EEOC JURISDICTION OVER CONTRACT EMPLOYEES

(Updated by Mr. Clarence Guillory and Mr. Phillip Tidmore)

One issue, which can be expected to rise in the future, is discrimination complaints filed by contract employees. With all the recent contracting out of work, the natural inclination is these are employees of the contractor and not the agency for purposes of Title VII of the Civil Rights Act. That, however, is not always the case. The general rule is the Equal Employment Opportunity Commission has no jurisdiction over complaints of discrimination filed against independent consultants and contractors used by agencies. Watson v. Veterans Administration, 01851413 (1986). These claims, lacking jurisdiction, may be properly dismissed as "failure to state a claim" under 29 C.F.R. §1614.107(a)(1)(2012). However, in determining whether an employee is a contract or government employee for purposes of Title VII of the Civil Rights Act of 1964, the EEOC essentially follows Sprides v. Reinhardt, 613 F.2d 826 (1979) as updated by a case mentioned later.

There are eleven factors, which must be considered in such cases and no one factor is decisive. They are:

1) the kind of occupation with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision;
2) the skill required in the particular occupation;
3) whether the "employer" or the individual in question furnishes the equipment used and the place of work
4) the length of time during which the individual has worked;
5) the method of payment whether by time or by the job;
6) the manner in which the work relationship is terminated; i.e. by one or both parties, with or without notice and explanation;
7) whether annual leave is afforded;
8) whether the work is an integral part of the business of the "employer";
9) whether the worker accumulates retirement benefits;
10) whether the "employer" pays social security taxes; and
11) the intention of the parties.

The EEOC notes it now follows the common law test set forth in Ma and Zheng v. Department of Health and Human Services, 01962390, 01962389 (1998). That case added a twefth factor of (12) the extent of the employer's right to control the means and manner of the worker's performance. Ma cited Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318 (1992) in applying the common law test.

The EEOC has noted that no single factor is decisive and each of the factors must be considered and weighed. Butler v. Postmaster General, 01996361 (2001).

Whether an individual acts as an independent contractor or consultant, or as an employee or agent of the company is determined by the common law test of control. McDonald v. Postmaster General, 01A12144 (2002). For example, if a federal agency exercises control over virtually every aspect of a contractor's work, this is sufficient control under Title VII to establish the agency as the employer. Fields v. GSA, 01A51814 (2006). If a federal agency controls the hiring of contract employees, it can be held to be the employer for Title VII purposes. In another case, the contractor controlled the job assignments, pay and benefits of employees. The agency merely gave the assignments to the contractor who decided which employees would complete those assignments. Fearn v. TVA, 01962874 (1996). In a recent case, the complainant was supervised by a postmaster but received no benefits, commendations, awards or training and was responsible for paying their own taxes. Therefore, the complainant was not an employee but a contractor. Smith v. Secretary of Interior, 01970503 (1997). In another case, the EEOC found an "employee" of a contractor was an agency "employee" since the agency exercised primary control over the employee by having her functionally and administratively supervised by agency personnel, furnishing her with equipment and work supplies and giving her paid leave and withholding federal and state taxes. Woods v. Postmaster General, 01971155 (1998). In a more recent case, the EEOC found a federal agency exercised control over virtually every aspect of a contractor's work and the EEOC had jurisdiction. Fields v. General Services Administration, 01A51814 (2006). However, the mere provision of work space, supplies, and equipment to perform a job is not a sufficient indicia of control where the contractor otherwise control every aspect of the employment relationship. Floro v. Secretary of Army, 01A12454 (2002). Moreover, the mere providing of computer equipment for the employee of a contractor does not convert the person to a federal employee for EEO complaint purposes where the government contractor retains day-to-day supervision of the employee, pays the employee, and retains the right to discipline the employee. Hall v. Secretary of Army, 01A31890 (2003). Furthermore, in still another case, the EEOC found the complainant was an employee of the contractor even though an agency official discussed job performance with contractor employees, oversaw their shifts and received direct reports from them. Miller v. Secretary of Veterans Affairs, 01A22997 (2003). The EEOC found a dentist was an agency employee since the agency provided all equipment, scheduled appointments, set hours and controlled hours, location, provided equipment and had the right to discharge the complainant. Ames v. Secretary of Air Force, 0120073926 (2008).

