



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

[REDACTED]
Latarsha A,¹
Complainant,

v.

Bill Nelson,
Administrator,
National Aeronautics and Space Administration
(Glenn Research Center),
Agency.

Appeal No. 2024003148

Agency Nos. NCN-22-GRC-00022; NCN-24-GRC-00012

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated April 1, 2024, dismissing her 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.

ISSUES PRESENTED

Whether the Agency's final decision properly dismissed Complainant's consolidated 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 as an Aerospace Engineer, GS-15, Low Gravity Exploration Technology Branch at NASA Glenn Research Center in Cleveland, Ohio.

On April 11, 2022, and January 24, 2024, Complainant filed two formal complaints which were consolidated by the Agency.² Complainant's consolidated complaints alleged that the Agency subjected her to discrimination on the bases of religion (Christian/sincerely held religious beliefs), disability (perceived disability/vaccination status), genetic information and reprisal (raising safety concerns regarding Agency masking policy) when:

1. Beginning on February 22, 2022, the Agency required that all NASA civil servants who were not vaccinated against COVID-19 be required to test negative for COVID-19 and report the result to their supervisor before being admitted to a NASA facility.
2. On February 1, 2022, and March 4, 2022, the Agency failed to

² Prior to Complainant filing his complaint, another Agency employee filed a class complaint alleging discrimination based on religion, disability, genetic information (as well as other bases) regarding COVID-19 testing and various restrictions pertaining to vaccination status. The Agency informed Complainant that the first of the two subject complaints (encompassing Claims 1 – 5) would be held in abeyance pending a decision by an Equal Employment Opportunity (EEOC) Administrative Judge (AJ) on class certification. On February 8, 2024, an AJ issued a Decision and Order Dismissing Class Complaint and Denying Class Certification. See Thomas v. NASA, EEOC Hearing No. 460-2022-00159X (February 8, 2024). The AJ found that the class complaint did not meet the prerequisites for class certification and failed to state a claim. On February 23, 2024, the Agency notified Complainant that following the AJ's dismissal of the class complaint, the Agency resumed the processing of Complainant's formal complaint as an individual complaint of discrimination. Thereafter, Complainant initiated contact with an Equal Employment Opportunity (EEO) Counselor in the second complaint (consisting of Claim 6), which the Agency later consolidated with the first complaint.

provide Complainant with a religious accommodation to the Agency's COVID-19 masking policy.

3. On March 10, 2022, Complainant's medical accommodation request to be exempted from the Agency's COVID-19 testing requirement was denied.
4. On March 31, 2022, Complainant's supervisor issued Complainant a Letter of Counseling after Complainant raised safety concerns regarding the Agency's COVID-19 masking policy.
5. On April 7, 2022, the Agency failed to provide Complainant with a religious accommodation to the COVID-19 testing requirement and Complainant's supervisor asked Complainant why a saliva test isn't okay.
6. Whether the Agency discriminated against Complainant and/or subjected Complainant to a hostile work environment based on religion (Christian) when on September 22, 2023, the Agency failed to provide Complainant with a religious accommodation exempting her from Agency guidance on the use of pronouns.³

On April 1, 2024, the Agency issued the instant final decision. The Agency found Claims 1-5 must be dismissed for failure to state a claim pursuant to 29 C.F.R. §1614.107(a)(1). The Agency also found in regard to Claims 1-5 that vaccination status is not a protected basis under the statutes enforced by the EEOC. Specifically regarding Claim 4, the Agency found that raising health and safety concerns does not amount to protected activity under the anti-discrimination statutes.

Regarding Claim 6, the Agency dismissed this matter for failure to state a claim pursuant to 29 C.F.R. §1614.107(a)(1). Specifically, the Agency found that exempting Complainant from following Agency guidance on the use of pronouns would result in discrimination against Complainant's co-workers. Additionally for Claim 6, the Agency found Complainant fails to state a claim of harassment/hostile work environment because Complainant does not allege facts which would indicate she was subjected to harassment that was sufficiently severe or pervasive to alter the conditions of her employment.

³ As discussed above, Claim 6 encompasses Complainant's second complaint, but was numbered as such in the Agency's dismissal and briefs on appeal.

Moreover, the Agency found allegations set forth in Claims 1-6 were, in part, based on violations of a number of laws outside of the EEO statutes covered by the EEO complaint process.

Complainant filed the instant appeal.

CONTENTIONS ON APPEAL

On appeal, Complainant argues she met the threshold for “aggrieved employee” under new U.S. Supreme Court case of Muldrow v. City of St. Louis, issued April 17, 2024, because she met the new threshold for harm in order to maintain a Title VII discrimination claim. Complainant argues harm must not be “significant” to impact a term or condition of employment. Complainant argues she established such harm by being required to test and wear a mask.

