



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

[REDACTED]
Evelyn S.,¹
Complainant,

v.

William J. Burns,
Director,
Central Intelligence Agency,
Agency.

Appeal No. 2022003678

Agency No. 22-60

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a May 12, 2022, final Agency decision (FAD) concerning her complaint of 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. We AFFIRM in part, and REVERSE in part the Agency's FAD.

BACKGROUND

On March 17, 2022, Complainant filed an equal employment opportunity (EEO) complaint alleging that the Agency subjected her to harassment and/or discrimination on the bases of perceived disability (physical - individuals not vaccinated against COVID-19 are perceived to be more susceptible to contracting COVID-19), religion (Christian) when, from 14 May 2021 through February 2022, the following occurred:

1(a). From 14 May 2021 to 28 July 2021, the Agency required Complainant, who was not fully vaccinated against COVID-19, to wear a mask in the workplace:

1(b). From 14 May 2021 through January 2022, the Agency sent workforce messages related to COVID-19 mitigation measures on overseas travel, masking, social distancing, testing, vaccination attestation, vaccination requirements, and the processing of requests for medical and

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.

religious accommodations;

1(c). Beginning 10 September 2021, per Executive Order 14043 and guidance from the Safer Federal Workforce Task Force, the Agency required Complainant to be fully vaccinated against COVID-19 by 22 November 2021, unless they had a pending or approved medical or religious accommodation;

1(d). Beginning 15 September 2021, the Agency provided guidance on the process for Complainant to pursue a medical or religious accommodation to the COVID-19 vaccination requirement;

1(e). On 17 December 2021, in response to her 28 October 2021 request for religious accommodations to the COVID-19 vaccine mandate, testing requirement, and mask and social distancing requirements, the Agency approved, among other accommodations, deferring Complainant's participation in [Agency training course 1];

1(f). On 17 December 2021, the Agency gave Complainant a deadline of 23 December 2021 to accept or decline her approved religious accommodations;

1(g). On 24 February 2022, the Agency notified the workforce that, effective 1 March 2022, individuals who were not fully vaccinated against COVID-19 would be required to wear a mask at all times while in the workplace;

1(h). Beginning October 2021, employees experienced delays and/or were asked to provide additional information in response to their requests for religious accommodations to the COVID-19 vaccination requirement;

1(i). As of November 2021, manager [A-1] denied Complainant registration to [Agency training course 2] due to perceived disability related vaccine status. All other trainees were still eligible to attend [Agency training course 2];

1(j). On 29 March 2022, the Agency announced the creation of a Board chaired by a named individual;

1(k). On 28 April 2022, the Agency denied Complainant's request for religious accommodation from the COVID-19 vaccination requirement in order for her to attend [Agency training course 3]; and

1(l). On 5 May 2022, the Agency notified Complainant that it was deferring her participation in [Agency training course 1] for another session, based on the Agency's 17 December 2021 approval of Complainant's 28 October 2021 request for religious accommodations to the COVID-19 vaccine mandate, testing requirement, and mask and social distancing requirements.

The Agency, in its FAD, found that claims 1(a), 1(b), 1(c), 1(d), 1(e), 1(f), 1(g), 1(h), 1(j), 1(k), and 1(l) were identical to claims raised in a recently filed class complaint that is currently pending before the Commission awaiting a determination regarding certification. Citing Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 8 § III. pp. 8-3 & 8-4 (Aug. 5, 2015) as authority, the Agency placed the above claims in abeyance pending a decision on class certification by the Commission. With respect to claim 1(i), the Agency determined that this matter was not identical to the issues raised in the class complaint, and that it failed to state a claim because it was based solely on a claim of "perceived disability" related to vaccine status, which the Agency noted was not a cognizable claim in the federal EEO complaint process.

