



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

[REDACTED]
Lynwood R.,¹
Complainant,

v.

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

Appeal No. 2023004287

Agency No. HS-CBP-00163-2022
Agency No. HS-CBP-02690-2022
Agency No. HS-CBP-00845-2023

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision (FAD) dated June 23, 2023, dismissing three complaints 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.

ISSUE PRESENTED

Whether the Agency's final decision properly dismissed Complainant's complaints of employment discrimination.

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

Complainant worked as an Officer at the Agency's Office of Field Operations in Springfield, Georgia.

Complainant filed three formal complaints of unlawful employment discrimination with the Agency alleging that he was subjected to harassment and discrimination on the bases of religion (Congregation of Universal Wisdom) and reprisal (prior protected EEO activity). The complaints were docketed Agency No. HS-CBP-00163-2022, Agency No. HS-CBP-02690-2022, and Agency No. HS-CBP-00845-2023.

In the first complaint, Agency No. HS-CBP-00163-2022, Complainant alleged that the Agency subjected him to harassment and discrimination when,

1. On October 4, 2021, Complainant was advised to get the COVID-19 vaccination or request an accommodation.
2. On October 13, 2021, Complainant received an email entitled "COVID-19 Vaccination Incentives for Federal Employees" which offered monetary compensation for those who got vaccinated.
3. On October 26, 2021, Complainant filled out a form in an automated accommodation request database (ACMS) where he did not agree with the questions asked.

In the second complaint, Agency No. HS-CBP-02690-2022, Complainant alleged that the Agency subjected him harassment and discrimination when,

1. Since June 10, 2022, Complainant has received multiple emails with instructions to be tested for COVID-19 with threats of discipline if not in compliance.
2. Since June 15, 2022, Complainant has not received a response to his religious accommodation request for exemption of the COVID-19 testing.

The third complaint, Agency No. HS-CBP-00845-2023, alleged that the Agency subjected Complainant to harassment and discrimination when, on January 24, 2023, the Agency sent Complainant an interactive dialogue questionnaire regarding his religious beliefs.

On June 23, 2023, the Agency issued a FAD, dismissing all three complaints on the grounds that they failed to state claim under 29 C.F.R. § 1614.107(a)(1). The Agency determined among other things, that Complainant was not an aggrieved employee.

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.

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 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 a disabling condition. 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). EEOC Regulation 29 C.F.R. §1614.107(a)(1) provides for the dismissal of a complaint which fails to state a claim within the meaning of 29 C.F.R. § 1614.103 or §1614.106(a).

In this case, the Agency correctly concluded that Complainant failed to state a claim of discrimination because he failed to articulate that he was an aggrieved employee, as discussed hereafter.

Agency No. HS-CBP-00163-2022

In the first complaint, Agency No. HS-CBP-00163-2022, Complainant alleged that he was aggrieved because he received an Agency-wide email which offered incentives to employees who got vaccinated. Additionally, Complainant stated that he was aggrieved because he did not agree with the questions that the Agency posed to its employees in an Agency-wide database. The record shows that the Agency used emails and a database as platforms to communicate about the COVID-19 vaccine mandate. The Agency-wide communications were addressed to everyone, not just Complainant. His claim amounts to a generalized grievance which is simply too speculative to render him personally aggrieved. (See Shana C. v. Dept of Veterans Affairs EEOC Appeal No. 2022002553 (April 17, 2023) office-wide communications following the vaccine mandate do not constitute an adverse employment action). Furthermore, although Complainant listed religion and retaliation as the bases of his claim, the record shows the Agency-wide communications were addressed to everyone regardless of their religion and EEO activity.

To the extent that Complainant says that he felt pressured to request a religious accommodation or felt pressured to get vaccinated, the Commission has previously found that allegations of feeling pressured to get vaccinated, and an agency's encouragement of vaccination by its employees did not state a claim because the complainant has not alleged that they were actually required to be vaccinated or was subjected to any disciplinary or other adverse employment action because he chose not to be vaccinated. See Ryan L. v. Dep't of Def., EEOC Appeal No. 2021004679 (July 26, 2022); See also 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 ("EEOC COVID-19 Guidance").

Agency No. HS-CBP-02690-2022

In the second complaint, Agency No. HS-CBP-02690-2022, Complainant alleged that he was aggrieved because he received instructions to test for COVID-19. Contrary to Complainant's contentions, an agency-wide policy mandating COVID-19 testing for unvaccinated employees is insufficient to render a complainant "aggrieved". See Colby S. v. Veterans Affairs, EEOC Appeal No. 2022000976 (April 18, 2022) (noting that the policy did not cause the complainant to be treated differently from other employees or result in a personal harm to the complainant). 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. Therefore, we find that he has failed to state a claim on the issue of COVID-19 testing.

Complainant also alleged that he was aggrieved because the Agency did not respond to his religious exemption request in a timely manner. The record shows that Complainant applied for a religious exemption to the Agency’s COVID-19 vaccination requirement, which had been implemented pursuant to Executive Order 14043. The Agency delayed processing Complainant’s request due to a preliminary nationwide injunction, which required federal Agencies to take no action to implement or enforce Executive Order 14043. On May 9, 2023, Executive Order 14043 was revoked. Therefore, it was no longer necessary for Complainant to seek a religious accommodation. Renaldo v., Department of Defense, EEOC Appeal No. 2023001971 (Sept. 23, 2024). Complainant’s claim is now moot. Since he has not alleged that he received the vaccine, and nothing in the record shows that he was impacted during the months that his request was being processed, we find that he has not shown any harm and that his allegation fails to state a claim.

Agency No. HS-CBP-00845-2023

In the third complaint, Agency No. HS-CBP-00845-2023, Complainant alleged that on January 24, 2023, he was aggrieved because the Agency sent him an interactive dialogue questionnaire (IDP) regarding his religious beliefs. We reviewed the questionnaire. The questionnaire is entitled, “Religious Accommodation IDP COVID-19 Testing Exemption” and it asked Complainant to explain how his religious beliefs conflicted with COVID-19 testing and his work duties. We find that the Agency was only requiring Complainant to fill out the questionnaire so that it could gain an understanding of his sincerely held religious beliefs and process his accommodation request. The Agency’s action was permissible and was not an adverse action.

Lastly, although Complainant listed religion and retaliation as protected bases in all three complaints, we find that his allegations involved disparate treatment based on his vaccination status.

The actions that Complainant complained about were his receipt of Agency-wide communications regarding COVID-19 safety concerns, testing policies, and the processing of his religious accommodation request. Vaccination status is not a basis protected by the statutes enforced by the EEOC. See 29 C.F.R. § 1614.103(a). Therefore, he has failed to state a claim of discrimination.

Harassment

We note that Complainant also alleged that he was subjected to harassment. The Commission has held that, a hostile work environment exists when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the condition of the victim's employment. See Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993). Here, the actions that Complainant complains of are his receipt of Agency-wide emails regarding COVID-19 safety concerns, testing policies, and the processing of his religious accommodation request. The actions of which Complainant complains simply do not rise to the level of an actionable claim. Therefore, he has failed to state a claim of harassment.

CONCLUSION

Based on a thorough review of the record we AFFIRM the Agency's final decision.

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)

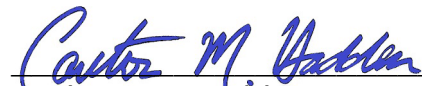
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision.

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

December 9, 2024

Date