



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

[REDACTED]
Merrill O,¹
Complainant,

v.

Jerome H. Powell,
Chair,
Federal Reserve System,
Agency.

Appeal No. 2023003494

Hearing No. 570-2023-00481X

Agency No. FRB-EEO-22-08-004

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated May 22, 2023, dismissing a formal 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.

ISSUE

Whether the AJ's decision, as implemented by the Agency, properly dismissed the formal EEO 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 was an applicant for the Law Enforcement Unit of Agency's Board of Governors in Washington, D.C.²

On September 9, 2021, the President issued Executive Order (EO) 14043 on "Requiring [COVID-19] Vaccination for Federal Employees." EO 14043 directed the Safer Federal Workforce Task Force to publish guidance on implementing the vaccine mandate. However, on January 21, 2022, the U.S. District Court for Southern District of Texas issued a nationwide preliminary injunction enjoining enforcement of EO 14043. Feds for Med. Freedom v. Biden, 581 F. Supp. 3d 826 (S.D. Tex.), *vacated and remanded*, 30 F.4th 503 (5th Cir. 2022), *reh'g en banc granted, opinion vacated*, 37 F.4th 1093 (5th Cir. 2022), *on reh'g en banc*, 63 F.4th 366 (5th Cir. 2023), and *aff'd*, 63 F.4th 366 (5th Cir. 2023).

As of January 24, 2022, in light of the Southern District of Texas' injunction, the Safer Federal Workforce Task Force issued updated guidance stating that federal government agencies would take no action to implement or enforce EO 14043. See "Frequently Asked Questions Related to Compliance with the Applicable Preliminary Nationwide Injunction on Implementation and Enforcement of the Vaccination Requirement Pursuant to [EO 14043], Guidance to Agencies." Such updated guidance stated that, to the extent a Federal job announcement includes that applicants must be fully vaccinated against COVID-19 pursuant to Executive Order 14043, that requirement does not currently apply. The updated guidance directed agencies to notify applicants that "To ensure compliance with an applicable preliminary nationwide injunction . . . the Federal Government will take no action to implement or enforce the COVID-19 vaccination requirement pursuant to Executive Order 14043." The updated guidance further stated that Agencies should reissue tentative and final offers of employment to modify the reference to the COVID-19 vaccination requirement pursuant to E.O. 14043. Additionally, the updated guidance instructed agencies not to discontinue processing requests they have already received for religious exceptions to the COVID-19 vaccination requirement pursuant to E.O. 14043.

Complainant applied for the vacancy at issue (Job Requisition #22771) on June 10, 2022.

² The record indicates that while Complainant's application was pending, he worked for another federal agency also located in Washington, D.C.

On June 28, 2022, the Agency extended Complainant an offer letter. Despite the updated guidance, the offer letter stated that full COVID-19 vaccination was required unless the Board found that a legal exception applied. The offer letter stated that the Agency's offer is contingent upon providing proof of and attestation to being fully vaccinated for COVID-19 unless the Board determines a legal exception applies. On that same date, Complainant requested a religious exemption to the COVID-19 vaccination requirement. On July 15, 2022, the Board denied Complainant's request. In a July 16, 2022, exchange of emails with Agency HR personnel, Complainant wrote:

I will not be able to begin the position I was offered and scheduled to start August 1, 2022 as we discussed and agreed to.

I do not agree with this decision at all and am very sorry this is the board's current position and decision. Their email and attachments I am forwarding read as if their mind was made up before receiving my exemption and in disregard to the job posting indicating an exemption could be requested, and in disregard to my serious held religious belief.

On July 20, 2022, Complainant initiated contact with the Agency's EEO Counselor but the parties were unable to resolve the matter informally. When Complainant had his August 22, 2022, interview with an EEO Counselor, he explained that the Board's offer letter was rescinded due to his failure to show proof of being fully vaccinated, resulting in his decision to remain in his current job.

On August 23, 2022, Complainant filed a formal complaint claiming that the Agency discriminated against him based on religion when, on July 15, 2022, the Board denied his request for an exception from the COVID-19 vaccination mandate as a religious accommodation.

After its investigation into the complaint, the Agency provided Complainant with a copy of the report of investigation and notice of the right to request a hearing before an EEOC Administrative Judge (AJ). Complainant requested a hearing.

On April 19, 2023, the AJ issued Complainant a Notice and Order to Show Cause to explain why his complaint should not be dismissed for failure to state an actionable claim of discrimination, however, Complainant failed to respond.

On May 2, 2023, the AJ dismissed the complaint, pursuant to 29 C.F.R. §1614.107(a)(1), for failure to state a claim. The AJ determined that Complainant's claim of discrimination was based on his unvaccinated status which is not protected under any statute or enforced by the Commission.

On May 9, 2023, President Biden officially ended the COVID-19 vaccine mandates by rescinding EO 14043. On May 22, 2023, the Agency issued a final action adopting the AJ's dismissal for failure to state a claim.

CONTENTIONS ON APPEAL

The instant appeal followed. Complainant provided a copy of the Agency's final action but did not present an appellate argument.

The Agency did not submit a brief in support of its position on appeal.

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 an aggrieved employee or applicant for employment who believes that he has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. §§ 1614.103, 1614.106(a). EEOC'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. Dep't of the Air Force, EEOC Request No. 05931049 (April 21, 1994). If a complainant does not allege that they were "aggrieved" within the meaning of EEOC's regulations, then an agency shall dismiss the complaint for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1).

Our review of the record, as well as the updated guidance regarding the injunction enjoining enforcement of EO 14043, indicate that the Agency should not have enforced its COVID-19 vaccination requirement against Complainant. According to the relevant updated guidance, the Agency should have removed the vaccine requirement from Complainant's offer letter and reissued Complainant an appropriate offer letter. Moreover, instead of denying Complainant's religious accommodation request for exception from the Agency's COVID-19 vaccination requirement, the Agency should have advised Complainant that, because the federal court's injunction prohibiting requiring COVID-19 vaccination, his accommodation request was no longer necessary and would not be processed.

Given the specific circumstances of this case, we find that Complainant has alleged a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy, and therefore, he is an aggrieved applicant. Therefore, we conclude that the dismissal of the formal complaint for failure to state a claim was improper.

CONCLUSION

The Agency's final decision implementing the AJ's dismissal of instant formal complaint is REVERSED. We REMAND this matter to the Agency, for submission to the appropriate Hearings Unit, as detailed in the ORDER below.

ORDER

The Agency shall submit to the Hearings Unit of the EEOC's Washington, D.C. field office a request for hearing on Complainant's behalf within fifteen (15) calendar days of the date this decision is issued. The Agency is directed to submit a copy of the complaint file, as well as a copy of this appellate decision, to the EEOC Hearings Unit within fifteen (15) calendar days of the date this decision becomes final. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the administrative judge shall process the complaint in accordance with 29 C.F.R. § 1614.109, and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and § 1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days

of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

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 (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court

within ninety (90) calendar days from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. 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. **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 22, 2025
Date