



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

[REDACTED]
Herb P.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Immigration and Customs Enforcement),
Agency.

Request Nos. 2024004611 & 2024004612

Appeal Nos. 2023004601 & 2023004602

Agency Nos. HS-ICE-00019-2022 & HS-ICE-01684-2022

DECISION ON REQUESTS FOR RECONSIDERATION

Complainant timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decisions in Rolf K. v. Department of Homeland Security, EEOC Appeal No. 2023004601 (July 16, 2024) and Brendon L. v. Department of Homeland Sec., EEOC Appeal No. 2023004602 (July 16, 2024). In accordance with 29 C.F.R. § 1614.606, we exercise our discretion to consolidate the above-referenced requests for reconsideration. For the following reasons, the Commission DENIES the requests.

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.

ISSUE PRESENTED

Whether Complainant's requests for reconsideration of EEOC Appeal Nos. 2023004601 and 2023004602 meet the criteria detailed in 29 C.F.R. § 1614.405(c).

BACKGROUND

Agency No. HS-ICE-00019-2022/EEOC Appeal No. 2023004601

During the period at issue, Complainant worked as a GS-1801-15 Deportation Officer at the Agency's Headquarters/Field Operations in Washington, D.C. Complainant filed a formal EEO complaint alleging that the Agency discriminated against him on the bases of religion, age, and genetic information when:

1. In or around the month of September 2021, and continuing, Complainant was notified of the Agency's COVID-19 vaccination mandate with a November 22, 2021 deadline; and
2. At an undetermined period of time, Complainant was harassed because of the Agency's use of reminder correspondence, which contained warnings of prospective penalties for failure non-compliance, to include a countdown clock to track the deadline on the COVID-19 vaccination mandate.

On August 8, 2023, the Agency issued a final decision dismissing the formal complaint, pursuant to 29 C.F.R. § 1614.107 (a)(1), for failure to state a claim. Specifically, the Agency determined that Complainant was not aggrieved because he had not alleged a present personal harm with respect to the terms and conditions of his employment. The Agency further determined that the alleged events were not sufficiently severe or pervasive enough to set forth an actionable hostile work environment claim. Finally, the Agency determined that Complainant failed to state a viable claim under Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), 42 U.S.C. § 2000ff et seq. because Complainant's allegations did not involve information regarding his genetic tests or genetic testing of family members.

In the appellate decision, the Commission affirmed the Agency's final decision. The Commission found that Complainant did not experience a present harm or loss with respect to a term, condition, or privilege of employment.

Further, Complainant failed to make any reference to his medical history or genetic information and, as a result, he did not allege a violation of GINA. Accordingly, the Commission found that the Agency's dismissal was proper.

Agency No. HS-ICE-01684-2022/EEOC Appeal No. 2023004602

During the relevant time of this complaint, Complainant worked as a GS-1801-15 Chief of Staff at the Agency's Headquarters in Washington, D.C.

Complainant filed a formal EEO complaint alleging that the Agency discriminated against him on the basis of age when:

1. on March 16, 2022, Complainant was notified he would be required to participate in the Agency's COVID-19 screening and testing program; and
2. on March 19, 2022, the Agency sent a box of COVID-19 testing kits to Complainant's home.

The Agency issued a final decision dismissing the formal complaint, pursuant to 29 C.F.R. § 1614.107 (a)(1), for failure to state a claim. The Agency determined that Complainant was not an aggrieved employee because he had not alleged a present personal harm with respect to the terms and conditions of his employment. The Agency further determined that the alleged events were not sufficiently severe or pervasive enough to set forth an actionable harassment claim.

In the appellate decision, the Commission affirmed the Agency's final decision. The Commission determined that there was no indication in the record that Complainant was subjected to any disciplinary action for failure to comply. Consequently, Complainant did not experience a present harm or loss with respect to a term, condition, or privilege of employment. As a result, the Commission found that the complaint was properly dismissed for failure to state a claim.

The instant requests for reconsideration followed.

CONTENTIONS ON REQUESTS

In his requests, Complainant contends that the Commission erroneously interpreted is that he was not and is not presently "aggrieved." Complainant argues that if the appellate decision were to stand, it would allow the Agency to use new tactics for future adverse activities and

retaliatory actions which would have a substantial impact on the Agency's policies, practices, and operations. Complainant maintains that his rights were violated and he experienced harm. Accordingly, Complainant requests that the Commission grant his requests for reconsideration.

STANDARD OF REVIEW

EEOC Regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c).

ANALYSIS

We have reviewed the various arguments raised by Complainant in the instant request for reconsideration. However, we can find no basis to disturb the Commission's prior decision. Complainant presents arguments which were previously raised and considered or could have been raised during the original appeal. We acknowledge that Complainant believes that the Agency discriminated against him and violated his rights. Here, there is nothing in the record indicating that Complainant was ever required to be immunized or subjected to disciplinary or any other adverse action as a result of declining to be immunized. Complainant has not articulated a harm that can be remedied under the EEO laws. We find, just as the appellate decision found, that Complainant has not presented persuasive evidence demonstrating that the Agency did not properly dismiss the complaints for failure to state a claim.

A request for reconsideration is not a second appeal to the Commission. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9 § VI.A (Aug. 5, 2015); see, e.g., Lopez v. Dep't of Agric., EEOC Request No. 0520070736 (Aug. 20, 2007). Rather, a reconsideration request is an opportunity to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, or will have a substantial impact on the policies, practices, or operations of the Agency. Complainant has not done so here. He has presented neither argument nor evidence that tends to satisfy either criterion for reconsideration. Rather, he merely attempts to relitigate his appeals on their merits.

CONCLUSION

After reviewing the previous decisions and the entire record, the Commission finds that the requests fail to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to DENY both requests. The decisions in EEOC Appeal Nos. 2023004601 and 2023004602 remain the Commission's decisions. There is no further right of administrative appeal on the decision of the Commission on these requests.

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (P0124)


This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. 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.

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 14, 2024
Date