



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

[REDACTED]
Robin H,¹
Complainant,

v.

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

Appeal No. 2023005112

Agency No. HS-ICE-00321-2022

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated September 6, 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)(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 relevant time, Complainant worked for the Agency as a Deportation Officer, GS-12, in Tucson, Arizona.

On February 18, 2022, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination based on religion (not specified) and disability (perceived mental disability) when:

1. Beginning around September 9, 2021, and continuing on numerous occasions, Complainant received emails regarding COVID-19 and felt intimidated and coerced to receive a COVID-19 vaccination.
2. Since September 23, 2021, Complainant has yet to receive a response to his religious and disability accommodation requests for exemption from the COVID-19 vaccine mandate.²
3. On an unspecified date, Complainant was required to disclose his vaccination status in the Vaccine Status System (VSS).

On September 6, 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).

Complainant filed the instant appeal.

CONTENTIONS ON APPEAL

On appeal, Complainant argues his protected status is not his vaccinated status but rather his religious beliefs. Regarding Claims 1 and 3, Complainant argues the VSS is not a confidential database. With regard to Claim 2, Complainant reiterates his allegations in formal complaint and before EEO Counselor arguing the delay in processing his accommodation constitutes discrimination.

In opposition to the appeal, the Agency maintains it properly found that workplace safety bulletins and emails informing employees about the Agency's response to COVID-19, including mitigation procedures and

² A review of the record indicates Complainant only alleged the basis of disability with regard to Claim 2.

maintaining vaccination status in a confidential database, do not constitute offensive conduct (Claims 1 and 3). With regard to his accommodation request (Claim 2), the Agency argues it properly dismissed the claim based on the instructions of the Safer Federal Workforce Task Force and a Federal Court's preliminary injunction to implement or enforce Executive Order 14043.

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).

Regarding Claim 1, nothing in the record supporting a claim that Complainant was adversely affected by the Agency-wide emails. There is no indication in the record that he was ever ultimately required to receive the COVID-19 vaccine, 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 he was disciplined or penalized by management.⁴ 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.

Regarding Claim 2, Complainant maintains that the Agency has indefinitely delayed processing his 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 Claim 2 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 3 was also properly dismissed. There is no indication that Complainant alleged a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy for disclosing his vaccination

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.

⁴ On appeal, Complainant attempts to raise a new claim, alleging he was issued a Letter of Reprimand. However, Complainant did not include this new claim prior to addressing it on appeal, so it will not be adjudicated in this decision. If Complainant wishes to pursue this new claim in an EEO complaint, he must contact an EEO Counselor pursuant to 29 C.F.R. § 1614.105. See Hall v. U.S. Postal Serv., EEOC Appeal No. 0120031342 (Apr. 24, 2003).

status within the internal database. 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). To the extent Complainant is alleging he was required to submit to testing, 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).

Moreover, to the extent that Complainant claims that he was the victim of harassment, we do not find that these isolated incidents are sufficiently severe or pervasive to set forth an actionable claim of harassment. Here, Complainant's allegations arise out of his receipt of Agency-wide emails regarding COVID-19 safety concerns, awareness, and testing policies. Management did not take action against him. We have held that claims of an isolated incident of alleged harassment usually are not sufficient to state a harassment claim. See Phillips v. Dep't of Veterans Affairs, EEOC Request No. 05960030 (July 12, 1996); Banks v. Health and Human Services, EEOC Request No. 05940481 (Feb. 16, 1995). The alleged incidents are of a type that typically arise out of workplace conflicts or communications. However, EEO laws are not a civility code. Rather, they forbid "only behavior so objectively offensive as to alter the conditions of the victim's employment." Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998). We agree with the Agency that workplace safety bulletins and emails that inform employees about steps the Agency is taking to keep employees safe from COVID-19 do not constitute offensive conduct. Therefore, Complainant's complaint of harassment fails to state a claim upon which relief can be granted pursuant to 29 C.F.R. § 1614.107(a)(1).

CONCLUSION

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.** 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 20, 2024

Date