



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

[REDACTED]

Jon M.,¹
Complainant,

v.

Christine Wormuth,
Secretary,
Department of the Army,
Agency.

Appeal No. 2022003920

Agency No. ARDETRICK22APR02225

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated June 16, 2022, 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.

BACKGROUND

During the period at issue, Complainant worked as a Patent Attorney at the Agency's Fort Detrick in Maryland through a contract which an entity identified as Venesco entered with the Agency.

On June 1, 2022, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination based on his race (African American) and sex (male). In its final decision dated June 16, 2022, the Agency determined that the formal complaint was comprised of the following claim: On April 4, 2022, management of Venesco terminated his contract as a Patent Attorney because of what he believed to be false allegations made by a named Patent Attorney.

The Agency dismissed the formal complaint for failure to state a claim. The Agency reasoned that Complainant was neither a federal employee nor an applicant for federal employment.

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and on the Commission's website.

In addition, the Agency reasoned that it lacked sufficient control over Complainant's employment to be considered a joint employer for EEO purposes.²

The instant appeal followed. On appeal, Complainant asserts that the Agency's dismissal is improper and that the Agency should be deemed a joint employer for EEO purposes. Complainant states that only Agency personnel assigned him work and set his work schedule. Complainant also states that the contractor did not provide daily supervision of him and only Agency legal personnel were allowed to supervise and evaluate his projects. Complainant asserts that an Agency Patent Attorney made false allegations that he disclosed confidential information. Complainant states that "shortly thereafter, without investigation or the opportunity to defend himself...Complainant was terminated. "

In response, the Agency requests that we affirm its final decision dismissing his complaint. The Agency states that Venesco, without consultation from the Agency, terminated Complainant. The Agency states that Venesco placed Complainant on a thirty-day probation and terminated Complainant after conducting an investigation.

ANALYSIS AND FINDINGS

The issue here is whether the Agency properly dismissed Complainant's complaint for failure to state a claim on the basis that Complainant was not its employee. EEOC Regulation 29 C.F.R. § 1614.103(a) provides that complaints of 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 covered department, agencies, units, Part 1614 applies to all employees and applicants for employment.

In Serita B. v. Dep't of the Army, EEOC Appeal No. 0120150846 (Nov. 10, 2016), the Commission reaffirmed its longstanding position on "joint employers" and noted that 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 1, 2000) (Compliance Manual); 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. Dept of Health and Human Services, EEOC Appeal Nos. 01962389 &

² The record contains an email from the Agency EEO Manager to an Agency Labor Law Attorney in the Office of the Staff Judge Advocate (which appears to be outside the Agency's EEO Office) dated June 8, 2022. Therein, the EEO Manager asserts that she is attaching a decision letter with respect to this matter on which she needs a "legal sufficiency review done on" and that she believes the individual is considered a de facto employee. In response, the record contains an email from the Agency's Labor Law Attorney dated June 14, 2020. Therein, the Agency Labor Law Attorney asserts "I did a semi edit to the acceptance letter to make it a denial..." We remind the Agency of its obligation to maintain a firewall between its EEO functions and the Agency's defensive function. See Management Directive 110 for 29 C.F.R. Part 1614, Ch. 1, (IV)(D) (rev. Aug. 5, 2015).

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. Dep't of the Army, EEOC Appeal No. 0120150262 (Feb. 11, 2016); Nicki v. B. v. Dep't of Educ., EEOC Appeal No. 0120151697 (Feb. 9, 2016). These elements are, however, just two of the factors relevant to joint employment under the Commission's long-standing position and it is not at all surprising that they would be present when an individual working under a federal contract for a federal agency raises a complaint of discrimination.

The term "joint employer" refers to two or more employers that each exercise sufficient control of an individual to qualify as the worker's employer. Compliance Manual, Section 2-III(B)(1)(a)(iii)(b). To determine whether the Agency has the right to exercise sufficient control, EEOC considers factors derived from common law principles of agency. See Enforcement Guidance, "Coverage Issues," at Question 2. EEOC considers, inter alia, the Agency's right to control when, where, and how the worker performs the job; the right to assign additional projects to the worker; whether the work is performed on Agency premises; whether the Agency provides the tools, material, and equipment to perform the job; the duration of the relationship between the Agency and the worker; whether the Agency controls the worker's schedule; and whether the Agency can discharge the worker. EEOC Compliance Manual, Section 2 -III(A)(1) (citing Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-24 (1992)); EEOC v. Skanska USA Bldg., Inc., 550 F. App'x 253, 256 (6th Cir. 2013) ("Entities are joint employers if they 'share or co-determine those matters governing essential terms and conditions of employment'") (quoting Carrier Corp. v. NLRB, 768 F.2d 778, 781 (6th Cir. 1985); see also Ma EEOC Appeal Nos. 01962389 & 01962390.

The language of the contract between the Agency and the staffing firm is not dispositive as to whether a joint employment situation exists. In determining a worker's status, EEOC looks to what actually occurs in the workplace, even if it contradicts the language in the contract between the staffing firm and the agency. Baker v. Dep't of the Army, EEOC Appeal No. 01A45313 (Mar. 16, 2006) (while contract between staffing firm and agency provided that contract personnel were employees of staffing firm under its administrative supervision and control, agency actually retained supervisory authority over the contract workers).

