



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

[REDACTED]  
Bert G.,<sup>1</sup>  
Complainant,

v.

Lloyd J. Austin III,  
Secretary,  
Department of Defense  
(Defense Intelligence Agency),  
Agency.

Appeal No. 2021003033

Agency No. DIA-2020-00030

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated March 26, 2021, dismissing his 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.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked for Booz Allen Hamilton, a contracting firm ("Contractor"), as a Russian Linguist at the Agency's Office of Counter-Intelligence in Washington D.C.

On March 4, 2020, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the basis of sex (male) when:

1. from January to November 2019, Complainant was subjected to sexual harassment by an Agency Team Lead ("TL1") (female); and

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<sup>1</sup> 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. on November 8, 2019, Complainant's security credentials and his building access badge were revoked, which subsequently resulted in the Contractor terminating his employment on November 15, 2019.

The Agency initially dismissed the complaint on the grounds that Complainant was not a Federal employee but a contractor. Complainant appealed that decision to this Commission. In EEOC Appeal No. 2020004289 (January 4, 2021), we found that instead of taking a holistic approach, the Agency's decision focused primarily on the language of the contract between the Agency and Complainant's employer and was:

made without consideration of what actually occurred in the workplace. . . . the record does not contain any information from the Contractor or Agency personnel with whom Complainant worked, including the person who served as Complainant's supervisor or point of contact, who would be familiar with Complainant's position and day-to-day interactions with Agency and/or Contractor personnel.

We therefore vacated the Agency's decision and remanded the matter to the Agency, directing it to "gather sufficient information from the Contractor and the Agency as to the nature of Complainant's position, his supervision and chain of command, and who had control over his duties and responsibilities in working with the Agency on a day-to-day basis," notwithstanding the actual language of the contract. Following its subsequent inquiry in compliance with our order, the Agency has issued a second dismissal decision of the complaint, again finding that Complainant was not a Federal employee but a contractor and hence failed to state a claim under the administrative EEO complaint process.

The instant appeal followed.

### 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. An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. §§ 1614.103, 106(a). The issue here is whether or not the Agency can be considered Complainant's joint employer, in addition to the Contractor, within the meaning of the 29 C.F.R. Part 1614 administrative EEO complaint process.

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);<sup>5</sup> 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 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.

#### *Some Aspects of the Relationship Support Finding Joint Employment*

The Agency furnished the equipment used and the place of work. Complainant had been working at the same facility since 2015 under a different contractor prior to working for the current Contractor, indicating a continuing relationship between Complainant and the Agency that was longer than his relationship with the Contractor. Complainant was paid a salary and was not paid by the job.

#### *Other Aspects of the Relationship Support Finding No Joint Employment*

According to Agency witnesses, an Agency Contracting Officer Representative "managed the Agency's contract with BAH [the Contractor], provided the over-all general guidance on the day to day activities of the contractors and set the deadlines on the requirements assigned to contractors," and that a Contractor Team Lead "managed and decided how the contractors performed the assigned tasks" and also "supervised how Complainant would interpret the [translated] information." The Agency Contracting Officer Representative emphasized that: "Complainant's performance was under the supervision of BAH's [the Contractor's] Team Lead."

We note, however, that this is contradicted by Complainant, who maintains that it was TL1, who worked for the Agency, who assigned him work and was the person accused of sexually harassing him. Another Agency Team Lead ("TL2") (male) stated that when TL1 came to him and told him that Complainant had made a pass at her, he spoke to the Contractor Team Lead, who then spoke to Complainant and sent him home. TL2 further stated that "if there were any

issues with a contractor's performance, he and [TL1] would raise the issue with [the Contractor Team Lead] who would then handle the issue on his side. TL2 said that the Team Leads and Agency employees did not provide input on the linguists' performance.

Finally, a Contractor Labor/Employee Management Relations specialist ("Contractor Labor Specialist") stated that the Contractor Team Lead managed Complainant and forty seven other Contractor employees, received high-level tasking from the Agency Representative which he then assigned to the contractors, and managed the performance, completion, and delivery of the assigned tasks by contractors. The Contractor Labor Specialist further stated that the Contractor completed Complainant's monthly performance reviews that were based on a set of criteria and that the Contractor Team Lead could request feedback from the Agency on Complainant's performance of his contractual obligations. In sum we conclude that the preponderance of the evidence indicates that the Contractor and not the Agency controlled the Complainant's performance.

Complainant argues that the Agency:

[U]nambiguously controlled when, where, and how [Complainant] performed his job. Because of the sensitive nature of the work, the Agency required [Complainant] to work at its facility, and had total control over [his] access to the facility. Additionally, the Agency controlled [Complainant's] hours and assignments, as all of [his] work tasking came directly from [A].

