



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Ty S.,¹
Complainant,

v.

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

Appeal No. 2023004944

Agency No. HS-CBP-02191-2022

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated August 8, 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. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. Upon review, the Commission finds that Complainant's complaint was properly dismissed pursuant to 29 C.F.R. § 1614.107(a).

ISSUES PRESENTED

Whether the Agency properly dismissed Complainant's complaint 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

At the time of events giving rise to this complaint, Complainant worked as a Customs Border Patrol Agent at an Agency field office in Detroit, Michigan. On July 19, 2022, Complainant filed a formal equal employment opportunity (EEO) complaint alleging that the Agency subjected him to discrimination on the bases of religion (Christian/Catholic), disability (perceived), and reprisal for prior protected EEO activity (request for religious accommodation) when:

1. from August 23, 2021 to March 17, 2022, Complainant was unable to apply for any training opportunities or temporary duty assignments because he is not vaccinated;
2. on May 16, 2022, Complainant received an email that he would have to submit to weekly COVID tests because he is not vaccinated;
3. on an unspecified date, the Agency released Complainant's private information to a third party, CoVerified²; and
4. on multiple days, Complainant received Agency-wide emails regarding COVID-19 vaccine and testing.

The Agency issued a final decision (FAD) dismissing Complainant's complaint pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim. Specifically, the FAD stated that claims (1) and (2) allege that the Agency treated Complainant disparately based on his vaccination status, which is not a protected class under EEO laws. For claim (3), the FAD stated that Complainant's vaccination status was shared with employees who needed the information to perform their job duties, ensuring COVID-19 compliance. The Agency cited What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (COVID-19 Guidance), Question K.4. Lastly, regarding claim (4), the FAD stated that Complainant's allegation does not rise to the level of a hostile environment. The instant appeal from Complainant followed.

CONTENTIONS ON APPEAL

On appeal, Complainant stated that the Agency's policies discriminated against him based on his religious beliefs rather than his vaccination status; the information he submitted to the Agency to justify his non-vaccination status is very personal and private and should not have been kept on a

² According to the record, CoVerified is a "platform built to manage COVID-19 compliance and prevent outbreaks."

database created solely to track vaccination status; and the constant emails about COVID vaccination and testing attempted to make Complainant violate his religious beliefs.

The Agency opposed Complainant's appeal, reiterating prior contentions from its FAD. Summarily, the Agency stated Complainant failed to allege actions that would render him aggrieved or rise to the level of a hostile work environment, or allege that he was treated differently based on a protected basis.

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

The Agency shall accept an EEO complaint from any aggrieved employee or applicant for employment who believes that they have been discriminated against by that Agency because of race, color, religion, sex, national origin, age or disabling condition or in reprisal for EEO-protected activity. 29 C.F.R. §§ 1614.103, 1614.106(a). This 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 (April 21, 1994).

The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides that the Agency shall dismiss a complaint that fails to state a claim. In this case, the Agency correctly concluded that the formal complaint failed to state a claim. In claims (1), (2), and (4), Complainant alleged, because he was "unvaccinated," he was unable to apply for training opportunities and temporary duty assignments, had to submit to weekly COVID-19 tests, and received Agency-wide emails about the COVID vaccine and testing, without

regard for the reason he did not receive the vaccine. We conclude Complainant is alleging discrimination based on vaccination status rather than his religion or other EEOC-protected basis. Casie v. Dep't of Veterans Affairs, EEOC Appeal No. 2022002450 (July 25, 2022). Complainant did not allege that he was required to get vaccinated, which he states violates his religious beliefs, or received disciplinary action. See id. The Commission has previously held that different procedures for vaccinated and unvaccinated employees are not examples of discrimination based on religion or disability, but instead are distinctions based on vaccinated status, which is not a protected class. Billy L. v. Dep't of Veterans Affairs, EEOC Appeal No. 2022002820 (August 25, 2022).

Regarding claim (3), documentation or other confirmation of vaccination status provided by the employee to the employer is medical information about the employee and must be kept confidential, with permitted release in limited circumstances. COVID-19 Guidance at B, and K.4. We find that while Complainant surmised his attestation might be improperly disclosed in violation of the Rehabilitation Act, this was speculative. The Agency shared the information with a third-party vendor that provided a health compliance program for COVID-19 at the Agency, CoVerified. For this reason, we affirm the Agency's dismissal of issue 3. Further, we find that the incidents alleged do not state a viable claim of harassment.

CONCLUSION

Accordingly, we AFFIRM the Agency's final decision dismissing Complainant's complaint.

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 21, 2024

Date