On the factor of the right to control when, where, and how the worker performs the job and to assign additional projects, complete agency control is not required. Rather, the control may be partial or joint and still point to joint employment. Shorter v. Dep't of Homeland Sec., EEOC Appeal No. 0120131148 (June 11, 2013) (where both staffing firm and agency made assignments, this pointed to joint employment); Complainant v. Dep't of the Navy, EEOC Appeal No. 0120143162 (May 20, 2015), request for reconsideration denied, EEOC Request No. 0520150430 (Mar. 11, 2016) (where staffing firm wrote and issued complainant's appraisal with

input from agency, this pointed toward joint employment). Likewise, where both the agency and staffing firm provided tools, material, and equipment to perform the job, this pointed to joint employment. Elkin v. Dep't of the Army, EEOC Appeal No. 0120122211 (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).

Complainant alleges that he was terminated due to false allegations made by an Agency Patent Law Attorney and that these allegations were reported to Venesco.³ Thus, the circumstances surrounding Complainant's termination are significant as to whether the Agency is a joint employer for EEO purposes.

The record reflects that the EEO Counselor interviewed the Agency Patent Attorney that Complainant alleges made false allegations against him. According to the EEO Counselor's Report, the Agency Patent Attorney asserted that she did not direct Venesco to terminate Complainant. The Agency attorney asserted that she spoke with a Venesco representative that she had concerns that Complainant had disclosed certain information to a non-government attorney and that she asked the Venesco representative to find out the details. The Agency attorney asserts that she found out later from an Agency paralegal that Venesco terminated Complainant's employment.

The record is not sufficiently developed to make a determination as to whether the Agency is a joint employer for the purpose of using the 29 C.F.R. Part 1614 complaint process. The record is devoid of evidence that the Agency interviewed or even tried to interview relevant officials with Venesco. In a document entitled "Requests for Information and Documents", Complainant states that "[a named Agency Patent Attorney] told Venesco and the military that [he] had spoken about substantive confidential information with a non-government attorney. While the Agency in its opposition brief asserts that Venesco conducted an investigation, prior to terminating him (Agency Brief at 5), Complainant appears to assert that than an investigation was not started until after he received notice of his termination.

³ In an Exit Interview form from Venesco dated April 5, 2022, Complainant stated that his reason for leaving was "false accusation of confidentiality [breach] by [a named Agency Patent Attorney]".

Specifically, Complainant stated that “[a]fter I received the termination email, I received a questionnaire from Venesco...”⁴ Complainant asserted that the Agency Patent Attorney had full knowledge he would be fired based on her allegations. We further note that while the EEO Counselor’s Report contains a summary of the testimony of the Agency Patent Attorney, the record does not contain an affidavit from this individual.⁵ In addition, the record does not contain an affidavit from Complainant surrounding the circumstances of his termination.

Accordingly, we VACATE the Agency’s final decision dismissing Complainant’s complaint and we REMAND this matter to the Agency for a supplemental investigation in accordance with the ORDER below.

ORDER

Within sixty (60) calendar days from the date this decision is issued, the Agency is ORDERED to take the following actions:

1. Conduct a supplemental investigation to obtain evidence consistent with this decision and relevant in assessing whether the Agency is a joint employer for EEO purposes. The evidentiary record shall include, but is not limited to, the following matters: an affidavit from the Agency Patent Attorney referenced in the EEO Counselor’s Report. The affidavit shall address the circumstances leading up to Complainant’s removal and whether she suggested or requested that Venesco take any action with respect to Complainant prior to his termination. The Agency shall also obtain affidavits from any other Agency officials that appear to have knowledge of the circumstances surrounding Complainant’s termination.
2. The Agency shall obtain an affidavit from Complainant addressing the circumstances surrounding his termination. The affidavit shall address when Complainant received notice of his termination and when an investigation was conducted into the allegations made against him (i.e. prior to or after receiving notice of his termination).
3. The Agency shall also obtain an affidavit from relevant officials from Venesco addressing, in detail, the circumstances surrounding Complainant’s termination and whether Agency officials requested Venesco to take any action prior to Complainant’s termination. The affidavits shall also address 1) when Complainant was terminated and 2) if Venesco conducted an investigation regarding the allegations made against Complainant and if so, *when* did the investigation occur

⁴ The record contains an email from Complainant to an official at Venesco dated March 18, 2022 4:50 p.m. with the subject “RE: [Complainant] Follow up Questions.”

⁵ We acknowledge that the record contains a declaration under penalty of perjury from a Paralegal Specialist providing information pertaining to Venesco’s contract with the Agency.

(prior to or after Complainant's termination). The supplemental investigation shall also include any documentation related to Complainant's termination.

4. The Agency shall either issue a new final decision either dismissing the formal complaint, with an appropriate analysis of relevant facts with appeal rights to the Commission, or a letter accepting Complainant's complaint for investigation.
5. A copy of the supplemental investigation and new dismissal letter or letter of acceptance shall be provided as set forth below in the section entitled "Implementation of the Commission's Decision."

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).

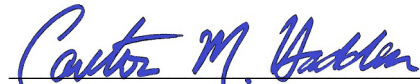
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

November 2, 2022

Date