



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

[REDACTED]
Ronnie R,¹
Complainant,

v.

Merrick B. Garland,
Attorney General,
Department of Justice
(Federal Bureau of Investigation),
Agency.

Appeal No. 2023004878

Hearing No. 440-2023-00005X

Agency No. FBI-2022-00358

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated July 31, 2023, dismissing his 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 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.

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.

ISSUE 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).

BACKGROUND

During the period at issue, Complainant worked as a Intelligence Analyst, Grade GS-13, at the Agency's Field Office facility in Chicago, Illinois.

On September 13, 2022, Complainant filed a formal class complaint alleging that the Agency subjected him and other Agency employees to discrimination on the bases of religion (Christian) and disability (mental and physical) and genetic information when:

- 1) Since November 8, 2021, the FBI failed to respond to requests for religious accommodations exempting employees from the COVID-19 vaccine requirement;
- 2) Beginning on November 22, 2021, FBI management officials ordered employees to receive a COVID-19 vaccine and required unvaccinated employees to provide proof of a negative COVID-19 test result;
- 3) Between November 30, 2021, and March 2, 2022, FBI management denied unvaccinated employees the opportunity to telework and forced them to use annual or sick leave or coded them as absent without leave (AWOL); and
- 4) Between May 9 and August 22, 2022, management coded unvaccinated employees as AWOL, forced them to use annual and sick leave, denied telework opportunities, and threatened further discipline, including termination, if they failed to submit a weekly COVID-19 test.

On February 1, 2023, an EEOC Administrative Judge (AJ) assigned to the case issued an order dismissing Complainant's class complaint and ordered the Agency to process Complainant's complaint as an individual one. On July 31, 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 submitted documents that included an amended class complaint filed on July 11, 2023. Therein, through Counsel, Complainant explained that the Agency had charged him as AWOL over approximately seven months for failure to test for COVID-19 after declining the vaccine.

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

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).

As an initial matter, we reject Complainant's allegation that the Agency's COVID-19 somehow 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). Nothing in the record indicates that the Agency's COVID-19 mitigation measures involved acquiring 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, the Agency properly dismissed genetic discrimination as a basis for Complainant's claims. See Melvin S. v. Dep't of Homeland Sec., EEOC Appeal No. 2023003270 (Nov. 19, 2024)(allegations regarding COVID-19 vaccination or COVID-19 testing fail to state a viable claim that an agency violated GINA).

Claim 1

Complainant's first claim alleged that he was discriminated against based on religion because the Agency did not respond to his accommodation request to be exempt from the COVID-19 vaccine. We note that, from January 21, 2022, onward, the U.S. District Court for Southern District of Texas has enjoined the federal government from taking action to implement or enforce Executive Order 14043, which had mandated COVID-19 vaccination of federal employees. Because of this nationwide injunction, federal agencies are prohibited from processing requests they have already been received for religious exceptions to the COVID-19 vaccination requirement and cannot take any steps related to adjudicating exception requests. We find that Agency's non-processing of Complainant's religious accommodation request for exemption from the COVID-19 vaccine requirement is consistent with the federal district court's nationwide injunction to take no action to implement or enforce Executive Order 14043. See Shana C. v. Dep't of Veterans Affairs, Appeal No. 2022002553 (Apr. 17, 2023)(according to Safer Federal Workforce Task Force guidance, so long as the nationwide injunction prevents the implementation or enforcement of Executive Order 14043 an exception therefore is not necessary).

Claims 2-4

Here, Complainant refused, not only to receive the COVID-19 vaccine, but he also refused to test for COVID-19 for prolonged periods. EEOC has held that it is permissible for agencies to require unvaccinated employees to test for COVID-19. 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).

This Commission has also held that 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. 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.6.²

We further reject Complainant's claims concerning denied telework opportunities. 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) (permitting an agency to deny the complainant temporary travel duty for lacking the COVID-19 vaccine).

CONCLUSION

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

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.**

² When evaluating an employee's initial or continued presence in the workplace an employer, may administer a COVID-19 viral test to detect the presence of the COVID-19 virus.

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 22, 2025
Date