In opposition to the appeal, the Agency argues Complainant cannot invoke the Commission’s jurisdiction because she has not demonstrated that she is an “aggrieved employee” as required by the Commission’s regulations. The Agency maintains Complainant has not alleged receiving any adverse employment actions or other cognizable harm or loss resulting from the COVID-19 safety protocols at issue, which are no longer in place. Regarding Claim 6, the Agency maintains Complainant has failed to allege any facts demonstrating she was subjected to conduct sufficiently severe or pervasive as to affect the terms or conditions of her employment.

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

As an initial matter, Complainant has alleged that the Agency's COVID-19 testing protocol for unvaccinated employees 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). The Agency's COVID-19 testing protocol did not involve information about Complainant's genetic tests or genetic testing of her family members. Moreover, Complainant has not alleged discrimination related her family medical history. Therefore, Complainant has failed to state a viable claim that the Agency violated GINA. See Buck S. v. U.S. Postal Serv., EEOC Appeal No. 2022003265 (June 30, 2022).

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 Claims 1-5, nothing in the record supports a claim that Complainant was "aggrieved." Despite Complainant's arguments on appeal regarding a recent U.S. Supreme Court ruling in Muldrow v. City of St. Louis, we find Complainant's arguments are misconstrued. A review of the Court's decision stands for in transfer of positions, a complainant should show "some harm respecting an identifiable term or condition of employment" and need not show "materially significant disadvantage." Complainant fails to show any harm she suffered with regard to a term or condition of her employment due to the Agency's policies. There is no indication in the record that she 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).⁴ Complainant does not allege that she was disciplined or penalized by management.⁵ 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 Claims 1-3 and 5, we agree with the Agency that Complainant's allegations regarding being required to test or wear a mask failed to state a claim. Agencies may not restrict an employee's presence and duties based on EEO-protected characteristics. However, they may do so based on an employee's remaining unvaccinated against COVID-19 which 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). We have 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. See 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. (as a mandatory screening measure, employers may administer a COVID-19 test when evaluating an employee's initial or continued presence in the workplace). In other words, a requirement for COVID-19 testing does not state a claim if consistent with guidance from Centers for Disease Control and Prevention (CDC), Food and Drug Administration (FDA), and/or state/local public health authorities that is current at the time of testing. Therefore, the Agency properly dismissed Claims 1-3 and 5 for failure to state a claim.

⁴ 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.

⁵ Regarding Claim 4, as addressed below, Complainant argued the Agency's actions were based on her raising safety concerns, not on a protected bases.

We likewise reject Complainant's argument that she was subjected to unlawful disparate treatment based on her COVID-19 vaccination status. This Commission has held that it is permissible for agencies to require unvaccinated employees to test for COVID-19 or require them to wear a mask. See 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). See Ambrose M. v. Dep't of the Navy, EEOC Appeal No. 2022004632 (Dec. 13, 2022) (where complainant alleged that the agency's policy that unvaccinated employees wear a mask "segregates unvaccinated and vaccinated personnel" failed to state a claim.) 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).

Turning to Claim 4, Complainant alleges she was issued a Letter of Counseling after she raised serious safety concerns regarding the Agency's COVID-19 masking policy. As the Agency pointed out, the Commission has held that raising health and safety concerns does not amount to protected activity under the anti-discrimination statutes. See Wilburn R. v. Dep't of Commerce (Bureau of the Census), EEOC Appeal No. 2021003505 (Sept. 27, 2021)(affirming agency's dismissal of complaint of reprisal based on complainant's raising of health and safety concerns about the COVID-19 vaccine). Accordingly, because Complainant's raising of safety concerns is not protected EEO activity, her claim of reprisal must be dismissed for failure to state a claim pursuant to 29 C.F.R. §1614.107(a)(1).

Finally, we address the dismissal of Claim 6. The Commission has long held that an Agency cannot discriminate, harass, or allow others to harass an employee based on his or her gender identity, as that states a viable claim of sex discrimination under Title VII. See Hillier v. Dep't of the Treasury (Internal Revenue Service), EEOC Appeal No. 0120150248 (Apr. 21, 2016), (citing Lusardi v. Dep't of the Army, EEOC Appeal No. 0120133395 (Apr. 1, 2015)). Additionally, in Hillier, the Commission determined that "an employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against his co-workers or deprive them of contractual or other statutory rights." Id. In Claim 6, Complainant seeks an accommodation from adhering to Agency's guidance that "all personnel should be addressed by names and pronouns they choose." Complainant is not seeking to be addressed by a chosen pronoun.

Complainant, instead, seeks to not have to refer to co-workers by theirs. As the Agency found, Complainant's requested accommodation to be exempt from following guidance concerning the use of preferred pronouns would result in the creation of a hostile work environment for Complainant's co-workers based on gender identity. We agree with the Agency's dismissal of Claim 6 for failure to state a claim pursuant to 29 C.F.R. §1614.107(a)(1).

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

November 26, 2024
Date