



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Myesha F.,¹
Complainant,

v.

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

Appeal No. 2023004453

Agency No. HS-CBP-03077-2022

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated July 10, 2023, dismissing her 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 Mission Support Specialist at the Agency's National Air Training Center in Oklahoma City, Oklahoma.

On October 5, 2022, Complainant filed a formal complaint which the Agency framed as alleging that the Agency subjected her to harassment and discrimination on the bases of religion (Christian) and disability (as related to vaccination status) when:

1. On December 17, 2021, Complainant received an email, asking her to complete interactive dialogue (ID) questions related to her COVID-19 vaccination exemption request during the timeframe she was on leave.
2. On August 5, 2022, Complainant was notified she would be required to schedule a COVID-19 test.

The Agency dismissed the complaint pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state claim. The Agency determined among other things, that Complainant was not an aggrieved employee.

The instant appeal followed.

CONTENTIONS ON APPEAL

On August 29, 2023, Complainant requested an extension to submit her appeal statement, due to her attorney's current caseload. The Commission granted her extension to September 19, 2023. Her appeal statement was filed on September 18, 2023, and has been considered in this decision. On appeal, Complainant clarifies that claim 1 was background information related to claim 2. Regarding claim 2, Complainant asserts that because she was being directed to test because of her vaccination status, this action constituted harassment based on her religious beliefs. She also states that her religious exemption had yet to be approved or denied.

The Agency opposes her appeal, arguing that she failed to state a viable claim of harassment because she was never required to take a COVID-19 test.

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 the formal complaint failed to state a claim because Complainant failed to articulate that she was an aggrieved employee, as discussed hereafter.

Complainant's allegations concern emails asking questions regarding her COVID-19 vaccination exemption request and being notified that she would be required to schedule a COVID-19 test. Complainant does not allege that she was actually required to take a COVID-19 test. However, even if she had taken a COVID-19 test, her claim would still be insufficient to render her aggrieved because the Agency's COVID-19 testing program was job-related and a business necessity. See Violet F. v. Department of the Treasury, EEOC Appeal No. 2022004441 (Jan. 31, 2023). 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.

Furthermore, although Complainant listed religion and disability as protected bases, we find that her complaint was based on her vaccination status. In her formal complaint, she stated that she had a perceived disability based on her vaccination status. She stated that she was unvaccinated, and she was treated differently to vaccinated employees because she was constantly questioned and instructed to schedule COVID-19 tests, when vaccinated employees were not. Vaccination status is not a basis protected by the statutes enforced by the EEOC. See 29 C.F.R. § 1614.103(a). Therefore, she has failed to state a claim of disparate treatment.

We note that Complainant also alleged that she 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 of which Complainant complains of simply do not rise to the level of an actionable claim. Therefore, she has failed to state a claim of harassment.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, 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 10, 2024
Date