



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

[REDACTED]
Michael G.,¹
Complainant,

v.

Merrick B. Garland,
Attorney General,
Department of Justice
(Drug Enforcement Administration),
Agency.

Appeal No. 2021004320

Hearing No. 570-2020-01641X

Agency No. DEA-2020-00053

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final order dated June 15, 2021, dismissing his complaint of 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. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant, an employee of Deloitte & Touche (Deloitte or Contractor), an accounting firm, worked as a Senior Manager at the Agency's Office of Finance in Arlington, Virginia under Deloitte's contract with the Agency.

On November 15, 2019, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of race (Hispanic), national origin (Dominican Republic), and disability (speech impediment/stuttering) when:

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.

1. He was subjected to a hostile work environment when, among other things, he was berated, humiliated, and interrogated in front of his colleagues; and
2. On or around August 23, 2019, he was removed from his contract between the Agency and Deloitte, which ended his employment with Deloitte.

Complainant asserted that within the first few weeks of working with the Agency, he discovered an inconsistency in an Agency transaction and on mentioning it to a Senior Consultant, was told to reach out to the Chief of the General Accounting Unit, an Agency employee, but that on doing so, she immediately berated him and publicly humiliated him in front of his colleagues. See Report of Investigation (ROI) at 8. He asserted that after he reported the incident to a Deloitte Senior Manager, the Agency told Deloitte on August 22, 2019, that he should be removed from the contract, which resulted in the end of his employment with Deloitte. See ROI at 10.

At the conclusion of the investigation, Complainant was provided a copy of the investigative file and requested a hearing before an EEOC Administrative Judge (AJ). The AJ *sua sponte* determined that there were no genuine issues of material fact and gave the parties notice of intent to issue a decision without a hearing, to which both parties responded. Thereafter, the AJ issued a decision dismissing the complaint for failure to state a claim, finding that the Agency was not a joint employer of Complainant and therefore Complainant could not use the EEO process to file a claim against the Agency. When the Agency failed to issue a final order within 40 days of receipt of the AJ's June 15, 2021 decision, the AJ's decision became the Agency's final action pursuant to 29 C.F.R. § 1614.109(i).

The instant appeal from Complainant followed. On appeal, Complainant argues that the AJ erred in finding that the Agency was not a joint employer because the majority of the factors of the agency test for joint employment argue in favor of finding the Agency was a joint employer of Complainant.

The Agency did not file a brief in response.

ANALYSIS AND FINDINGS

The matter before us is whether the AJ properly dismissed Complainant's complaint for failure to state a claim on the basis that the Agency was not a joint employer of Complainant for purposes of the EEO process. 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); 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.

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.

After a careful review of the record, we find that the AJ erred in concluding that the Agency was not a joint employer of Complainant.²

² We note that the Agency accepted Complainant's complaint and conducted a full investigation, so we find that the record is sufficiently developed for us to make a determination as to the joint employment issue.

While we acknowledge that there is some conflicting evidence in the record and Complainant himself acknowledged that the chain of command and process for communicating on day-to-day matters was confusing (see ROI at 82-83), we find that the preponderance of the evidence indicates that the Agency exercised sufficient control over Complainant to make it a joint employer of Complainant for EEO purposes. The parties do not dispute that Complainant worked entirely at the Agency's Headquarters and used Agency equipment. See ROI at 71; 457; 470-76. Complainant testified that he essentially had two first-line supervisors, the Section Chief of the Financial Integrity Section, an Agency employee, (Section Chief) and the Senior Manager, a Deloitte employee. See ROI at 69-70; 74-77. Complainant noted, however, that the Senior Manager was "less and less visible" after he was put on the contract. See ROI at 74-77. The Section Chief stated that the Unit Chief, another Agency employee, was in charge of directing Complainant's day-to-day activities, while the Contracting Officer, another Agency employee, was responsible for overseeing Complainant's hours and leave. See ROI at 246-47. The contract with Deloitte stated that an Agency employee was responsible for monitoring Deloitte contractors' day-to-day performance and communicating any inadequacies. See ROI at 457. There is also contemporaneous email correspondence in the record between Complainant and the Agency's Unit Chief regarding Complainant's performance of his duties which indicate that the Unit Chief oversaw the performance of Complainant's day-to-day duties. See ROI at 503-508.

Furthermore, we find that the evidence in the record indicates that the Agency exercised control over Complainant's removal from the contract and removal from his position with the Agency. The Unit Chief stated that Complainant was removed from the contract after discussions with the Agency's Section Chief and the Contracting Officer, stating that there were concerns that he did not understand their processes and the subject. See ROI at 329-31. Complainant testified that he was informed by Deloitte that his services would no longer be required within a month of the Agency's telling Deloitte that he should be removed from the contract. Complainant further stated that the communication he received from the Deloitte partner ending his employment effectively told him that his employment was ending because the Agency had removed him from the contract. See ROI at 130-32. Under the circumstances, we find that the Agency possessed sufficient control over Complainant in the performance and exercise of his duties, including his removal from his position at the Agency, to qualify as a joint employer for the purpose of the 29 C.F.R. Part 1614 EEO complaint process. We therefore find that the AJ erred in dismissing the complaint.

CONCLUSION

Therefore, after a careful review of the record, including Complainant's arguments on appeal and arguments and evidence not specifically discussed in this decision, the Commission reverses the Agency's final action and remands the matter to the Agency in accordance with this decision and the Order below.

ORDER

Within fifteen (15) calendar days of the date this decision is issued, the Agency is directed to a renewed request for a hearing on Complainant's behalf to the EEOC's Washington Field Office Hearings Unit, as well as the complaint file and a copy of this appellate decision. 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 adjudicate the complaint on its merits 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

February 16, 2023

Date