



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Sonny M.,¹
Complainant,

v.

Bill Nelson,
Administrator,
National Aeronautics and Space Administration
(Langley Research Center),
Agency.

Appeal No. 2021001448

Agency No. NCN-19-LARC-00207

DECISION

On December 29, 2020, Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a December 11, 2020 final Agency decision (FAD) dismissing his 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.

BACKGROUND

Complainant worked for a staffing firm serving the Agency's Clouds and the Earth's Radiant Energy System (CERES) project in the Agency's Langley Research Center in Hampton, Virginia as a Senior Research Scientist (Programmer). While he generally worked at the staffing firm's facility in Hampton, he sometimes attended meetings at Langley.

On October 4, 2019, Complainant filed an equal employment opportunity (EEO) complaint alleging that the Agency discriminated against him based on his sex (male) when he was terminated from his position effective March 27, 2019.

The Agency dismissed the complaint for failure to state a claim because it did not, under common law, employ or jointly employ Complainant. Complainant appealed. In EEOC Appeal No. 2020003134 (Oct. 15, 2020), the Commission vacated the dismissal because there

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.

was insufficient evidence to decide on the issue of joint employment. It ordered the Agency to obtain the evidence and then accept the complaint or issue another FAD dismissing it for lack of standing. After conducting a supplemental investigation (S/ROI), the Agency again dismissed the complaint, asserting Complainant was not its employee.

The instant appeal followed. On appeal, Complainant argues that he was jointly employed by his staffing firm and the Agency. In reply, the Agency argues the FAD should be affirmed.

ANALYSIS AND FINDINGS

The matter before us is whether the Agency properly dismissed Complainant's complaint for failure to state a claim on the basis that he was not its employee. 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 therewith.

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) OLC Control No. EEOC-CVG-2000-2 (May 12, 2000) (Compliance Manual); EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms OLC Control No. EEOC-CVG-1998-2 (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. 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.

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), req. to reconsider 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 shows Complainant coded and programmed for the CERES website to provide visualization, sub-setting and ordering of CERES satellite data products for the public and fulfill data order requests made on the website. While we agree with the Agency's finding that the staffing firm assigned Complainant to perform work on CERES, we disagree with its finding that the record lacks evidence Agency officials actually assigned him tasks.

Complainant met weekly with the Agency CERES Team Lead (GS-15 Team Lead). Complainant, the GS-15 Team Lead, and the Team Lead's supervisor (the Agency CERES Principal Investigator) all stated the GS-15 Team Lead assigned Complainant tasks to do on the website. The GS-15 Team Lead elaborated he gave Complainant PowerPoints showing webpage layouts and functions he wanted. This was corroborated by Complainant's statement. The Principal Investigator stated he and the GS-15 Team Lead would discuss work needed on the website, and then the GS-15 Team Lead would assign these tasks to Complainant. S/ROI, Ex. 3 at 31, ¶ 2, Bates No. 58, Ex. 7, at 3 – 4, ¶¶ 13, 17, Bates Nos. 80 – 81, Ex. 9 at 2, ¶ 15, Bates No. 90.

Complainant primarily worked at the staffing firm's facility, but did come on Agency premises for some meetings. He wrote code on a laptop provided by the staffing firm, which he transferred to Agency computers. Complainant stated that for "back-end" jobs he coded directly onto Agency computers. He used the Agency's virtual private network to do the above. Complainant used some Agency equipment to perform his duties.

Complainant worked for the staffing firm serving the Agency for over nine years before he was terminated, a long duration. He applied for his job via the staffing firm's website. We disagree with the Agency's finding that it was not involved in the staffing firm's decision to hire Complainant. Complainant stated that at the staffing firm Vice President's request, he flew to Hampton to interview for the job. According to Complainant, they went to the Agency's facility and he was interviewed by the Agency Principal Investigator on how he would show data on webpages. The Principal Investigator then told the GS-15 Team Lead, who was present, that the decision was up to him since it was his area. Complainant stated that on the way back, the Vice President said he was pleased with the interview, asked about salary, and two weeks later he was offered the job. While it is true that both the GS-15 Team Lead and the Principal Investigator denied involvement in the hiring process, neither addressed Complainant's specific contentions above, which left un rebutted evidence that the Agency had input into the staffing firm's decision to hire Complainant to serve the Agency.

Moreover, since this is a removal case, a significant factor is the power to discharge the worker. On Friday, March 15, 2019, in an Agency building hallway Complainant allegedly interacted with the Agency CERES Data Management GS-13 Team Lead (female) about data requests in a way she found intimidating and caused her concern for her safety. On March 18, 2019, the GS-13 Team Lead's Branch Chief emailed the Agency Contract Officer Representative (COR) that Complainant's behavior was unacceptable, that he behaved this way in the past, and he was not completing tasks requested by the GS-15 and GS-13 Team Leads. The Branch Chief requested that Complainant's access to the Langley Research Center be removed until the matter was resolved. On March 18, 2019, the COR called the staffing firm's Program Manager, advised of the above incident and requested Complainant's access to the Agency (badge) be removed until the matter was fully investigated.

On the same morning, the staffing firm took Complainant's badge. The staffing firm's Program Manager investigated the matter and made the decision to terminate Complainant, which was effective March 26, 2019. S/ROI, Ex. 14, at 2 -3, ¶ 19, Bates Nos. 118 – 119. The termination letter explained Complainant displayed behavior that was an act of workplace violence and conducted himself in a way that discredited the staffing firm or was offensive to the customer, both violations of staffing firm policies.

In reply to Complainant's appeal, the Agency argues that it merely raised behavioral concerns with the staffing firm and cooperated with its investigation. It argues the staffing firm did an independent investigation and then determined the appropriate discipline.

The staffing firm Program Manager's investigatory notes indicate he interviewed Complainant on March 18, 2019. He noted Complainant is louder and more passionate about his job than most people. The Program Manager noted he could see how the GS-13 Team Lead felt threatened, but he was quite sure this is not what Complainant intended. He then interviewed the Branch Chief, who expressed concern for the safety of his staff and relayed he had been told that Complainant gestured in the GS-13's Team Lead's face with his hand/finger and talked threateningly to her. The Program Manager noted the Branch Chief said he did not want Complainant to return to work at the Agency and wanted Complainant's access to computer systems cut-off so he did not mess with them.² The Program Manager noted he asked the Branch Chief if there was any chance Complainant might be able to work remotely full-time, but the GS-15 Team Lead and the Branch Chief were not receptive. The Program Manager then interviewed the GS-13 Team Lead, who indicated she felt threatened and uncomfortable around Complainant, and wanted no further contact with him.

We find that it is more likely than not that a significant factor in the staffing firm's decision to terminate Complainant was the Agency officials expressing that they did not want Complainant's service under any condition, including 100% remote work. As such, we conclude that the Agency played a significant role in the decision to terminate Complainant.

² There is no indication in the record that Complainant ever did anything to indicate he wanted to sabotage data on Agency computers, attempted to do so, or did so.

In sum, it appears from the evidence that the Agency exercised sufficient control over Complainant's employment to be deemed his joint employer for the purpose of utilizing the 29 C.F.R. Part 1614 EEO complaint process.

CONCLUSION

The FAD, dismissing the complaint for lack of standing, is REVERSED.

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 a FAD, 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 28, 2021

Date