



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

[REDACTED]
Glynda S.,¹
Complainant,

v.

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

Appeal No. 2023001848

Agency No. ARDETRICK23NOV00429

DECISION

Complainant timely appealed with the Equal Employment Opportunity Commission (“EEOC” or “Commission”) from the Agency's January 16, 2022, dismissal of 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was employed by the Henry Jackson Foundation for the Advancement of Military Medicine, Inc. (“HJF”). Complainant held the position of Chief of Operations, Emerging Infectious Diseases Branch (“EIDB”), within the Agency’s Center for Infectious Diseases Research (“CIDR”) at the Walter Reed Army Institute of Research (“WRAIR”) in Silver Spring, Maryland.

On January 4, 2023, Complainant filed a formal EEO complaint alleging that the Agency subjected her to discrimination on the bases of race (African-American), sex (female), and color (Black) when, on October 14, 2022, HJF terminated Complainant’s 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 the Commission’s website.

A fair reading of Complainant's complaint reveals that she alleges that the Director of the Center for Infections Diseases Research ("CIDR"), an Agency employee, orchestrated her termination and subjected her to a hostile work environment which included the following alleged events:

1. On various dates, CIDR Director denigrated Complainant's professional competence and finance/budgeting acumen and falsely blamed her for discrepancies;
2. On various dates, CIDR Director failed to attribute authorship to Complainant and her staff for their work product;
3. On various dates, CIDR Director made professionally disparaging comments about Complainant to her colleagues, HJF Supervisor and subordinates; and
4. On various dates, CIDR Director "bragged" about blocking Complainant and other African-American/Black colleagues from receiving credit as authors on publications, and made discriminatory race and sex-based statements about Complainant and her African-American/Black colleagues.

The Agency dismissed the matter pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim. 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. 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")²; 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.

² The EEOC Compliance Manual and other guidance documents, as well as federal-sector appellate decisions, are available online at www.eeoc.gov.

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.

In its FAD, the Agency made a generalized reference to Ma, and acknowledged that Complainant met at least one Ma factor, as her work "appeared to be highly technical in nature." However, the Agency determined that any Ma factors Complainant may have satisfied were outweighed when considering "all of the circumstances in the relationship between the parties." Citing Bryant v. Dep't of Justice, EEOC Appeal No. 0120064102 (May 8, 2007). The Agency offers no meaningful elaboration as to what "circumstances" it considered. Rather, the Agency ambiguously stated that the HJF determined Complainant's "employment matters and work assignments" whereas the Agency's "only" contribution was "programmatic oversight and involvement in the medical research produced through the cooperative agreement."

We find that the analysis presented in the Agency's decision does not reflect a holistic consideration of all aspects of Complainant's relationship with the Agency. Glynda S. v. Dep't of the Army, EEOC Appeal No. 2020002243 (Sept. 3, 2020) (despite evidence in the record, the agency's FAD lacked an analysis of whether it was a "joint employer," instead making only a "brief reference several factors") see also, e.g. Alfredo S. v. Dep't of the Army, EEOC Appeal No. 2021001400 (Jun. 7, 2021) (the Agency's "sparse" FAD "simply concludes that Complainant is not an Agency employee and therefore the complaint fails to state a claim, and that "it is clear that the Agency has not even touched on any supportive evidence in its

decision”). As the Commission previously observed in Alfredo S., this is not the first time a dismissal for lack of standing, *by this Agency*, has been found to be deficient in applying our guidance in Serita B.³

Nevertheless, the record contains sufficient evidence for this Commission to reach a decision as to whether the Agency qualifies as a “joint employer.” The portion of the cooperative agreement provided by the Agency indicates that the HJF employees and the Agency employees working on the project are funded by the same grant issued by the Department of Defense (“DoD”). The DoD grant dictates the budget, reporting, and time frame requirements. Under the section entitled “Specific Medical Research Terms and Conditions,” the cooperative agreement states that “[i]n addition to the DoD’s normal stewardship (i.e. site visits, program reviews, performance reporting and financial reporting activities) DoD will have the following *substantial involvement*” to include, among other things, a federally appointed management and oversight committee for all new research, strategic and technical input for research and administrative efforts... collaboration or joint participation in research efforts with the awardee.” Emphasis added. Complainant’s role included financial and budgetary planning for EIDB’s portion of the HJF project. Therefore, the means and manner of Complainant’s work was determined by both the Agency and HJF based on the specifications of the DoD grant.

There is no evidence in the record that Complainant worked for any other entity besides the Agency during her 18-year tenure with HJF. Although CIDR Director did not have direct supervisory authority over Complainant, the record indicates that he had influence over whether Complainant’s contract was terminated. He was in charge of EIDB when the EIDB Director left, and, as CIDR Director, had a hand in the subsequent realignment of EIDB and other CIDR branches. Additionally, CIDR Director wielded significant control over Complainant’s professional standing and development because he was able to remove her name as an author of her and her team’s work product, generated as part of the HJF project.

The majority of the Agency’s appellate response brief improperly addresses the merits of Complainant’s claims by explaining *why* her contract was terminated.

³ In Alfredo S., the Commission also stated that “the inadequate support for such dismissals *has been repeatedly brought to the Agency’s attention.*” In subsequent decisions the Agency has continued to struggle with pre-complaint inquiries and FADs within the context of the “joint employer” standing analysis. Examples of cases the Commission remanded due to deficiencies in the record include: Simone J. v. Dep’t of the Army, EEOC Appeal No. 2023000012 (Mar. 14, 2023), Alex L. v. Dep’t of the Army, EEOC Appeal No. 20220004581 (Jan. 31, 2023), Homer V. v. Dep’t of the Army, EEOC Appeal No. 2022000447 (Mar. 21, 2022), Jon M. v. Dep’t of the Army, EEOC Appeal No. 2022003920 (Nov. 2, 2022), Kyong L. v. Dep’t of the Army, EEOC Appeal No. 2022000492 (Mar. 2, 2022), Johana S. v. Dep’t of the Army, EEOC Appeal No. 2021002992 (Oct. 7, 2021), Towanda B. v. Dep’t of the Army, EEOC Appeal No. 2021003450 (Oct. 4, 2021). We urge the Agency to avail itself to the Commission’s training resources. See <https://www.eeoc.gov/federal-sector/federal-training-outreach>.

The only issue before the Commission is whether the Agency is a “joint employer” thereby giving Complainant standing to pursue her complaint. To the extent that the Agency’s brief lists indicia of control (e.g. payroll, leave approval), given the nature of the grant, it is not clear that HJF alone determined Complainant’s total pay, provided sole oversight for her performance, and determined her schedule. Significantly, the Agency’s response brief acknowledges that *both* “the Agency and HJF needed to make personnel decisions.”

In her appellate brief, Complainant clarifies her EEO complaint further by articulating the role of the HJF Principle Investigator, the HJF employee responsible for administering the grant that was the basis of the “cooperative agreement.” Throughout the relevant time frame, Principle Investigator was aware of the hostile work environment created by CIDR Director, yet failed to take action to protect Complainant. Additionally, Principal Investigator allegedly perpetuated the hostile work environment created by CIDR Director.

CONCLUSION

The Agency’s decision is hereby REVERSED. The complaint is REMANDED to the Agency for further processing in accordance with this Decision and the Order below.

ORDER (E0618)

The Agency is ordered to process the remanded claims (Complainant’s October 14, 2022 termination, her hostile work environment allegations regarding CIDR Director, as framed herein) 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 an Agency final decision, 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

August 8, 2023

Date