There are many recent cases in this area. In a 2010 case, the complainant worked for an agency supervisor who provided an employee with all her work and controlled the time and place of work. Bashrawl v. Secretary of State, 0210101859 (2010). The same thing occurred in another 2010 case when there was no doubt there was agency control over the contract employee. The agency controlled the means and manner of the employee's work. Caarranza v. Secretary of Army, 0120092727 (2010). In a 2009 case, a contract employee was held not to be one for EEOC purposes despite the fact the work was performed on the agency's premises and equipment furnished by the agency. The employee worked on the Latin American Plant Initiative. This person's work involved extracting samples, research, and cataloguing data. Smith v. Smithsonian Institution, 0120092412 (2009). Finally, one factor the EEOC will look at to determine

whether a complainant is an employee of the agency or the contractor is any agreement the complainant has signed with the employing entity. Clark v. Postmaster General, 01A11615 (2002).

As noted by one Circuit Court of Appeals, the Spirides test essentially considers the economic realities of the work relationship, but actually focuses more on the extent of the employer's right to control the means and manner of the worker's performance. Mares v. Marsh, 777 F.2d 1066 (5th Cir. 1985). Other federal circuit court of appeals follow Spirides. Garrett v. Mills, 721 F.2d 979 (4th Cir. 1983); EEOC v. Zippo Mfg. Co., 713 F.2d 32 (3d. Cir. 1983); Oestman v. National Farmers Union Insurance Co., 958 F.2d 303 (10th Cir. 1992); Frankel v. Bally, Inc., 987 F.2d 86 (2d Cir. 1993). In determining whether an individual acts as an independent consultant or an employee or an agent of a federal agency, it is determined by the common law test of control. MacDonald v. Postmaster General, 01A12444 (2004).

If an agency fails to review the Spirides factors in its investigation, the EEOC will remand the case to the agency to obtain such information through affidavits and exhibits. In one recent case, the EEOC remanded a case to the agency ordering the agency to obtain information on the role of agency officials in their relationship to the complainant's performance. The EEOC specifically noted the information needed to look to the extent the agency and a private company actually controlled the means and manner of the complainant's performance. After a through review, the agency could determine whether the complainant was an employee of the agency within the meaning of 29 C.F.R. § 1614.103(c)(2012). Jenkins v. Secretary of the Army, EEOC 01972165 (1997).

In one case, the EEOC upheld an agency's dismissal of an individual's claim because he was an independent contractor at the time he was subject to the alleged discrimination; however, the complainant was allowed to bring a claim as an applicant when the independent contractor was denied a job as a federal civil service employee. Hamilton v. Dept. of Navy, 01996039 (2000). In another case, a complaint was dismissed since the complainant performed a variety of assignments independent of agency supervision. The complainant's company deducted taxes, Medicare and Social Security. Her employment was terminated by her company and not by the agency. OFO upheld the dismissal of the complaint since it failed to state a claim. Vaughn v. Thompson, Appeal No. 01A21353 (2000).

One recent case where a contractor was held to be an employee of the agency is Kereem v. Secretary of State, 052011969 (2012). Seven of the factors showed the contractor was an employee of the agency. In a second 2012 case, the EEOC found that the complainant was infact not performing regular business of the agency for the Coast guard. It noted that the record did not contain evidence indicating that the maintenance and repair of Government aircraft is a vital or express part of the Agency's mission.

Paragraph 4.3 of AFI 36-2706 covers proper complainants in EEO case and notes the 12 factors that are looked at to determine whether an infividual qualifies as an agency

employee. Subparagraph 4.3.2.2 lists out the 12 factors to determine whether an individual classified as a independent contractor may qualify as an Agency employee.

This topic is covered at pages 205 to 212 in A Guide to Federal Sector Equal Employment Law and Practice 2013 edition by Mr. Ernest Hadley.