

EEOC Pushes Boundaries of Harassment Liability in Select Staffing Lawsuit

By [Jessica L. Westerman](#)

June 29, 2018

Earlier this month, the Equal Employment Opportunity Commission (EEOC) filed a [lawsuit](#) on behalf of female employees of Select Staffing, a temporary staffing agency operating in Albuquerque, New Mexico, who were sexually harassed during their job placements with the Albuquerque Police Department Inspection of Public Records Act (IPRA) Unit. According to the complaint, filed in the District of New Mexico on June 13, 2018, female Select Staffing employees endured both verbal harassment and physical assaults from supervisors, managers, and/or coworkers in the IPRA Unit between 2014 and 2015. Although the women reported the harassment to Select Staffing on numerous occasions, the staffing agency failed to prevent or correct the harassment, as required by Title VII of the Civil Rights Act of 1964.

The lawsuit highlights several interesting trends with both practical and legal ramifications. The suit was filed along with [seven other sexual harassment suits](#) the EEOC announced on the same day to showcase its commitment to eradicating sexual harassment in the #MeToo era.

The suit also furthers the EEOC's interest in developing the law that holds staffing agencies responsible for discriminatory treatment of their employees by client companies. The EEOC's [substantive area priorities](#) for Fiscal Years 2017-2021 include "[c]larifying the employment relationship and the application of workplace civil rights protections in light of the increasing complexity of employment relationships and structures, including temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy." The EEOC secured a \$30,000 settlement in a case against [a different staffing agency](#) earlier this month.

Protecting Temporary Employees against Workplace Harassment

In the rapidly growing "gig" economy, in which employees frequently use intermediaries like staffing agencies to secure short-term employment, developing the law in this area is becoming more and more pressing. According to [David Weil](#), head of the Department of Labor's Wage and Hour Division under President Obama, the economy has in recent years undergone what he calls a "fissuring" in response to increasing pressure to improve financial performance, companies "focus[ed] their businesses on core competencies — that is, activities that provide the greatest value to their consumers and investors— and . . . shed[] less essential activities." At first, companies outsourced more peripheral functions like payroll, publications, accounting, and human resources. Over time, however, the practice "spread[] into employment activities that could be regarded as core to the company: housekeeping in hotels; cooking in restaurants; loading and unloading in retail distribution centers; even basic legal research in law firms." Companies soon came to rely on staffing agencies to fill these positions efficiently and inexpensively.

This "fissuring" has had a major impact on the way American workers organize their work lives. More and more workers are stringing together temporary, short-term jobs at numerous employers over the course of their careers, rather than building long-term relationships with one or a small handful of

employers. For this reason, they often have a stronger relationship with the staffing agencies they use to find jobs than with the employers in whose offices they actually work. What is more, many staffing agencies operate nationwide. This means that their policies and practices can affect thousands of employees at workplaces across the country.

The Legal Obligations of Staffing Agencies for Protecting Temporary Workers

Given the significant role that staffing agencies play in today's economy, it is critical for staffing agencies and client employers to understand their legal obligations under federal anti-discrimination laws, and for workers to know who is responsible when they are subject to discrimination or harassment. Plaintiffs often bring charges against or sue both the staffing agency that sent them to a workplace and the company where they perform their job, under a theory that they are joint employers. In this case, the EEOC sued only Select Staffing, and not the Albuquerque Police Department, where the employees worked. The EEOC has broad authority to bring civil actions against private employers but is prohibited by statute from filing lawsuits against governments, government agencies, or political subdivisions. 42 U.S.C. § 2000e-5(f)(1). If the federal government decides to bring a Title VII (or disability) case against a state or local government, the case is handled by the U.S. Department of Justice. In this case, however, the employees' use of a staffing agency to secure employment at the Albuquerque Police Office enabled the EEOC to litigate the case and seek relief for the victims of harassment from the agency that referred them to their jobs. As EEOC Regional Attorney Mary Jo O'Neill [explained](#) when the lawsuit was filed, "The fact that [the] misconduct [alleged in the case against Select Staffing] occurred in a police unit makes this case even more distressing."

Determining Liability in Workplace Harassment Cases with Joint Employers

This case highlights another legal ramification of efforts to impose liability appropriately in harassment cases in joint employer situations. The women in this case were harassed by employees of the police department, not other employees of Select Staffing. Under existing precedent and general negligence principles, staffing agencies can be held liable for harassment that occurs at a job placement—even if the harasser is not also one of the agency's employees—if the agency "knew or should have known about the [harassment] and failed to undertake prompt corrective measures within its control." See, e.g., *Whitaker v. Milwaukee County., Wisconsin*, 772 F.3d 802, 812 (7th Cir. 2014) (citation omitted). Of course, when the harasser is not also employed by the staffing agency, the corrective measures available to the staffing agency are limited. The staffing agency could not, for example, terminate the individual, or even transfer him or her to a different location. But as the EEOC [has explained](#), the staffing agency can still take corrective measures including making the harasser's employer aware of the harassment; insisting that the harasser's employer take prompt investigative and corrective measures; and allowing the staffing agency employee to take a different job assignment at the same rate of pay, if he or she so desires. In the Select Staffing case, the EEOC has alleged both that the Select Staffing employees "repeatedly complained to Select Staffing about the hostile or offensive work environment liability," and that Select Staffing "negligently failed to take timely preventative or remedial actions."

If successful, the Select Staffing case will reaffirm staffing agencies' obligation to provide employees a workplace that is free from sexual harassment. Staffing agencies cannot simply look the other way when their clients engage in discrimination and harassment; they must provide their employees with the same workplace protections as any other employer.