



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

[REDACTED]
Bryant F.,¹
Complainant,

v.

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

Appeal No. 2024004121

Agency No. 22-00174-01677

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision (FAD) dated June 26, 2024, 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. For the reasons presented below, we AFFIRM the Agency's final decision dismissing the complaint.

ISSUE PRESENTED

Whether the Agency's final decision properly dismissed Complainant's formal 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

At the time of events giving rise to this complaint, Complainant worked as an Engineer, ND-04 at the Agency's Naval Surface Warfare Center in Arsenal, New Jersey.

On November 21, 2022, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of religion (sincerely held moral belief) and disability (perceived physical disability) when, between February 7, 2022, and November 7, 2022, he was required to submit negative COVID-19 test results before being allowed into the workplace².

On June 26, 2024, the Agency dismissed Complainant's pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state claim³. The Agency determined that Complainant had alleged discrimination based on his vaccination status, which is not a protected basis.

The instant appeal followed.

CONTENTIONS ON APPEAL

Complainant did not submit a statement or brief in support of his appeal. The Agency submitted a brief reiterating that he failed to state a claim.

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

² Two additional allegations were not accepted for investigation and were dismissed for failure to state a claim. In the additional allegations, Complainant alleged that he was subjected to discrimination when he was required to participate in weekly COVID-19 screenings. Complainant did not contest the dismissal of the additional allegations on appeal; therefore, we will not address them in this decision.

³ On or around July 16, 2024, the Agency was notified that Complainant was identified as a class member for a class complaint. See EEOC Hearing No. 550-2022-00189X. This matter is not currently before us, because it was not accepted for investigation in the instant case and was not discussed in the FAD.

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

An agency shall accept a complaint from any aggrieved employee who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or a disabling condition. 29 C.F.R. § 1614.103, § 1614.106(a). The 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. Department of the Air Force, EEOC Request No. 05931049 (April 21, 1994). EEOC Regulation 29 C.F.R. §1614.107(a)(1) provides for the dismissal of a complaint which fails to state a claim within the meaning of 29 C.F.R. § 1614.103 or §1614.106(a).

In this case, the Agency concluded that Complainant failed to state a claim because he alleged discrimination based on vaccination status. We agree. Although Complainant cites religion and disability as grounds for disparate treatment in his formal complaint, a fair reading of the record reflects that he believes that as an unvaccinated employee he is being treated differently than vaccinated employees. For example, during the pre-complaint process, Complainant stated that although vaccinated and unvaccinated employees could be equally infectious, vaccinated individuals were treated better because they were not subject to the Agency's testing requirement. This sentiment was echoed in his formal complaint, when he said that the Agency's policy mandating COVID-19 testing was "disparate treatment of unvaccinated individuals." We therefore conclude that Complainant alleged discrimination because he was unvaccinated for COVID-19, and because of his objection to being tested for COVID-19. Neither either of these characteristics is protected under the statutes the Commission enforces. 29 C.F.R. § 1614.103(a).

Furthermore, although Complainant argued that he was aggrieved because he was required to complete COVID-19 tests for months, COVID-19 testing is job-related and consistent with business necessity, and the Commission has decided that “employers can require mandatory COVID-19 viral testing to evaluate an employee's continued presence in the workplace.” See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws, EEOC Technical Assistance Questions and Answers -- Updated on July 12, 2022, at Question A.6. Therefore, we find that the Agency-wide policy mandating COVID-19 testing for unvaccinated employees was insufficient to render Complainant aggrieved. See Colby S. v. Veterans Affairs, EEOC Appeal No. 2022000976 (April 18, 2022) (noting that the policy did not cause the complainant to be treated differently from other employees or result in a personal harm to the complainant).

CONCLUSION

Accordingly, 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

January 22, 2025

Date