



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

[REDACTED]
Jade R,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Federal Emergency Management Agency),
Agency.

Appeal No. 2023004830

Agency No. HS-FEMA-00793-2022

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated August 7, 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 Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. Upon review, the Commission determines that the instant formal 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 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 for the Agency's Federal Emergency Management Agency (FEMA) as a Mitigation & Communications Specialist, GS-13, in Washington, D.C.

On June 9, 2023, Complainant filed a formal complaint alleging that the Agency subjected her to a hostile work environment and discrimination based on religion (Not Specified), disability (perceived), and in reprisal for prior protected EEO activity when:

1. On an unspecified date ("in late 2021"), she applied for a reasonable accommodation, based on religion, to be exempt from the COVID-19 vaccine mandate, but she has not received approval or denial;
2. Effective March 1, 2022, FEMA mandated that unvaccinated employees such as herself take a PCR test for COVID-19, which was not approved by the Centers for Disease Control (CDC); and,
3. On April 1, 2022, she was able to go into the office without taking a PCR test only because the community threat level was deemed to be "low" in Washington, DC, but she was treated as though she were "diseased."

On August 7, 2023, the Agency issued the instant final decision. The Agency found her claims must be dismissed for failure to state a claim pursuant to 29 C.F.R. §1614.107(a)(1). The Agency noted there is no indication in the record that Complainant was ever ultimately required to receive the COVID-19 vaccine, received the COVID-19 vaccine because of a denial of an accommodation/exemption request, was required to submit to COVID-19 screening testing, or was disciplined or received any other adverse action for failing to be immunized or tested. The Agency also found Complainant was alleging discrimination based on vaccination status, and that vaccination status is not a protected basis under the statutes enforced by the EEOC. Specifically, the Agency found that raising health and safety concerns does not amount to protected activity under the anti-discrimination statutes. The Agency noted an agency-wide policy requiring testing of unvaccinated employees, as well as restricting travel for unvaccinated employees, is insufficient to render a complainant "aggrieved."

Complainant filed the instant appeal.

CONTENTIONS ON APPEAL

On appeal, Complainant argues the subject claims are not based on her vaccination status. Complainant requests the Commission remand her complaint for investigation.²

In opposition to Complainant's appeal, the Agency reiterates its grounds for dismissal and requests the Commission affirm the dismissal based on prior caselaw on similar facts. Specifically, the Agency argues that Commission precedent provides that claims alleging different procedures for unvaccinated and vaccinated employees are not examples of religious or disability-based discrimination. The Agency argues, instead, that these are distinctions based on vaccination status, which is not a protected class. The Agency notes nothing in the record or Complainant's appeal brief shows that the Agency ultimately required Complainant to receive the COVID-19 vaccine or get tested for COVID-19 before entering the workplace.

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

² On appeal for the first time, Complainant submitted a document regarding her awareness of pending COVID-19 class complaints. Complainant stated:

Please note I am aware of and in agreement with some of the most salient points of a putative class agent named Ken Duffy Jr. (EEOC No. 540-2022-00074X; Agency No. HS-CBP-00709-2022). I would like to be considered for inclusion as a class member for that case after/if it is certified, and he becomes a class agent, please.

We noted Complainant's request is conditional on class certification. A review of EEOC Hearing documents in EEOC No. 540-2022-00074X reveals no determination on class certification has been made. Additionally, Complainant has not submitted any documentation in that matter, or alleged she has requested the Agency add her to that pending matter. We find Complainant's request to be speculative and conditional, to either hold her appeal in abeyance or remand to the Agency.

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

To establish standing, in accordance with 29 C.F.R. §1614.103, 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).

Here, nothing in the record supports a claim that Complainant was "aggrieved." Complainant fails to show any harm she suffered with regard to a term or condition of her employment due to the Agency's policies. There is no indication in the record that she was ever ultimately required to receive the COVID-19 vaccine, or that she was disciplined or received any other adverse action for failing to be immunized. See Violet F. v. Dep't of the Treasury, EEOC 2022004441 (Jan. 31, 2023) (affirmed dismissal for failure to state a claim in which she alleged that she refused COVID testing and was threatened with discipline but did not allege that she was actually disciplined).³ Complainant does not allege that she was disciplined or penalized by management. Thus, there is no indication that Complainant suffered a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy.

