



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

[REDACTED]
Buster D.,¹
Complainant,

v.

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

Appeal No. 2023004035

Agency No. HS-ICE-02599-2022

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated June 6, 2023, dismissing a formal complaint alleging 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 set forth herein, we AFFIRM the Agency's final decision dismissing the formal complaint.

ISSUE PRESENTED

Whether the Agency's final decision properly dismissed Complainant's formal complaint for failure to state a claim.

BACKGROUND

During the period at issue, Complainant worked for the Agency as a Deportation Officer in Fort Myers, Florida.

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.

On August 9, 2022, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination based on religion (Christian).

In its June 6, 2023 final decision, the Agency determined that the formal complaint was comprised of the following claim:

[on various dates], Complainant was required to test for COVID-19 in order to enter the workplace.

The Agency dismissed the formal complaint for failure to state a claim. The Agency reasoned that Complainant was alleging discrimination based on vaccination status. The Agency further set forth that Complainant was not actually required to get vaccinated.

The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant reiterates that he was subjected to religious discrimination due to COVID-19 testing. Specifically, he argues that “the underlying issue of refusing the vaccine was religious.” Complainant asserts that several vaccinated employees, who were not required to test, were infected with COVID. Finally, Complainant argues that while he was not required to get vaccinated, this is due to the government not pursuing the vaccine mandate due to an injunction “but it was their intent.”

In response, the Agency requests that we affirm its final decision dismissing Complainant’s complaint and reiterates its reasoning set forth in its final decision.

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

The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complaint from any aggrieved employee or applicant for employment 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, .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. Dep't of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994).

We concur with the Agency that a fair reading of Complainant's formal complaint is based on vaccination status rather than religion. See Arnoldo E. v. Dep't of Veterans Affairs, EEOC Appeal No. 2022001607 (Dec. 13, 2022) (affirming Agency's dismissal of complainant's claim that he was subjected to discrimination based on religion when he was required to undergo weekly COVID-19 testing along with other unvaccinated employees). Vaccination status is not a basis protected by the statutes enforced by the EEOC. See 29 C.F.R. § 1614.103(a).

In the instant matter, the Agency's policy required Complainant, as an unvaccinated employee, to engage in COVID-19 testing when the COVID-19 community level was medium or high. Complainant does not expressly allege that COVID-19 testing conflicts with a religious belief. Thus, an agency-wide policy mandating COVID-19 testing for unvaccinated employees is insufficient to render Complainant aggrieved. See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws (Updated May 15, 2023) at A.6.(employers may implement COVID-19 testing when it is consistent with guidance from Centers for Disease Control and Prevention, Food and Drug Administration, and/or state/local public health authorities that is current at the time of testing); Reese W. v. Veterans Affairs, EEOC Appeal No. 2022002734 (July 25, 2022) (where the agency granted complainant's accommodation request exempting him, because of his religious belief, from the vaccination requirement, but required weekly testing in lieu of getting vaccinated, complainant was not aggrieved).

CONCLUSION

Accordingly, we AFFIRM the Agency's final decision dismissing the formal complaint, for the reasons discussed above.

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