Although the Agency indicated that claims 1(e), and 1(l) were identical to the class complaint claims and that they were being held in abeyance, the Agency found that “[t]o the extent that they articulate unique claims . . . they are also subject to dismissal,” on the grounds that they failed to state a claim. According to the Agency, Complainant did not establish that she suffered a harm to a term, condition, or privilege of her employment regarding these matters because her training requests were merely delayed because of her requests for religious accommodation, and therefore, she is not aggrieved.

On appeal, Complainant does not challenge the Agency’s action placing claims in abeyance pending a class certification determination. She does contest the dismissal of claims 1(e), 1(i), and 1(l). According to Complainant, regarding claims 1(e), and 1(l), she is aggrieved because training is essential for her position and her advancement, and that by removing her from the scheduled course, the Agency “is delaying my promotion.”

With respect to claim 1(i), Complainant argued, in pertinent part, that

[I]t is quite clear that the EEOC has not truly considered whether discriminating against an individual solely for being unvaccinated - and without first determining whether that individual would ever even pose a threat to others. That is precisely what I believe is inherently wrong with the manner in which I have been treated by the Agency – I have been mistreated and disciplined solely for remaining unvaccinated and solely because the Agency believes I will contract COVID-19, spread it to my vaccinated co-workers, and endanger the health and safety of the vaccinated co-workers.

The Agency, in pertinent part, requests that we affirm its FAD.

ANALYSIS AND FINDINGS

An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age, disability, genetic information, sex-based wage discrimination or retaliation for EEO activity. 29 C.F.R. § 1614.103(a). EEOC Regulation 29 C.F.R. § 1614.107(a)(l) requires that an agency dismiss a complaint that fails to state a claim pursuant to § 1614.103. To establish that she is aggrieved Complainant must show an injury or harm to a term, condition, or privilege of employment for which there is a remedy. See Diaz v. Dep’t of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994).

At the outset, we find that the Agency erred by dismissing claims 1(e), and 1(l) after determining that they were identical to the class complaint claims and that they would be held in abeyance. Moreover, we find that the Agency improperly dismissed these matters on the grounds that they failed to state a claim. The only questions for an agency to consider in determining whether an issue states a claim are: (1) whether the complainant is an aggrieved employee; and (2) whether the complainant raises employment discrimination on a basis covered by EEO statutes.

If these questions are answered in the affirmative, an agency must accept the complaint for processing regardless of its judgment of the merits. See Odoski v. Dep't of Energy, EEOC Appeal No. 01901496 (Apr. 16, 1990). As set forth above, Complainant is alleging an ongoing denial of training, which is a term, condition, or privilege of her employment, because of, in part, her religion. Thus, she has set forth an actionable claim.

With respect to claim 1(i), we find that this claim was appropriately dismissed by the Agency. A person's vaccination status is not a protected basis under the statutes enforced by the EEOC; therefore, Complainant's claim fails to state a claim. Karolyn E. v. Dep't of Defense, EEOC Appeal No. 2022002840 (Sep. 19, 2022).

CONCLUSION

Accordingly, the Agency's final decision is AFFIRMED in part, and REVERSED in part. Claims 1(e), 1(l) are hereby remanded to the Agency for further processing in accordance with this decision and the Order below.

ORDER

The Agency is ORDERED to process claims 1(e), and 1(l) in accordance with 29 C.F.R. § 1614.204 et seq. The Agency shall acknowledge to Complainant that it has received the remanded claims within thirty calendar days (30) from the date this decision is issued. The **Agency shall hold in abeyance** these claims, along with claims 1(a), 1(b), 1(c), 1(d), 1(f), 1(g), 1(h), 1(j), and 1(k), until such time as a final determination is made on the class complaint, Agency No. 22-35, Hearing No. 570-2022-00591X. If the putative class is not certified, the Agency shall resume processing the instant complaint under 29 C.F.R. Part 1614.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting evidence, including a copy of the Agency's letter acknowledging the remanded claims.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and § 1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0920)

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 his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>. Alternatively, Complainant can submit his or her 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 his or her 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(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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 his or her 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

June 21, 2023

Date