



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

Mary J. Pietsch,
Complainant,

v.

Kathleen Sebelius,
Secretary,
Department of Health and Human Services,
Agency.

Appeal No. 0120090933

Agency No. HHS-NIH-1447-2008

DECISION

Complainant filed a timely appeal with this Commission from a final agency decision (FAD) dated December 11, 2008, 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.*

ISSUE PRESENTED

Whether the FAD properly dismissed the complaint for failure to state a claim on the ground that complainant was not an employee of the agency.

BACKGROUND

In her complaint, complainant alleged that she was subjected to discrimination on the bases of sex (female) and reprisal for prior protected EEO activity under Title VII:

1. she was sexually and otherwise harassed by a co-worker,
2. as a result of her complaints of harassment, the agency assigned her out of her old workspace on August 25, 2008, including to one bad workspace (isolated, no air conditioning, signs warning of asbestos, and so forth); she was moved without her computer or telephone; during some of the times of her relocations, including time in her old workspace, she had limited to no access to computer functions;

3. from September 9, 2008 to September 19, 2008, she was no longer invited to meetings; and
4. on September 19, 2008, she was terminated.¹

Complainant initiated contact with an EEO counselor on July 9, 2008, regarding her complaint, and was interviewed by the counselor on October 29, 2008. The alleged harassment in claim 1 extended up to and beyond the date complainant initiated EEO counseling. The FAD dismissed the complaint for failure to state a claim, reasoning that complainant was not an employee of the agency. 29 C.F.R. § 1614.107(a)(1) and .103.

Complainant served as a Project Officer for the agency's National Institutes of Health (NIH) in Bethesda, Maryland. She entered into a contact with Louviere, Stratton, & Yokel, LLC (LSY) exclusively to provide project management services to NIH from November 19, 2007, to May 19, 2008, with a six month option term. Under the contact, complainant agreed to provide 940 hours of service per six month period (full-time work), and compensation was set at \$63.99 an hour upon submission of time sheets every two weeks. Complainant served at NIH under three different contractors since 2000.

Complainant and a co-worker broke off an intimate relationship in August 2006. The co-worker then began allegedly harassing complainant in the summer of 2007, first by trying to resume the relationship, and then, when complainant would not do so, communicating with her in an angry fashion, sometimes laced with unwelcome sexuality, and hacking into her work computer. Things allegedly at times escalated from there, including alleged harassment both on and off the job. Complainant writes that on August 22, 2008, she "filed a harassment complaint" with an individual she describes as her second line supervisor at NIH. Thereafter, the agency relocated complainant's office space, more than once. Complainant's first line supervisor was an agency employee. On September 19, 2008, the agency gave LSY a letter advising that it was terminating the services of complainant at the end of the day. It explained that it would be cost effective to reduce contract staff. On the same day, referring to the agency's "termination letter," LSY issued a letter to complainant terminating their agreement.

In finding complainant was a contractor, the FAD reasoned that complainant referred to herself as a contractor of the agency in her complaint, that her contract with LSY states she is being retained as an independent contractor to supply services to NIH, payment of services was made by LSY contingent on complainant submitting timesheets, and LSY was not responsible for the payment of any taxes or benefits, including workers' compensation.

On appeal, complainant argues through counsel that the agency was complainant's employer. She argues that she worked at NIH for eight years, performed no services for LSY, all her work and training were assigned by her first level supervisor at NIH, an NIH employee, who approved

¹ The FAD characterized the complaint as only alleging claim 4. The intake form and complaint complainant submitted to the agency's Office of Equal Opportunity and Diversity Management show that she alleged claims 1 through 4.

all her timesheets and leave requests, and all her work was performed at NIH, which provided her office space, equipment, and supplies. The agency does not respond to complainant's appeal.

ANALYSIS AND FINDINGS

The matter before us is whether the agency properly dismissed complainant's complaint. 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.

The Commission has applied the common law of agency test to determine whether an individual is an agency employee versus a contractor. *See Ma v. Department of Health and Human Services*, EEOC Appeal Nos. 01962389 & 01962390 (May 29, 1998) (citing *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-24 (1992)).

The question of whether an employer-employee relationship exists is fact-specific and depends on whether the employer controls the means and manner of the worker's work performance. This determination requires consideration of all aspects of the worker's relationship with the employer. Factors indicating that a worker is in an employment relationship with an employer include the following:

- The employer has the right to control when, where, and how the worker performs the job.
- The work does not require a high level of skill or expertise.
- The employer furnishes the tools, materials, and equipment.
- The work is performed on the employer's premises.
- There is a continuing relationship between the worker and the employer.
- The employer has the right to assign additional projects to the worker.
- The employer sets the hours of work and the duration of the job.
- The worker is paid by the hour, week, or month rather than the agreed cost of performing a particular job.
- The worker does not hire and pay assistants.
- The work performed by the worker is part of the regular business of the employer.

