



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

[REDACTED]
Clayton C,¹
Complainant,

v.

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

Appeal No. 2023004506

Agency No. HS-ICE-02997-2022

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated July 27, 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. and Title II of the Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff et seq. Upon review, the Commission finds that Complainant's complaint was properly dismissed pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim.

ISSUES PRESENTED

Whether the Agency's final decision properly dismissed Complainant's formal complaint for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1).

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 relevant time, Complainant worked as a Enforcement Removal Assistant, Grade GS-8, at the Agency's Enforcement Removal Operations unit in Grand Rapids, Michigan.

On October 27, 2022, Complainant filed a formal complaint alleging that the Agency subjected him to harassment discrimination based on genetic information and in reprisal (for requesting exemption from the COVID-19 testing) when:

1. On July 27, 2022, the Supervisory Detention and Deportation Officer (SDDO) called Complainant several times at the instruction of the Assistant Field Office Director (AFOD) informing Complainant of an unscheduled teleconference and texted him cautioning him that if he did not respond he would be placed on absent without leave;
2. On July 27, 2022, and August 5, 2022, the AFOD placed Complainant on administrative leave due to his opting-out of and non-compliance with the ICE COVID-19 testing protocol;
3. On August 2, 2022, Complainant received an email reminder of the ICE COVID-19 testing protocol for unvaccinated employees; and
4. On August 5, 2022, the SDDO, following instructions from the AFOD gave Complainant a verbal warning for not being present at the office during his scheduled duty hours.

On July 27, 2023, the Agency issued a final decision dismissing the complaint for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1).

CONTENTIONS ON APPEAL

On appeal, Complainant argues that his placement on paid administrative leave was punitive and an employment hardship. Complainant contends that management's action in doing so violated Agency policy on administrative leave. Complainant maintains that he should have instead been provided portable work that he could have accomplished his duties while teleworking.

Complainant further states that being placed on administrative leave caused him stress in having to catch-up on work that he could not perform during administrative leave.

The Agency responded that his allegations were comprised of the issuance of two legitimate verbal attendance counselings; and merely the receipt of a COVID-19 testing email. As to the placement administrative leave the Agency asserted that its personnel action was non-disciplinary and did not cause Complainant employment harm.

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

As an initial matter, we note that Complainant has alleged that the Agency's COVID-19 testing protocol for unvaccinated employees violated the Genetic Information Nondiscrimination Act (GINA). The GINA statute protects genetic information that consists of information about (i) an individual's genetic tests; (ii) genetic tests of that individual's family members and (iii), the manifestation of a disease or disorder in family members of such individual (family medical history). 29 C.F.R. § 1635.3 (c). The Agency's COVID-19 testing protocol did not involve information about Complainant's genetic tests or genetic testing of his family members. Moreover, Complainant has not alleged discrimination related his family medical history. Therefore, Complainant has failed to state a viable claim that the Agency violated GINA. See Buck S. v. U.S. Postal Serv., EEOC Appeal No. 2022003265 (June 30, 2022).

In accordance with 29 C.F.R. §1614.103, to establish standing, a complainant must be either an employee or an applicant for employment of the agency against which that complainant alleges discrimination.

The claim must concern a policy or practice which affects a complainant as an employee or applicant. An agency shall accept a complaint from any aggrieved employee or applicant who believes that he has been discriminated against because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. §1614.106(a). EEOC Regulation 29 C.F.R. §1614.107(a)(1) provides for dismissal of a complaint which fails to state a claim within 29 C.F.R. §§ 1614.103 and 1614.106(a). Our case precedent defines an "aggrieved employee" as one who suffers a harm with respect to a term, condition, or privilege of employment for which there is a remedy under EEOC regulations. Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994).

Harassment: Claims 1, 3, 4

In Claims 1, 3 and 4, Complainant contends that he has been subjected to retaliatory harassment discrimination based on his refusal to submit to COVID-19 testing. EEO laws are not a civility code. Rather, they forbid "only behavior so objectively offensive as to alter the conditions of the victim's employment." Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998). Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance.

In Claims 1 and 4, Complainant received communications from the SDDO and AFOD, advising him to respond to a message about a meeting and reminding him to be present during his scheduled duty hours. We note that these were not formal counselings, and there were neither severe nor pervasive. Rather, these incidents were normal workplace interactions and discussions that occur between subordinates and supervisors in discharging their supervisory responsibilities. In sum, with respect to Claims 1 and 4, we agree with the Agency in that those incidents did not rise to the level of a discriminatorily hostile workplace.

Claim 3 arose out of Complainant's receipt of an email reminder about the Agency's COVID-19 testing protocol for unvaccinated employees. We have previously held that communications about policies requiring weekly COVID-19 testing for unvaccinated employees are insufficient to render a complainant "aggrieved." See Colby S. v. Veterans Affairs, EEOC Appeal No. 2022000976 (Apr. 18, 2022) (a policy requiring unvaccinated employees to test for COVID-19 did not cause the complainant to be treated differently from other employees or result in a personal harm to the complainant).

See Cassie S. v. Veterans Affairs, EEOC Appeal No. 2022002450 (Jul. 25, 2022) (rejecting complainant's claim that she was required to undergo weekly COVID-19 testing, unlike vaccinated employees, because it was based on her vaccination status). COVID-19 vaccination status and refusal to undergo COVID-19 testing are not bases protected by the statutes enforced by the EEOC. See 29 C.F.R. § 1614.103(a).

Therefore we do not find that the incidents as described in Claim 1, Claim 3 or Claim 4, were sufficiently severe or pervasive to set forth an actionable claim of harassment.

Administrative Leave: Claim 2

We agree with the Agency that the claim regarding being placed on administrative leave over two separate weeks failed to state a claim. Agencies may not restrict an employee's presence and duties based on EEO-protected characteristics. However, they may do so based on an employee's remaining unvaccinated against COVID-19 which is not an EEO protected class. See 29 C.F.R. § 1614.103(a); Mario L. v Dep't of the Army, EEOC Appeal No. 2022003213 (Sept. 19, 2022) (permitting an agency to deny the complainant temporary travel duty for lacking the COVID-19 vaccine). Where an employee refuses to submit to COVID-19 testing, it is permissible for an agency to restrict such an employee from entering the workplace. See Violet F. v. Dep't of the Treasury, EEOC Appeal No. 2022004441 (Jan. 31, 2023) (affirmed dismissal for failure to state a claim where complainant refused COVID-19 testing and was temporarily barred from entering the workplace). See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws (Updated May 15, 2023) at Question A.6. (as a mandatory screening measure, employers may administer a COVID-19 test when evaluating an employee's initial or continued presence in the workplace). In other words, a requirement for COVID-19 testing does not state a claim if consistent with guidance from Centers for Disease Control and Prevention (CDC), Food and Drug Administration (FDA), and/or state/local public health authorities that is current at the time of testing. Therefore, the Agency properly dismissed Claim 2 for failure to state a claim.

CONCLUSION

Accordingly, the Agency's final decision dismissing Complainant's complaint is AFFIRMED 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