



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

[REDACTED]
Woodrow B.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Customs and Border Protection),
Agency.

Appeal No. 2023003938

Agency No. HS-CBP-02562-2022

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision (FAD) dated June 29, 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 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 Supervisory Customs and Border Protection Officer at the Agency's Office of Field Operations in Houston, Texas.

On August 17, 2022, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of religion (Christian Baptist) and reprisal, when on May 31, 2022, and continuing, he received emails informing him that was required to register with Co-Verified and schedule weekly COVID-19 testing.

Complainant did not specifically raise his retaliation claim on his formal complaint form, he raised it in an attachment to his complaint and during counseling. Complainant said that he filed a religious accommodation to be exempt from the Agency's vaccination mandate and was worried that the Agency would retaliate against him in the future for failure to comply with its COVID-19 requirements.

On June 29, 2023, the Agency dismissed Complainant's claims pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state 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 did not submit any brief or argument on appeal. The Agency submitted a brief arguing that the FAD should be affirmed because there was no harm to a term or condition of Complainant's employment.

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

By regulation, 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 disability. 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). If a complainant does not allege that they were "aggrieved" within the meaning of the Commission'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).

Complainant asserted that the Agency had different procedures for vaccinated and unvaccinated employees. Specifically, he stated unvaccinated employees had to undergo mandatory COVID-19 testing and everyone knew who they were because they were required to test in a specific office which gave them a "negative stigma." In essence, Complainant accused the Agency of treating vaccinated employees more favorably than unvaccinated 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).

As for Complainant's retaliation claim, Complainant speculated that he would be subjected to retaliation for failure to comply with the Agency's COVID-19 policies.

However, there is no indication in the record that he was ever ultimately required to receive the COVID-19 vaccine or received any adverse action for failing to be immunized. Furthermore, Complainant admitted that he never tested for COVID-19. And the Agency submitted evidence which shows that COVID-19 testing is no longer a requirement. Complainant's speculations of future harm fail to make him an aggrieved employee. We agree with the Agency, that he has not alleged a *present* harm related to a term or condition of employment. 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). 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 (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

November 20, 2024
Date