



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Alphonse L,¹
Complainant,

v.

Merrick B. Garland,
Attorney General,
Department of Justice
(Bureau of Alcohol, Tobacco, Firearms & Explosives),
Agency.

Appeal No. 2024004375

Agency No. ATF-2022-000510

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated May 30, 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, we determine 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 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 period at issue, Complainant worked for the Agency as a Special Agent, Grade GS-11, in Seattle, Washington.

On May 4, 2022, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the basis of disability (perceived) when:

1. From September 2021 to May 2022, ATF management officials required Complainant to receive the COVID-19 vaccination, subjected him to tri-weekly symptomless COVID-19 testing and symptomless masking restrictions, and required him to disclose his COVID-19 vaccination status; and
2. On January 7, 2022, Complainant's request for a "permanent" medical exception to the COVID-19 vaccination mandate was denied.

On May 30, 2024, the Agency dismissed Complainant's complaint for failure to state a claim under 29 C.F.R. § 1614.107(a)(1).

CONTENTIONS ON APPEAL

On appeal, Complainant disputes characterization of his refusal to receive the COVID-19 vaccine as a "decision." Complainant argues that the Agency's choice of words expressed unlawful bias against his claims. Complainant maintains that the COVID-19 vaccine was an experimental medical intervention and had not gone through appropriate safety vetting procedures. Complainant states medical concerns about the COVID-19 vaccine were genuine because his blood relative had suffered serious medical complications as a direct result of the COVID-19 vaccine. He states that this meant he had an EEO-protected disability that prevented him from safely receiving the COVID-19 vaccine. Complainant asserts that the COVID-19 vaccine was technically something other than an actual vaccine. He additionally claims that the Agency had violated his rights under the Privacy Act because it had twice compelled him to provide personal medical records to a third-party website.²

² Jurisdiction for claims that an agency violated the Privacy Act rests exclusively in the United States district courts and cannot be adjudicated in the administrative EEO complaint process. Herman F. v. Dep't of Transp., EEOC Appeal No. 2022003450 (Feb. 6, 2023).

Complainant further accused the Agency of engaging in nonsensical theatrics by enforcing masking policies that were ineffective against preventing the spread of COVID-19. Finally, Complainant asserts that the true purpose of the Agency's COVID-19 prevention measures was to demoralize him and to coerce him into receiving an unsafe medical procedure.

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).

Claim 1

First, we considered Complainant's claim that Agency management requiring him to vaccinate for COVID-19 harmed his employment. We disagree. Although Complainant felt pressured to get vaccinated against COVID-19, he has not alleged that he was involuntarily vaccinated or that he was subjected to any disciplinary or other adverse employment action because he refused to

be vaccinated. Complainant failed to sufficiently allege that he is aggrieved with regard to the Agency strongly advocating employee compliance with its COVID-19 policies. Terrance A. v. Nat'l Aeronautics and Space Admin., EEOC Appeal No. 2022003840 (Feb. 21, 2023) (holding that Agency-wide emails on mandatory vaccinations for COVID-19 were not offensive conduct but rather petty slights, annoyances, or isolated incidents which did not rise to the level of illegality).

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 (July 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.) While agencies may not restrict an employee based on 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).

We now address Complainant's claim that he was wrongfully required to disclose his COVID-19 vaccination status. We concur with the Agency in that questions about an employee's vaccinations or lack thereof are not the type of disability-related inquiries that employers are restricted from asking. Asking an employee if he or she is vaccinated against COVID-19 is not likely to disclose the existence of a disability because there are many reasons an employee may not provide confirmation of vaccination besides having a disability. See EEOC What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, at Question K.9 (Updated May 15, 2023).

Claim 2

Complainant's January 7, 2022 request for a medical exemption from the COVID-19 vaccine requirement was not outright denied. Rather, the Agency temporarily granted Complainant's exemption request through June 30, 2022.

Then on January 15, 2022, the U.S. District Court for the Northern District of Texas enjoined the federal government from enforcing Executive Order 14043 which contained the COVID-19 vaccination mandate. By the time Complainant's temporary exemption had expired, the District Court's injunction against enforcing the COVID-19 vaccination mandate remained in effect. In other words, Complainant's request for a permanent vaccine exemption was rendered unnecessary because the Agency was no longer requiring COVID-19 vaccination for Complainant or any of its employees.

Finally, there is no indication in the record, including Complainant's appeal statement, that he received the COVID-19 vaccine because his exemption request was not permanent. The Agency did not discipline him or subject him to adverse action for failing to be immunized. Consequently, we agree with the Agency, that Complainant has not alleged a present employment harm for which there is an EEOC remedy. Valery G. v. Dep't of Def., EEOC Appeal No. 2022002547 (Aug. 16, 2022).

CONCLUSION

Accordingly, the Agency's final decision dismissing Complainant's formal 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 9, 2024

Date