



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

[REDACTED]  
Earnest G,<sup>1</sup>  
Complainant,

v.

Carlos Del Toro,  
Secretary,  
Department of the Navy,  
Agency.

Appeal No. 2024004027

Agency No. 22-00174-00515

**DECISION**

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated June 18, 2024, 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 determines that the formal 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 complaint for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1).

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<sup>1</sup> 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 Administrative/Technical Specialist, NT-0346-04, at the Agency's Naval Surface Warfare Center in Indian Head, Maryland.

On April 7, 2022<sup>2</sup>, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of religion (sincerely held religious belief), disability (communicable disease), and reprisal (vaccine mandate) between September 2021 and April 7, 2022, when:

1. Complainant was required to submit negative results of the COVID-19 test before being allowed into the workplace; and,
2. Complainant was not allowed to travel as part of his official duties.

On June 18, 2024, the Agency issued the instant final decision. The Agency found his claims must be dismissed for failure to state a claim pursuant to 29 C.F.R. §1614.107(a)(1). The Agency also found Complainant was alleging discrimination based on vaccination status, and that vaccination status is not a protected basis under the statutes enforced by the Commission.

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<sup>2</sup> After Complainant submitted his formal complaint, the Agency was then notified that Complainant was identified as a presumed or putative class member for an EEOC class complaint, Jeffrey Lebret, et al. v. Carlos Del Toro, Secretary of the Navy, DON 22-00253-00481, EEOC No. 550-2022-00189X. As a result, on November 1, 2022, the Agency notified Complainant that his formal complaint would be held in abeyance, effective as of that same date, pending a decision from the EEOC Administrative Judge (AJ) in Lebret v. Sec. of Navy on whether to accept or reject certification of the class complaint. On June 16, 2023, the AJ in EEOC No. 550-2022-00189X issued her decision finding that the putative class agent in that matter failed to meet the requirements of 29 C.F.R. § 1614.204(a)(2) for class certification. The AJ also dismissed the putative class agent's complaint for failure to state a claim upon which relief can be granted. On October 2023, Mr. Lebret filed a complaint "on behalf of himself and a class of similarly situated individuals" in the United States District Court for the Western District of Washington, Lebret v. Austin, et al., Case 3:23-cv-05961 (2023). Review of that matter, and the subsequent consolidated case has not shown Complainant to be listed among the putative class for those matters. As noted hereafter, on June 18, 2024, the Agency dismissed Complainant's complaint pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim.

Specifically, the Agency found that raising health and safety concerns does not amount to protected activity under the anti-discrimination statutes. The Agency noted an agency-wide policy requiring testing of unvaccinated employees, as well as restricting travel for unvaccinated employees is insufficient to render a complainant "aggrieved."

Complainant filed the instant appeal.

### CONTENTIONS ON APPEAL

On appeal, Complainant argues his vaccination status is intertwined with his religious beliefs and therefore alleges a viable claim of discrimination. Complainant also argues he was aggrieved when Agency-wide policy was instituted regarding non-vaccinated employees only traveling for mission critical travel.

In opposition to the appeal, the Agency argues Complainant cannot invoke the Commission's jurisdiction because he has not demonstrated that he 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.

### 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).

Here, nothing in the record supports a claim that Complainant was “aggrieved.” Complainant fails to show any harm he 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 he was ever ultimately required to receive the COVID-19 vaccine, or that he 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).<sup>3</sup> Complainant does not allege that he was disciplined or penalized by management. 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.

We agree with the Agency that Complainant’s allegations regarding being required to test 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).

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<sup>3</sup> 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.

We likewise reject Complainant's argument that he was subjected to unlawful disparate treatment based on his COVID-19 vaccination status. 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).

The 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. 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 Complainant's claims for failure to state a claim.

Further, Complainant alleges that he was not permitted to travel unless for mission critical assignments due to his unvaccinated status. Again, Complainant has not articulated a harm that can be remedied under the EEO laws. The Commission has consistently held that one's vaccination status is not a characteristic that is protected under the statutes enforced by the EEOC. Ryan L. v. Dep't of Def., EEOC Appeal No. 2022002450 (July 25, 2022); Valery G. v. Dep't of Def., EEOC Appeal No. 2022002547 (Aug. 16, 2022).

Moreover, he has not alleged any specific employment-related harm resulted from these travel restrictions. See Nobuko M. v. Dep't of Agriculture, EEOC Appeal No. 2023000865 (Mar. 13, 2023)(where Complainant failed to articulate a harm to be remedied under EEO laws when she alleged she was not allowed to travel to certain locations due to her unvaccinated status).

To the extent Complainant attempted to state a claim of reprisal for raising safety concerns regarding the Agency's COVID-19 testing or vaccine policy. 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, his claim of reprisal must be dismissed for failure to state a claim pursuant to 29 C.F.R. §1614.107(a)(1).

We note the record is vague on whether Complainant was also alleging a claim that he was discriminated against based on religion/disability when his accommodation request to be exempt from the COVID-19 vaccine was delayed. As Complainant and the Agency both address this matter on appeal, we will address the matter herein. On appeal, 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 this claim was properly dismissed for failure to state a claim. See Shana C. v. Dep't of Veterans Affairs, Appeal No. 2022002553 (Apr. 17, 2023).

### 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)

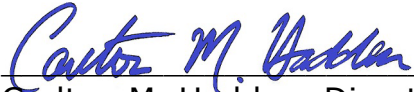
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department 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

December 19, 2024

Date