We note that we have taken into account the fact that the Agency required Complainant to work at its facility. With regard to hours, we note that the record shows that as a contractor, Complainant was not allowed to use non-traditional hours or an alternate or compressed work schedule, unlike Agency employees. With regard to Complainant's claim that the Agency controlled his hours, we note any such control was within a relatively broad framework beginning "no later than 8:30 am and depart[ing] no earlier than 3:00 pm, for a total of forty hours per week, comprised of five consecutive workdays of eight and a half consecutive hours per day, which includes a thirty minute non-billable lunch period."

With regard to the skill required in the particular operation, Complainant argues that the position is not one "requiring particularized expertise," and cites our decision in Kereem v Secretary of State, EEOC Request No. 052011069 (April 26, 2012), where we found that an Arabic Language Instructor was jointly employed by the Agency. We note, however, that while we did find in Kereem that, based on the totality of the circumstances, complainant should be considered a joint employee, we also found specifically with regard to whether or not the work requires a high level of expertise, that the complainant's position in that case:

[R]equires a high level of skill. Specifically, BPA Section C.3 (Qualifications) requires Complainant to be an educated native speaker of the language and Section B.3 (Supplies or Services, and Prices/Costs) reflects that the Agency paid her \$30-35 an hour for her expertise. Commission guidance holds that a factor

indicating that a worker is an employee is that the work does not require a high level of skill or expertise.

Id.

Similarly, in the instant case, we find that Complainant's position as a translator requires a high level of skill and expertise, which would support a finding that he was not an employee.

With regard to the manner in which Complainant's job was terminated, the Contractor Labor Specialist said that on November 8, 2019, while the Agency took Complainant's credentials, escorted him out of the building, and requested the Contractor not to let Complainant return to the Agency, the Agency did not in fact remove him from the contract. The Contractor Labor Specialist said that the Contractor agreed to remove Complainant from the worksite and not to let him return to the worksite. However, it was the Contractor that then decided to pull Complainant out of the contract with the Agency. The Contractor Labor Specialist stated that the Contractor conducted an internal investigation on the allegation of inappropriate conduct and based on the findings of their investigation as substantiated by supporting evidence, it was the Contractor that decided to terminate Complainant's employment on January 16, 2020.

Complainant argues that:

In this case, it is undisputed that the Agency directed [the Contractor] to remove [Complainant] from its facility, suspended his security clearance, and then barred him from performing his duties. [The Contractor] then placed [Complainant] on administrative leave, and ultimately removed him given that the Agency would not allow him to perform his job as a Linguist for them. This is the exact circumstance described in cases where the Commission has found the Agency to be the joint employer of an appellant.

Such a version of events is contradicted by Contractor Labor Specialist who explained that the Contractor terminated Complainant's employment, not because the Agency wouldn't allow him to perform his job as a linguist, as Complainant maintains, but because an internal Contractor investigation supported allegations of inappropriate conduct by Complainant.

Complainant concedes that some factors support a finding that he is a contractor and not a Federal employee. However, Complainant argues that "it is safe to say that translating between Russian and English is part of the 'regular business' of the Office of Counter Intelligence."

The Agency, by contrast, argues that:

[L]inguists support the mission rather than comprise an integral part of it. . . . Appellant's role was to provide translations and other linguistic support so that Agency officers could use that information in fulfilling their missions. Language skills – while important – are commoditized: if a document needs to be translated

from Russian to English, any person fluent in Russian can complete that translation.

Following a review of the record we find that while translating between Russian and English may be part of the Agency's "regular business," we disagree that it is an "integral part" of the Agency's business. We note in this regard that the Agency may require translations from numerous other languages besides Russian and that the integral part of the Agency's business is obtaining and evaluating intelligence, not interpreting foreign languages.

Taking a holistic view of Complainant's relationship with the Agency, we find that the Agency did not exercise sufficient control over Complainant's employment to be considered a joint employer for purposes of the EEO complaint process.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we find that Complainant has not shown that he should be considered a Federal employee for the purposes of this complaint, and we AFFIRM the Agency's Dismissal.

### 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 (S0610)

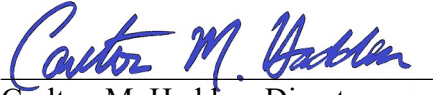
You have the right to file a civil action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, filing a civil action will terminate the administrative processing of your complaint.

#### RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests.

Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director  
Office of Federal Operations

October 18, 2021

Date