



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

[REDACTED]
Nathaniel S,¹
Complainant,

v.

Thomas J. Vilsack,
Secretary,
Department of Agriculture,
Agency.

Appeal No. 2023000597

Agency No. FS-CF-2022-00191

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated September 30, 2022, dismissing his 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. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the reasons presented below, we AFFIRM the Agency's final decision dismissing the complaint.

ISSUE PRESENTED

Whether the Agency's final decision properly dismissed Complainant's formal complaint.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Welding Inspector, WL-8 at the Agency's Forest Service facility in Curlew, Washington.

On March 29, 2022, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of religion (Christian), disability (perceived contagious), and reprisal when:

1. On or about June 2, 2022, Complainant learned that pursuant to the Agency's COVID-19 screening testing program guidelines he was required to complete COVID-19 testing in front of his supervisor.
2. On January 18, 2022, Complainant was notified that the Agency was instituting a COVID-19 screening testing program.
3. In October 2021, the Agency changed its accommodations process by requiring employees to complete a newly developed form for requests for religious exemption from the COVID-19 mandate, and elevating approval authority for such requests to senior management.
4. Since September 2021 management has not responded to Complainant's request for a religious exemption from the COVID-19 vaccine mandate.
5. On September 9, 2021, Complainant was notified that Agency employees were required to be vaccinated or face possible disciplinary action including removal from the Agency pursuant to implementation of Executive Order 14043 by the Agency's Secretary.
6. On an unspecified date Complainant submitted his vaccination status to the Agency due to the threat of disciplinary action for non-compliance with the Agency's vaccine mandate policy.
7. On an unspecified date, Complainant did not apply for a job opportunity due to its COVID-19 vaccination requirement.

On September 30, 2022, the Agency dismissed Complainant's complaint in its entirety pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state claim. The Agency determined among other things, that Complainant was not an aggrieved employee. In addition, the Agency dismissed claim 5 pursuant to 29 C.F.R. § 1614.107(a)(3) for raising a claim that was raised in a pending class action in a district court.

The instant appeal followed.

CONTENTIONS ON APPEAL

Complainant, through his attorney, argues that he was an aggrieved employee because he was threatened with disciplinary action for not receiving the vaccine and was required to take COVID-19 tests.

The Agency asserts that Complainant was not aggrieved because he was never disciplined and was not required to take the vaccine.

STANDARD OF REVIEW

The Agency's decision to dismiss a complaint is subject to de novo review by the Commission, which requires the Commission to examine the record without regard to the factual and legal determinations of the previous decision maker and issue its decision based on the Commission's own assessment of the record and its interpretation of the law. 29 C.F.R. § 1614.405(a). The Commission should construe the complaint in the light most favorable to the complainant and take the complaint's allegations as true. See Cobb v. Department of the Treasury, EEOC Request No. 05970077 (March 13, 1997). Thus, all reasonable inferences that may be drawn from the complaint's allegations must be made in favor of the complainant.

ANALYSIS

An agency shall accept a complaint from any aggrieved employee who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or a disabling condition. 29 C.F.R. § 1614.103, § 1614.106(a). The Commission's federal sector case precedent has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. Diaz v. Department of the Air Force, EEOC Request No. 05931049 (April 21, 1994). EEOC Regulation 29 C.F.R. §1614.107(a)(1) provides for the dismissal of a complaint which fails

to state a claim within the meaning of 29 C.F.R. § 1614.103 or §1614.106(a).

In this case, the Agency correctly concluded that the formal complaint failed to state a claim because Complainant failed to articulate that he was an aggrieved employee, as discussed hereafter.

In claims 1 and 2, concerning the Agency's COVID-19 testing requirement, Complainant argues that he was aggrieved because he was required to complete COVID-19 tests for months. Contrary to Complainant's contentions, an agency-wide policy mandating COVID-19 testing for unvaccinated employees is insufficient to render a complainant "aggrieved". See Colby S. v. Veterans Affairs, EEOC Appeal No. 2022000976 (April 18, 2022) (noting that the policy did not cause the complainant to be treated differently from other employees or result in a personal harm to the complainant). COVID-19 testing is job-related and consistent with business necessity, the EEOC has decided that "employers can require mandatory COVID-19 viral testing to evaluate an employee's continued presence in the workplace." What You Should Know About COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws, EEOC Technical Assistance Questions and Answers -- Updated on July 12, 2022, at Question A.6. Therefore, we find that claims 1 and 2 fail to state a claim.

Claims 3, 4, 5 and 6 concern the Agency's vaccine requirement and Executive Order 14043. The record shows that the Agency delayed processing Complainant's accommodation request due to a preliminary nationwide injunction, which required federal Agencies to take no action to implement or enforce Executive Order 14043. On May 9, 2023, Executive Order 14043 was revoked, consequently, any policies premised on the order may no longer be enforced. Renaldo v., Department of Defense, EEOC Appeal No. 2023001971 (Sept. 23, 2024). Complainant's claim is now moot. There is no indication in the record, including consideration of Complainant's appeal brief, that he was ever ultimately required to receive the COVID-19 vaccine or received any other adverse action for failing to be immunized. Therefore, we find that he has not shown any harm and that claims 3, 4, and 5 fail to state a claim. See Valery G. v. Defense, EEOC Appeal No. 2022002547 (August 16, 2022) and Chadwick W. v. Department of Transportation, EEOC Appeal No. 2022003448 (February 6, 2023).

With claim 7, Complainant alleges that he did not apply for a job opportunity because he observed that the job had a COVID-19 vaccination requirement.

Generally, a claim of discriminatory non-selection fails to state a claim when the complainant failed to apply for the position. See Owen v. Social Security Administration, EEOC Request No. 05950865 (December 11, 1997). A complainant is only aggrieved by such claims where he proves that the agency discouraged him from applying, or that the application process was secretive. See Ozinga v. Department of Veterans Affairs, EEOC Request No. 05910416 (May 13, 1991). In the present case, Complainant admits that he never applied for the position. He has failed to show that Agency officials discouraged him from applying, or otherwise kept him unaware of the opening. Accordingly, his complaint fails to state a claim.

Since Complainant's complaint is properly dismissed for failure to state a claim, we will not determine whether it was properly dismissed on other grounds.

CONCLUSION

Accordingly, the Agency's final decision dismissing Complainant's complaint is AFFIRMED.

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 (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 25, 2024
Date