



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Antwan N,¹
Complainant,

v.

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

Appeal No. 2024000713

Agency No. HS-CBP-01865-2022

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated September 27, 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 finds that Complainant's complaint was properly dismissed pursuant to 29 C.F.R. § 1614.107(a)(2), for untimely EEO Counselor contact, and pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim

ISSUES PRESENTED

Whether the Agency properly procedurally dismissed Complainant's formal EEO complaint.

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 Management and Program Analyst, Grade GS-14, in Air and Marine Operations at the Agency's headquarters in Washington, D.C.

On April 29, 2022, Complainant initiated contact with an EEO Counselor. The Agency and Complainant were unable to resolve the matter through informal EEO counseling.

On June 9, 2022, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of religion (not specified), disability (perceived), and in reprisal for EEO-protected activity when:

1. On December 17, 2021, Complainant was issued a Letter of Reprimand; and
2. On April 28, 2022, Complainant was notified that he would have to undergo COVID-19 screening testing on a weekly basis.

On September 27, 2023, the Agency issued a final decision dismissing Complainant's complaint. Regarding Claim 1, the Agency determined that Complainant's EEO Counselor contact was untimely pursuant to 29 C.F.R. §§ 1614.105(a)(1) and 1614.107(a)(2). Regarding Claim 2, the Agency determined that Complainant failed to state a claim pursuant to 29 C.F.R. 1614.107(a)(1).

The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant did not directly challenge the Agency's determination that, for Claim 1, his EEO Counselor contact was untimely. Complainant, however, stated that this matter was part of a long line of recurring discrimination events. Complainant argues that the Agency had misled him and mischaracterized his religious accommodation request as a vaccine exemption request. Complainant asserts that the Agency improperly considered his request outside of the regular religious accommodation process. Additionally, Complainant argues that the Agency improperly closed his request, in August 2023, without granting or denying the request.

Regarding Claim 2, Complainant argues that Agency COVID-19 policy discriminatorily required him to test for COVID-19 whereas vaccinated employees were unrestricted. Complainant maintained that he had stated a valid claim based on his religious beliefs and based on the Agency perceiving him as having a disabling contagious disease. Complainant also characterizes the Agency's testing program as a form of retaliation against him for requesting a COVID-19 vaccine exemption and against other employees who held common religious beliefs against vaccination.

In its response, opposing Complainant's appeal, the Agency denied that Complainant was disciplined for requesting a religious accommodation. Instead, the Agency states that it had issued Complainant the Letter of Reprimand for failing to report his COVID-19 status after being instructed to do so. Even, so the Agency asserted that Complainant raised the matter of the Letter of Reprimand more than 45 days after it had issued with notice of the applicable EEO time limit. Next, the Agency cited the Commission's appellate decisions which supported its position that Complainant's claims were properly dismissed because they were based on COVID-19 vaccination status, which is not an EEO-protected class.

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

Claim 1

EEOC Regulation 29 C.F.R. § 1614.107(a)(2) states, in pertinent part, that the Agency shall dismiss a complaint for failure to comply with the applicable time limits. EEOC Regulation 29 C.F.R. § 1614.105(a)(1) provides, that complaints of discrimination must be brought to the attention of an EEO Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case

of a personnel action, within forty-five days of the effective date of the action. Time limits are subject to waiver, estoppel, or equitable tolling. 29 C.F.R. § 1614.604(c).

The record discloses that the allegedly discriminatory Letter of Reprimand issued on December 17, 2021, but Complainant did not initiate contact with an EEO Counselor until April 29, 2022, which is beyond the forty-five-day limitation period. On appeal, Complainant has presented no persuasive arguments or evidence warranting an extension of the time limit for initiating EEO Counselor contact. Furthermore, the Agency evidenced that Complainant had received training which included applicable 45-day time limit, in August 2021.

Claim 2

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, disabling condition or because of retaliation. 29 C.F.R. §1614.103(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).

We concur with the Agency, in that it is permissible for agencies to require unvaccinated employees to test for COVID-19. See Reese W. v. Veterans Affairs, EEOC Appeal No. 2022002734 (July 25, 2022) (where the agency required weekly COVID-19 testing in lieu of getting vaccinated, the complainant was not aggrieved). We reject Complainant’s argument that he was subjected to unlawful disparate treatment, in the form of an email directing him to test for COVID-19, because of his religious beliefs, perceived disability, or reprisal. Based on a fair reading of the record, it was Complainant's decision to remain unvaccinated, which resulted in the Agency’s COVID-19 testing requirement. This Commission has consistently held that COVID-19 vaccination status is simply not a basis protected by the statutes enforced by the EEOC. See Ela O. v. Dep’t of Def., EEOC Appeal No. 2023001168 (June 6, 2023). Therefore, we find that the Agency's dismissal of the formal complaint was proper.

CONCLUSION

The Agency's final decision dismissing Complainant's 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

January 8, 2025

Date