



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

[REDACTED]  
Helen E.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2023004817

Agency No. HS-CBP-01625-2022

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated July 27, 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., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, we AFFIRM the Agency's decision to dismiss the complaint.

ISSUE PRESENTED

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

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Border Patrol Agent, GS-12, at the Agency's Houlton Sector Headquarters in Houlton, Maine.

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<sup>1</sup> 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 May 11, 2022, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination based on religion (Christian) and disability (perceived physical disability) when:<sup>2</sup>

1. On February 15, 2022, Complainant received emails that she would be required to undergo weekly COVID-19 testing because she was unvaccinated.
2. On March 30, 2022, Complainant received the COVID-19 testing kit.

In its July 27, 2023, final decision, the Agency dismissed Complainant's complaint pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim, as the Agency found that Complainant was not an aggrieved employee because her vaccination status was not covered by the statutes enforced by the Commission. The instant appeal followed.

### CONTENTIONS ON APPEAL

On appeal, Complainant submits no statement or brief in support.

The Agency opposes the appeal and argues that it properly dismissed Complainant's complaint for failure to state a claim, as Complainant failed to allege discrimination on a protected basis or establish that she was aggrieved within the meaning of EEO laws.

### 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. The Commission should construe the complaint in the light most favorable to the complainant and take the complaint's allegations as true. Thus, all reasonable inferences that may be drawn from the complaint's allegations must be made in favor of the complainant.

### ANALYSIS

EEOC Regulations 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 they have been discriminated against by an Agency because of race, color, religion, sex, national origin, age, disabling condition, genetic information, or reprisal. 29 C.F.R. §§ 1614.103, .106(a).

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<sup>2</sup> In her formal complaint, Complainant also alleged discrimination based on genetic information and reprisal. However, the Agency did not address these bases in its final decision. As Complainant has not specifically challenged the Agency's framing of the complaint, as reflected herein, we need not address whether Complainant's allegations were properly framed. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chap. 9, § IV.A.3 (Aug. 5, 2015).

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).

Here, Complainant alleged that she was adversely impacted by the weekly testing requirement because of her sincerely held religious belief against receiving the COVID-19 vaccine. Complainant also asserted that she was subjected to discrimination based on disability because the Agency perceived her as having a disability due to the likelihood of contracting a communicable disease, and in so doing, perceived her as a direct threat without any evidence. She emphasized that her vaccinated colleagues were not subjected to the same testing requirement, while she was forced to undergo either testing or vaccination to be free from discrimination and humiliation.<sup>3</sup>

While we are mindful of Complainant's allegations, we note that Complainant's vaccination status is not a protected basis under the statutes enforced by the Commission. See 29 C.F.R. § 1614.103(a). Indeed, the Commission has repeatedly held that complaints alleging disparate treatment based on vaccination status simply do not state a claim, as different procedures for vaccinated and unvaccinated employees are not examples of discrimination based on a protected class, but instead are distinctions based on vaccination status. See Arnoldo E. v. Dep't of Vet. Affs., EEOC Appeal No. 2022001607 (Dec. 13, 2022), citing Casie S. v. Dep't of Vet. Affs., EEOC Appeal No. 2022002450 (Jul. 25, 2022) (an agency-wide policy mandating weekly COVID-19 testing for unvaccinated employees is insufficient to render a complainant "aggrieved"); 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 (EEOC COVID-19 Guidance) at Question A.6 (Updated on July 12, 2022) (does not state a claim when COVID-19 testing is 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). Based on foregoing, we find that the Agency correctly analyzed the facts and law of this case to dismiss Complainant's complaint in accordance with 29 C.F.R. § 1614.107(a)(1).

### CONCLUSION

Accordingly, 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:

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<sup>3</sup> Notably, Complainant does not allege that she was required to be vaccinated, but only challenges the Agency's requirement that she undergo regular testing for COVID-19 in lieu of vaccination.

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

July 22, 2024  
Date