



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



Alba H.,¹
Complainant,

v.

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

Appeal No. 2023001417

Agency No. DLAE-23-0035

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision, dated December 1, 2022, dismissing her 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

In January 2019, Complainant was hired by ECS Tech (sub-contractor) to serve as an Inventory Reconciliation Analyst on a contract Accenture Federal Services (prime contractor) entered with the Agency. Accenture provided consulting and technical support to the Agency by conducting reviews and analysis of petroleum inventory accounts and transaction data details. As an Inventory Reconciliation Analyst, Complainant reviewed electronic documents received from field agencies and posted receipt of the documents onto the Agency's Inventory Accountability Web Tool (IAWT) database.

In September 2022, Complainant discovered a "poop" emoji next to her name, and the names of the other two African American ECS Tech employees, in the IAWT database. She complained about the incident to Agency Branch Chief of Inventory Accountability ("Branch Chief") and

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.

Accenture Team Lead during a staff meeting. According to Complainant, Agency Branch Chief was aware of the emojis, stating they had been there for years. He chuckled and thought it was a joke. Thereafter, Complainant called ECS Tech Program Manager regarding the incident. He asked her to send him a screen shot, which she did.

On September 12, 2022, Complainant was accused of creating a Controlled Unclassified Incident (CUI) when she sent the screenshot of the Agency's database to an ECS employee who was not on the project team and authorized to view the Agency's internal systems. In a September 15, 2022, email from Accenture to ECS Tech, the prime contractor explained that based on this security issue they discovered Complainant's prohibited screenshot sharing and "[b]ased on these security issues [it] requested that [the Agency] remove [Complainant's] access to [Agency] systems and disable her CAC on September 12, 2022. [Accenture] has also removed her from this project." ECS Tech, in turn, notified Complainant that she was terminated from her employment.²

Believing that the Agency's actions and her removal were discriminatory, Complainant contacted an EEO Counselor. Informal efforts to resolve Complainant's concerns were unsuccessful.

On November 25, 2022, Complainant filed a formal complaint alleging the Agency subjected her to discrimination based on her race (African American). In its dismissal decision, the Agency defined the allegations as follows:

1. On September 7, 2022, she logged into the government's database to see if records had been uploaded when she noticed the "poop emoji" next to her name and two other coworkers' names.
2. On September 7, 2022, she received a message from her supervisor asking what hours she'd worked.
3. On September 9, 2022, she received an email from her supervisor requesting a meeting in regard to her performance.
4. On September 12, 2022, she received a message from the prime contractor that she'd violated the Controlled Unclassified Incident (CUI) policy by taking a picture of the database exposing the "poop emoji" and sending it to others who were not part of the contract.
5. On September 13, 2022, she logged into her computer and noticed that her CAC card had been revoked.

² According to Complainant, ECS Tech initially told her they would try to place her on another project, but they failed to follow-up.

6. On September 19, 2022, she tried to enter her time into the time system and noticed that she was locked out.
7. On September 19, 2022, she was terminated from her contracting position, effective September 14, 2022.

On December 1, 2022, the Agency dismissed the complaint, in its entirety, for failure to state a claim. The Agency found that Complainant was an employee of ECS Tech, not the Agency.

Complainant filed the instant appeal.

On appeal, Complainant, through her attorney, argues that sufficient factors support finding the Agency holds joint-employer status. She points to the inclusion of the contractor employees and Accenture Team Lead in weekly staff meetings held by Branch Chief. Complainant asserts that the mention of upcoming vacation leave during such meetings “indicates all employees needed Agency approval in order to use an earned benefit.” The Agency provided Complainant with a government laptop, CAC, and access to IAWT database. Lastly, Complainant cites a November 7, 2022, email in which an ECS Tech executive stated to the EEO Counselor that the Agency asked Accenture to remove her due to the CUI incident.

The Agency did not submit a statement in response.

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. Dep’t of the Army, EEOC Appeal No. 0120150846 (Nov.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 (March 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.

Here, we note that the Agency's sparse dismissal decision does not reflect the detailed, holistic analysis the Commission requires when dismissing on such grounds. In its decision, the Agency has provided a summary list of factors considered in a conclusory fashion, but has failed to describe, without reference to affidavits or documentary evidence, what actually occurred in the workplace or explain how the factors listed support its conclusion that Complainant is not its joint employee for EEO purposes. We further note that the Agency has not submitted any argument on appeal to expand on its summary dismissal decision.

On the other hand, Complainant, through her attorney, submitted a substantial brief on appeal accompanied by exhibits containing evidence in support of the arguments presented, including a sworn statement from Complainant addressing the Serita B. factors relating to a determination of the joint employment issue.

Based on our review of the limited record, there is some evidence that suggests the Agency may not be Complainant's joint employer. It is clear that all pay, leave and benefits decisions were made by ECS Tech, although Complainant does assert that vacation leave requests also required some level of approval by Agency officials. It is also clear that Complainant had an Accenture supervisor, who participated with the Agency Branch Chief in leading the joint Agency-contractor team. Complainant did acknowledge that additional assignments from the Agency Branch Chief were communicated through the Accenture supervisor to the ECS Tech employees. However, there are other factors that indicate the Agency had some control over Complainant's employment. The Agency provided the equipment and materials Complainant needed to perform her job (i.e., laptop, CAC, database access).

The Agency also acknowledged that her work was within the regular business of the Agency. Moreover, the record reflects that Complainant worked on a team comprised of both contractor and Agency employees. The team was led by both an Accenture Audit Team Lead and the Agency's Branch Chief. The Agency Branch Chief held weekly meetings that included the contractor employees. It was at such a meeting that Complainant first reported her problem with the emojis and alleges the Agency Branch Chief treated it as a joke. The position description for Complainant's job included reference to daily interactions with Agency Inventory Reconciliation Analysts, as well as occasional interactions with the Agency Branch Chief. Lastly, Complainant was expected to communicate resolutions and metrics to the Agency on a recurring basis.

Here, a significant factor in determining whether the Agency could be considered Complainant's joint employer concerns its role in the decision to terminate her services. See Joseph Q. v. Dep't of Defense, EEOC Appeal No. 2022002392 (Nov. 21, 2022); Murphy v. Veterans Affairs, EEOC Appeal No. 0120132014 (Sept. 17, 2013). As part of the evidence provided by Complainant to the record is an email response from ECS Tech management to the EEO Counselor's inquiry, stating that the Agency requested Accenture remove Complainant. In light of this evidence, and the Agency's lack of response on appeal and very summary analysis in its dismissal decision, we will consider this evidence in the light most favorable to Complainant and weigh this factor in favor of the Agency have significant control over Complainant's termination, the very subject of her complaint.

As already noted, complete control is not required for the Agency to be considered Complainant's joint employer. We conclude that the factors discussed above are sufficient to find the Agency is Complainant's joint employer for the purposes of the 29 C.F.R. Part 1614 EEO complaint process. The Agency's abbreviated analysis and lack of response on appeal falls short of a holistic consideration of the nature of the employment relationship and is, therefore, insufficient to substantiate its dismissal of the complaint.

CONCLUSION

Accordingly, we REVERSE the Agency's final decision dismissing the formal complaint and we REMAND this matter to the Agency for a supplemental investigation in accordance with 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 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

July 11, 2023
Date