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

[redacted]
Zenobia K.,[1]
Complainant,

v.

Ryan D. McCarthy,
Secretary,
Department of the Army,
Agency.

Appeal No. 2019001706

Agency No. ARCEERDC18MAY01868

DECISION

On November 9, 2018, Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a final Agency decision (FAD) dated July 30, 2018, and received by her on October 11, 2018, dismissing her 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked for Staffing Firm 1 serving the Agency as a Personal Computer Technician at the Agency's U.S. Army Corps of Engineers - Information Technology, Buffalo District in Buffalo, New York. Staffing Firm 1 was a subcontractor of Staffing Firm 2, which had an onsite supervisor (S1) who worked directly with Complainant, interacted with her, and was her direct supervisor.

On June 26, 2018, Complainant filed an equal employment opportunity (EEO) complaint alleging that the Agency subjected her to discrimination based on her race (Black) and sex (female) when she was terminated on May 16, 2018.

The Agency dismissed the complaint for failure to state a claim. It reasoned that Complainant was not an employee of the Agency and was terminated by Staffing Firm 1.

[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.

ANALYSIS AND FINDINGS

The matter before us is whether the Agency properly dismissed Complainant's complaint for failure to state a claim on the basis that she was not its employee. 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.

In Serita B. v. Department of the Army, EEOC Appeal No. 0120150846 (November 10, 2016), the Commission recently reaffirmed its long-standing position on "joint employers" and noted it is found in numerous sources. The sources include 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.

The term "joint employer" refers to two or more employers that each exercises 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. 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, the record shows that Complainant's car was broken into on April 9, 2018, and among the things stolen were her two Common Access Cards (CAC) – one a user CAC which also served as her identification, and the other an Administrator CAC, along with her work key fob. A CAC gives the possessor access to classified information. The key fob gives the possessor access to the Buffalo District reservation, including numerous buildings and the server room. Staffing Firm 1's contract with Staffing Firm 2 requires Staffing Firm 1 employees display their CAC at all times and conform to government security rules. It also gives Staffing Firm 2 the power to direct Staffing Firm 1 to remove from the contract any of its employees who commit a willful or negligent act that results in the loss or compromise of classified information or who repeatedly violate security procedures. Leaving a CAC card unattended is a security breach.

Complainant wrote that she notified S1 about the break-in. When she got to work after the notification, the Agency's Chief of Information Technology asked her why she left her CAC in her car, said this was a security violation, and advised her to go to an identified Security Officer for replacements. The Security Officer issued Complainant a replacement key fob, and advised her where to go to get replacement CAC cards.

Complainant wrote that on May 7, 2018, she walked away to get material needed to service a computer and accidentally left her CAC on her desk, and when she returned two minutes later it was missing. The Agency Chief had picked Complainant's CAC off her desk and gave it to S1. S1 later advised Complainant that she needed to be careful not to leave the CAC on her desk when she was away.

On May 14, 2018, the Agency Chief sent an email that S1 brought him Complainant's CAC that she again had left unattended on her desk when she walked away, and her lanyard which also had her key fob, which gave access to numerous buildings and the server room. The Chief wrote that Complainant had a pattern of leaving her CAC cards unattended, and this was her third occurrence of non-control of a CAC card in a short amount of time. This email was sent to the Agency's Contractor Officer Representative (COR), and possibly Staffing Firm 1 and/or Staffing Firm 2. Staffing Firm 2 received the email either from the COR and/or the Agency Chief. On May 16, 2018, Staffing Firm 2, pointing to their contract with Staffing Firm 1, directed Staffing Firm 1 to remove Complainant from serving the Agency for violating security requirements. On the same day, Staffing Firm 1 terminated Complainant for violating security requirements.

Complainant alleged that she was disparately treated based on race and sex when the Agency reported her security breaches to her staffing firm. Complainant conceded that she had two security breaches, suggested that the Agency Chief falsely reported she had three, and contended his false statement led to her termination.

In his report, the EEO counselor relayed that the Agency Chief said he had no communication with Staffing Firm 1 regarding the reason Staffing Firm 2 removed Complainant from the contract.

The COR relayed to the EEO counselor that the Agency has no authority to direct a staffing firm to hire or fire an individual. Here, Complainant alleges that the Agency discriminated against her when the Agency Chief reported her security breaches, which led to her termination by Staffing Firm 1. Because Complainant's complaint regards her termination, the control factor of the Agency having *de facto* ability to cause Complainant to be terminated by Staffing Firm 1 is especially significant. Complainant does not contend that the Agency told Staffing Firms 1 and/or 2 that she was no longer wanted or allowed to serve the Agency, and there is no evidence of this in the record. We find that it is more likely than not that Staffing Firm 2 made an independent decision to direct Staffing Firm 1 to remove Complainant from the contract, resulting in her termination. The record does not show that the Agency had *de facto* power to terminate Complainant. Given this, we find that the Agency did not have sufficient control over Complainant's employment to be her joint employer.

The FAD is AFFIRMED.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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

November 21, 2019
Date