



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

[REDACTED]  
Melvin S.,<sup>1</sup>  
Complainant,

v.

Alejandro N. Mayorkas,  
Secretary,  
Department of Homeland Security  
(Immigration and Customs Enforcement),  
Agency.

Appeal No. 2023003270

Agency No. HS-ICE-01751-2022

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated April 18, 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and Title II of the Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff et seq. (GINA). 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.

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<sup>1</sup> 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 Criminal Investigator, GS-13 at the Agency's Homeland Security Investigations (HSI) Office of the Deputy Special Agent in Charge in Tucson, Arizona.

On April 20, 2022, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of religion, disability (perceived), reprisal, and genetic information when, on March 14, 2022, he was enrolled in the Agency's COVID-19 Screening Testing Program<sup>2</sup>.

The Agency dismissed the formal complaint pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim. Specifically, the Agency determined that Complainant was attempting to allege discrimination on the basis of vaccination status, which is not protected under the statutes enforced by the Commission.

The instant appeal followed.

### CONTENTIONS ON APPEAL

Complainant submitted a statement with his appeal, arguing that he has stated a claim. The Agency filed a brief in response, arguing that its dismissal should be affirmed.

### 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).

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<sup>2</sup> In January 2022 Complainant filed a complaint where he challenged the enforcement of Executive Order 14043, which mandates COVID-19 vaccination of federal employees. The Agency Case number for that matter is HS-ICE-00640-2022. HS-ICE-00640-2022 has been held in abeyance pending a class action and Complainant has acknowledged that HS-ICE-00640-2022 is separate from this case so it will not be discussed here. (See COMPLT File, p. 20)

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

The Agency shall accept an EEO complaint from any aggrieved employee or applicant for employment who believes that he has been discriminated against by the Agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. §§ 1614.103, 1614.106(a). This 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 under EEOC regulations. Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994). Under 29 C.F.R. § 1614.107(a)(1), the Agency shall dismiss a complaint if it fails to state a valid EEO claim.

#### *Genetic Discrimination*

Regarding GINA, Complainant has stated the Agency discriminated against him because the COVID-19 vaccine has genetic material, and the Agency required him to either inject the genetic material into his body or take tests to see if he had COVID-19. GINA prohibits employers from discriminating against any employee because of genetic information with respect to the employee. Genetic information means information about: (i) an individual's genetic tests; (ii) genetic tests of that individual's family members; and (iii) the manifestation of a disease or disorder in family members of such individual (family medical history). 29 C.F.R. § 1635.3(c). Regardless of the COVID-19 vaccine's biological mechanism, Complainant's allegations did not involve information about his genetic tests, genetic testing of his family members, or his family's medical history. Therefore, he has failed to state a viable claim that the Agency violated GINA. Buck S. v. U. S. Postal Serv., EEOC Appeal No. 2022003265 (June 30, 2022).

#### *Religion and Perceived Disability*

Complainant insists that he has been discriminated against due to his religion and perceived disability. In his appeal statement, Complainant expressly states, that in January 2022, his supervisor notified him that he had to complete COVID-19 tests at home and upload the results onto a

telehealth website "before being allowed to visit government premises." Complainant expressed his discontentment and declared, why "don't vaccinated employees have to test as well for the safety of the workforce as it is scientifically proven now both vaccinated and unvaccinated individuals can contract, spread, and become ill with the COVID-19 virus? Why were only a created class of unvaccinated employees being discriminately targeted?" In short, Complainant accused the Agency of treating him less favorably than vaccinated employees. Vaccination status is not protected under the statutes enforced by the Commission. 29 C.F.R. § 1614.103(a). Furthermore, 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. Moreover, the EEOC has affirmed dismissal for failure to state claim where the complainant has alleged discrimination based on individual choice to remain in an unvaccinated status. Karolyn E. v. Dep't of Def., EEOC Appeal No. 2022002840 (Sept. 19, 2022). Dismissal of the complaint for failure to state a claim was, therefore, proper.

### 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).

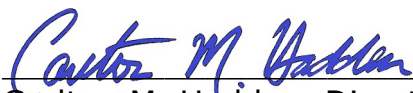
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

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:



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Carlton M. Hadden, Director  
Office of Federal Operations

November 19, 2024

Date