainant’s position and job duties are similar to those associated with a U.S. Army unit level Armorer and is an “integral part” of the business of the Army. As acknowledged by the Agency, Complainant’s work was performed in an Agency building at an Agency military base. Complainant contends that he received his assignments from Agency personnel and was under the direct supervision of an Agency official. Further, Complainant believes that Agency officials were responsible for his removal. According to Complainant, after the June incident, he was eventually cleared to return to work by LM. It was only when the Agency issued its “loss of confidence” letter, the he was terminated.

Even if we were to consider the Agency’s newly presented analysis, we find that it is insufficient to support its dismissal. The parties do not dispute that Complainant performed his job duties at an Agency facility with Agency equipment and materials. Further, the type of work is one that is an integral part of the Agency’s mission. As for supervision and the assignment of duties, the record identifies both Agency employees and LM individuals. The majority of witnesses identified by Complainant are also Agency employees, indicating that Complainant performs his work as part of the Agency’s unit. Additionally, we note that immediately following the June incident with Solider-S, Complainant was sent to the Agency’s Battalion Psychologist. Complainant also raised his concerns, about being called a racist, to an Agency official. These facts tend to indicate an employer/employee relationship between Complainant and the Agency.

As for the Agency’s assertion that LM had exclusive “human resources authority” over Complainant, specifically hiring, firing, performance evaluations, determining the rate of pay, approval of leave, and setting work hours, there is no evidence in support of this claim. Moreover, the instant record does not contain a copy of a contract with LM, or documentation regarding the incident with Soldier-S, Complainant’s subsequent security clearance revocation, or his removal.

Therefore, we find that the Agency has failed to support its dismissal and the instant record indicates sufficient control by the Agency to be considered Complainant’s joint employer for EEO purposes.

CONCLUSION

The Agency's decision is hereby **REVERSED**. The complaint is **REMANDED** to the Agency for further processing in accordance with this decision and the Order below.

ORDER (E0618)

The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108 et seq. 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, a copy of complainant's request for an Agency final decision, or a statement from the agency that it did not receive a response from complainant by the end of the election period.

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).

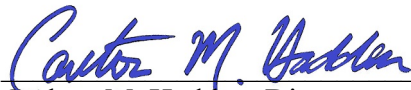
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

June 7, 2021
Date