



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

████████████████████
Will K,¹
Complainant,

v.

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

Appeal No. 2023004872

Agency No. HS-ICE-02851-2022

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated July 26, 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. 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 period at issue, Complainant worked as a Deportation Officer, Grade GS-12, at the Agency's Enforcement and Removal Operations in Phoenix, Arizona.

On September 16, 2022, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination based on religion (non-denomination, otherwise unspecified) and disability (perceived) when:

1. On November 8, 2021, Complainant submitted a request for religious accommodation and has not received a response;
2. On June 22, 2022, Complainant was notified that he had to submit to weekly COVID-19 testing because he was unvaccinated; and
3. On unspecified dates, Complainant was barred from being physically present in the office and was placed in telework status because he was unvaccinated.

On July 26, 2023, the Agency issued a final decision. The Agency dismissed the formal complaint for failure to state a claim, in accordance with 29 C.F.R. 1614.107(a)(1).

CONTENTIONS ON APPEAL

Complainant did not submit a brief containing arguments in support of his appeal.

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. Dep't of the Treasury, EEOC Request No. 05970077 (Mar. 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).

Regarding Claim 1, Complainant maintains that the Agency has indefinitely delayed processing his religious 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, Claim 1 was properly dismissed for failure to state a claim. See Shana C. v. Dep't of Veterans Affairs, Appeal No. 2022002553 (Apr. 17, 2023).

Claim 2 was also properly dismissed. As the Commission has previously held, 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).

We concur with the Agency in finding that Claim 3, failed to state a claim. Agencies may not restrict an employee's presence and duties based on religion or disability. However, 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) (permitting an agency to deny the complainant temporary travel duty for lacking the COVID-19 vaccine).

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

CONCLUSION

The final Agency final decision dismissing the formal EEO 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 14, 2024
Date