- The worker is not engaged in his/her own distinct occupation or business.
- The employer provides the worker with benefits such as insurance, leave, or workers' compensation.
- The worker is considered an employee of the employer for tax purposes (*i.e.*, the employer withholds federal, state, and Social Security taxes).
- The employer can discharge the worker.
- The worker and the employer believe that they are creating an employer-employee relationship.

This list is not exhaustive. Not all or even a majority of the listed criteria need be met. Rather, the determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *EEOC Compliance Manual*, Section 2: Threshold Issues, 2-III.A.1, pages 2-25 and 2-26 (May 12, 2000) (available at www.eeoc.gov).

Under the Commission's *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms* (December 3, 1997)(available at www.eeoc.gov), we recognize that a "joint employment" relationship may exist where both the agency and the staffing firm may be joint employers. There are different types of staffing firms. Those that contract with a client to perform a certain service on a long-term basis and place its own employees, including supervisors, at the client's work site to carry out the service are contract firms. *Id.* at Introduction section.

Clients of contract firms, including the federal government, qualify as employers of workers assigned them if the clients have sufficient control over the workers, regardless of whether the worker is on the federal payroll. *Id.* and *Baker v. Department of the Army*, EEOC Appeal No. 01A45313 (March 16, 2006). For example, the client is an employer of the worker if it supplies the work space, equipment, and supplies, and if it has the right to control the details of the work performed, to make or change assignments, and to terminate the relationship. *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, Staffing Service Work Arrangements section. The test to determine employment status turns on whether the employer controls the means and manner of the worker's work performance. *EEOC Compliance Manual*, Section 2: Threshold Issues, 2-III.A.1, page 2-25. This applies regardless of whether a complainant is an employee or contractor of the staffing firm.

Here, complainant has served at NIH for some eight years, a long duration. She was engaged by LSY to exclusively provide her services to NIH. Her work was performed on the agency's campus, and she used the agency's computer network in doing work. She was paid an hourly wage. Complainant, who oversaw aspects of construction projects, duties included participating

in agency budget meetings, monitoring project spending, and reviewing payment applications by the a construction company, work which is part of the regular business of the agency.

In *International Union v. Clark*, 2006 WL 2598046, 18 A.D. Cases 932 (D.D.C. 2006), the court ruled that contrary to the contention of the United States Marshals Service, Court Security Officers (CSOs) were jointly employed by the agency and staffing firm contracting companies. Writing that perhaps the most important factor in determining whether the agency was a joint employer was if its power to decide whether a particular CSO could be removed from the contract for failure to meet the qualifications of the job was tantamount with removal power since an adverse agency determination in most cases of a CSO resulted in termination by the contractor. Similarly here, the record shows that the agency had the power to terminate complainant's services, which was tantamount to removal power since LSY solely engaged complainant provide services to NIH. Complainant's argument on appeal, which is not rebutted by the agency, is consistent with a finding that complainant was an employee of the agency.

Based on the legal standards and criteria set forth herein, we find that the agency exercised sufficient control over complainant's position to qualify as his employer for the purpose of the EEO complaint process. Contrary to the finding in the FAD, the financial arrangements between the parties, and complainant being referred to as a contractor do not establish, in light of the above, that complainant was a contractor.

Accordingly, the FAD's dismissal of complainant's complaint for failure to state a claim is reversed.

ORDER

The agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108. The remanded claims are whether complainant was discriminated against based on her sex (female) and reprisal for prior protected EEO activity under Title VII when (1) she was sexually and otherwise harassed by a co-worker, (2) as a result of her complaints of harassment, the agency assigned her out of her old workspace on August 25, 2008, including to one bad workspace (isolated, no air conditioning, signs warning of asbestos, etc.); she was moved without her computer or telephone; during some of the times of her relocations, including time in her old workspace, she had limited to no access to computer functions; (3) from September 9, 2008 to September 19, 2008, she was no longer invited to meetings; and (4) on September 19, 2008, she was terminated. The agency shall acknowledge to the complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision becomes final. 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 becomes final, 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.

A copy of the agency's letter of acknowledgment to complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0408)

Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to the complainant. 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.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M1208)

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 or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. 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 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 (R0408)

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 (Z1008)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. *See* Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney with the

Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

JUN 3 2009

Date

CERTIFICATE OF MAILING

For timeliness purposes, the Commission will presume that this decision was received within five (5) calendar days after it was mailed. I certify that this decision was mailed to the following recipients on the date below:

Mary J. Pietsch
6904 Race Horse Ln.
Rockville, MD 20852

Morris E. Fischer, Esq.
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Bethesda, MD 20814

Joe W. Ellis, Assistant Secretary
Administration and Management
Department of Health and Human Services
200 Independence Ave., SW Room 309F
Washington, DC 20201

JUN 3 2009

Date



Equal Opportunity Assistant