



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

[REDACTED]
Eric M,¹
Complainant,

v.

Frank Kendall,
Secretary,
Department of the Air Force,
Agency.

Appeal No. 2023002542

Hearing No. 470-2022-00166X

Agency No. 9XIM2200170

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated February 21, 2023, 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. For the reasons discussed below, we affirm the Agency's final decision.

ISSUES PRESENTED

Whether the Agency properly procedurally dismissed Complainant's 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

During the period at issue, Complainant worked as a Principal Computer Engineer, Grade DR-04, in the Air Force Research Laboratory, Sensors Subsystems Branch at Wright-Patterson Air Force Base, Ohio.

On September 24, 2021, the Deputy Secretary of Defense issued a policy memo limiting employees who were not vaccinated against COVID-19 to mission critical official travel. Thereafter, Complainant declined to receive the COVID-19 vaccine for religious reasons and his requests for official travel were not successful. The Deputy Secretary of Defense rescinded the applicable policy on January 30, 2023.

On February 1, 2022, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the basis of religion (Christianity) when:

On 22 November 2021, Complainant was informed that he could no longer travel for work due to his sincerely held religious beliefs not to be vaccinated and the travel policy directed and signed by The Honorable Kathleen Hicks, Deputy Secretary of Defense, on 24 September 2021.

On September 14, 2022, the Agency issued Complainant its investigative report and notice of right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing. On December 12, 2022, the Agency moved to dismiss. On January 6, 2023, Complainant responded and opposed the Agency's motion. On January 17, 2023, the AJ granted the Agency's motion to dismiss, finding that Complainant had failed to state a claim on an EEO protected basis and because Complainant did not allege a present harm. The AJ further remanded the matter to the Agency for final action. On February 21, 2023, the Agency issued its Final Order adopting the AJ's dismissal decision.

CONTENTIONS ON APPEAL

On appeal, Complainant maintains that he stated a viable claim of religious discrimination and that the AJ's dismissal was improper. Complainant states that the AJ did not allow him to obtain or submit additional evidence supporting his position that he had suffered employment harm.

Complainant contends that the AJ failed to consider the number of official travel and leave opportunities that he had missed for over a year because of the discriminatory policy. Complainant stated that the policy of requiring the Undersecretary of the Air Force to approve unvaccinated employees as “mission critical” for official travel was unreasonable and caused a discriminatory adverse impact against him and a statistically significant number of unvaccinated religious personnel. According to Complainant, his request for Undersecretary approval for official travel was thwarted by an obtuse coordination process and the onerous level of effort required. Complainant argues the Agency’s policy amounted to a ban on official travel for all unvaccinated personnel. In addition to having his complaint reinstated, Complainant also requested the Commission amend his complaint to include a claim of denial of religious accommodation.

In response to Complainant’s appellate brief, the Agency cites prior Commission precedent for permitting policies that restricted employees based on their unvaccinated statuses because of religious beliefs. In the alternative, the Agency stated that the matter was moot because the policy restricting official travel for unvaccinated employees was rescinded.

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

As to initial matters, Complainant faced a high bar in claiming that the AJ abused her broad discretion in conducting the hearing. Trina C. v. U.S. Postal Serv., EEOC Appeal No. 0120142617 (Sept. 13, 2016). Complainant must make a substantial showing of that the AJ displayed personal bias in order to prevail.

The bias must be shown to have been prejudicial against him. In other words, Complainant must establish that alleged substantial personal bias so tainted the process that he did not receive a fair and impartial pre-hearing. Smith v. Dep't of the Army, EEOC Appeal No. 01880866, (May 11, 1988). EEOC regulations confer upon AJs discretion to dismiss complaints pursuant to 29 C.F.R. § 1614.107, even where those matters had been accepted and processed by the Agency. 29 C.F.R. § 1614.109(b). A dismissal by an AJ will not be disturbed unless it was so clearly against reason or the evidence as to constitute an abuse of discretion. Hunter v. Soc. Sec. Admin., EEOC Appeal No. 0720070053 (Feb. 16, 2012).

Upon careful review of the record, we found no evidence that the AJ was biased in favor of the Agency such that Complainant did not receive a fair evaluation of his case. Moreover, Complainant has acknowledged that he had missed his opportunity before the AJ to amend his complaint to include the claim regarding denial of religious accommodation.

To establish standing, in accordance with 29 C.F.R. § 1614.103, a complainant must be either an employee or an applicant for employment of the agency against which that complainant alleges discrimination. The claim must concern a policy or practice which affects a complainant as an employee or applicant. An agency shall accept a complaint from any aggrieved employee or applicant who believes that he has been discriminated against because of race, color, religion, sex, national origin, age or disabling condition or because of retaliation. 29 C.F.R. §1614.106(a). EEOC Regulation 29 C.F.R. §1614.107(a)(1) provides for dismissal of a complaint which fails to state a claim within 29 C.F.R. §§ 1614.103 or 1614.106(a). Our case precedent defines an "aggrieved employee" as one who suffers a harm with respect to a term, condition, or privilege of employment for which there is a remedy under EEOC regulations. Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994).

Agencies may not restrict an employee's presence and duties based on EEO-protected characteristics. However, it is permissible to restrict official travel based on an employee's remaining unvaccinated against COVID-19, which is not an EEO protected class. Mario L. v Dep't of the Army, EEOC Appeal No. 2022003213 (Sept. 19, 2022). In that decision, we affirmed dismissal of a similar complaint alleging discriminatory denial of official travel under the same COVID-19 vaccination policy.

Furthermore, to the extent Complainant has alleged that the official travel limitation policy prevented him from further possible career advancement opportunities, we reject this claim because it is speculative at best. Byron P. v. Dep't of the Air Force, EEOC Appeal No. 2023001833, (July 11, 2024) citing Colby S. v. Dep't of Veterans Affairs, EEOC Appeal No. 2022000976 (Apr. 18, 2022); request for reconsideration denied, EEOC Request No. 2022003458 (Sept. 29, 2022).

Upon review, the Commission finds that Complainant's complaint was properly dismissed pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim.

CONCLUSION

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

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0124.1)

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 their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit their 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 their 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(f).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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 their 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

January 8, 2025

Date