³ According to the Safer Federal Work Force Task Force FAQ on screening testing (<https://www.saferfederalworkforce.gov/faq/testing/>), an agency may pursue disciplinary action up to and including removal if the employee's request for an accommodation to a testing requirement is denied, and the employee does not comply with the testing requirement.

Complainant's allegations regarding being required to test 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).

We likewise reject Complainant's argument that she was subjected to unlawful disparate treatment based on her COVID-19 vaccination status. It is permissible for agencies to require unvaccinated employees to test for COVID-19 or require them to wear a mask. See Reese W. v. Veterans Affairs, EEOC Appeal No. 2022002734 (Jul. 25, 2022) (where the agency required weekly COVID-19 testing in lieu of getting vaccinated, the complainant was not aggrieved). See Ambrose M. v. Dep't of the Navy, EEOC Appeal No. 2022004632 (Dec. 13, 2022) (where complainant alleged that the agency's policy that unvaccinated employees wear a mask "segregates unvaccinated and vaccinated personnel" failed to state a claim.) This is because while agencies may not restrict an employees based on religion or disability, remaining unvaccinated against COVID-19 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).

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). 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 Complainant's claims for failure to state a claim.

To the extent Complainant alleges that she was not permitted to go into the office due to her unvaccinated status, again, Complainant has not articulated a harm that can be remedied under the EEO laws.

The Commission has consistently held that one's vaccination status is not a characteristic that is protected under the statutes enforced by the EEOC. Ryan L. v. Dep't of Def., EEOC Appeal No. 2022002450 (July 25, 2022); Valery G. v. Dep't of Def., EEOC Appeal No. 2022002547 (Aug. 16, 2022). Moreover, she has not alleged any specific employment-related harm resulted from these travel restrictions. See Nobuko M. v. Dep't of Agriculture, EEOC Appeal No. 2023000865 (Mar. 13, 2023)(where Complainant failed to articulate a harm to be remedied under EEO laws when she alleged she was not allowed to travel to certain locations due to her unvaccinated status).

To the extent Complainant attempted to state a claim of reprisal for raising safety concerns regarding the Agency's COVID-19 testing or vaccine policy. Raising health and safety concerns does not amount to protected activity under the anti-discrimination statutes. See Wilburn R. v. Dep't of Commerce (Bureau of the Census), EEOC Appeal No. 2021003505 (Sept. 27, 2021)(affirming agency's dismissal of complaint of reprisal based on complainant's raising of health and safety concerns about the COVID-19 vaccine). Accordingly, because Complainant's raising of safety concerns is not protected EEO activity, her claim of reprisal must be dismissed for failure to state a claim pursuant to 29 C.F.R. §1614.107(a)(1).

Finally, Complainant asserts in Claim 1, and as reprisal for filing an accommodation request, that she was discriminated against based on religion/disability when her accommodation request to be exempt from the COVID-19 vaccine was delayed. As Complainant and the Agency both address this matter on appeal, we will address the matter herein. On appeal, Complainant maintains that the Agency has indefinitely delayed processing her religious and/or disability accommodation request for an exemption from the COVID-19 vaccine. A federal district court's preliminary nationwide injunction requires the federal government take no action to implement or enforce Executive Order 14043 which had mandated COVID-19 vaccination of federal employees. Because of this preliminary nationwide injunction, federal agencies are prohibited from processing requests they have already been received for disability or religious exceptions to the COVID-19 vaccination requirement and cannot take any steps related to adjudicating exception requests. The Agency's non-processing of Complainant's religious accommodation request is consistent with the federal district court's preliminary nationwide injunction to take no action to implement or enforce Executive Order 14043. Accordingly, we agree that this claim was properly dismissed for failure to state a claim. See Shana C. v. Dep't of Veterans Affairs, Appeal No. 2022002553 (Apr. 17, 2023).

CONCLUSION

The Agency's final decision dismissing Complainant's complaint is AFFIRMED for the reasons discussed herein

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

January 8, 2025

Date