

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-1582

ERIC FLORES,

Petitioner

v.

UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,

Respondents

ON PETITION FOR REVIEW FROM THE UNITED STATES DEPARTMENT
OF EDUCATION, OFFICE FOR CIVIL RIGHTS, DALLAS OFFICE

THE UNITED STATES DEPARTMENT OF EDUCATION'S
MOTION TO DISMISS THE PETITION FOR REVIEW
FOR LACK OF SUBJECT MATTER JURISDICTION,
MOTION TO DEFER FILING OF THE ADMINISTRATIVE RECORD, AND
MOTION TO DISMISS AS MOOT PETITIONER'S PENDING MOTION
TO PROCEED IN FORMA PAUPERIS

Petitioner Eric Flores, proceeding pro se, has petitioned this Court for review of a discretionary decision of the United States Department of Education's (Department) Office of Civil Rights (OCR). OCR's February 13, 2014, letter to Flores denied his appeal challenging OCR's dismissal of his complaints of discrimination based on, *inter alia*, race or national origin in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (Title VI). See denial

letter (Attachment A). Flores subsequently filed a motion to proceed in forma pauperis. This Court issued an order deferring consideration of Flores's application to proceed in forma pauperis pending review of the appeal on the merits.

Pursuant to Federal Rule of Appellate Procedure 27 and Fourth Circuit Local Rule 27(f), the Department respectfully moves this Court to dismiss Flores's petition for review for lack of jurisdiction because he does not have the right to seek review of OCR's decision in this Court. We also respectfully request the Court to defer the filing of the administrative record pending its resolution of our motion to dismiss the petition, and to dismiss as moot Flores's pending motion to proceed in forma pauperis. See pp. 10-11, *infra*.

BACKGROUND

1. In October 2013, OCR's Dallas Office received petitioner Eric Flores's administrative complaints in Case Nos. 06142007 and 06142015 against the University of Texas at El Paso (UTEP). Case No. 06142007 Dismissal letter 1 (Attachment B); Case No. 06142015 Dismissal letter 1 (Attachment C). In both complaints, Flores alleged that UTEP discriminated and retaliated against him on the basis of, *inter alia*, race and national origin in violation of Title VI. Case No. 06142007 Dismissal letter 1; Case No. 06142015 Dismissal letter 1. On December 4, 2013, OCR issued separate letters dismissing and closing each complaint. In

each letter, OCR stated that Flores had filed 16 OCR complaints against UTEP since 2012; that OCR dismissed several recent complaints on the ground that the allegations contained therein “were so incoherent that they were not sufficiently grounded in fact for OCR to infer that discrimination or retaliation occurred”; and that the instant complaint “consist[ed] of incoherent allegations similar to those that have been addressed and found to be without merit in previous OCR complaints.” Case No. 06142007 Dismissal letter 1; Case No. 06142015 Dismissal letter 1.

On January 16, 2014, Flores appealed OCR’s dismissal of his complaints. Denial letter 1. On February 13, 2014, the Regional Director of OCR’s Dallas Office issued a letter notifying Flores of the denial of his appeal challenging OCR’s dismissal of his complaints, and of several other complaints he had filed against UTEP. The letter stated that “the issues raised in your appeal do not warrant a change in OCR Dallas’s disposition of your case under the laws and regulations enforced by OCR.” Denial letter 1.

On June 12, 2014, Flores petitioned this Court for review of OCR’s decision dismissing his complaints. Doc: 4-1. The petition asks this Court to enjoin UTEP faculty members from using “advanced [satellite] technology” to harm Flores or his relatives; to compel the Department to issue sanctions against UTEP for noncompliance with Title VI and its implementing regulations; to instruct the

Department to admonish the Department investigator assigned to these complaints for allegedly attempting to protect UTEP employees from lawful sanctions for discriminating and retaliating against Flores; and to order the Department to refer Flores's complaints to the United States Department of Justice. Doc: 4-7 at 50-52. This Court set an informal briefing schedule for the case pursuant to Local Rule 34(b), and Flores filed an informal opening brief on July 1, 2014.

2. On June 27, 2014, Flores petitioned the D.C. Circuit for review of OCR's decision dismissing his complaint in Case No. 06142007 (Appeal No. 14-1128). The Department moved to dismiss Flores's petition for lack of jurisdiction, arguing that neither the Administrative Procedure Act (APA) nor any other statute authorizes direct appellate review of a funding agency's discretionary decision not to take enforcement action on an individual's discrimination complaint. That motion is currently pending before the D.C. Circuit.¹

¹ Flores has filed numerous petitions from adverse OCR decisions, none of which has been found to be meritorious. See *In re Eric Flores*, 519 F. App'x 150 (4th Cir. 2013) (No. 13-1331); Order, *Flores v. United States Dep't of Educ.*, No. 14-60390 (5th Cir. July 30, 2014); Order, *Flores v. United States Dep't of Educ.*, No. 13-60303 (5th Cir. July 19, 2013); Order, *Flores v. United States Dep't of Educ.*, No. 13-60078 (5th Cir. May 3, 2013); Order, *Flores v. United States Dep't of Educ.*, No. 13-1062 (per curiam) (D.C. Cir. Dec. 11, 2013); Order, *Flores v. United States Dep't of Educ.*, No. 13-1161 (per curiam) (D.C. Cir. Oct. 15, 2013).

DISCUSSION

This Court should dismiss the petition for review for lack of jurisdiction. The present petition for review for all practical purposes is nearly identical to petitions for review Flores filed in the Fifth Circuit and D.C. Circuit, which those courts have dismissed for lack of jurisdiction. See p. 4 n.1, *supra*. The Court should dismiss the pending petition for review for that same reason. As we show below, this Court lacks jurisdiction to review OCR's discretionary determination that Flores's complaints lacked allegations that were sufficiently grounded in fact for the agency to infer that discrimination or retaliation occurred or is occurring.

1. "Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 390 (4th Cir. 2004) (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)). The party claiming federal subject matter jurisdiction has the burden of proving it exists. See *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 347 (4th Cir.), cert. denied, 558 U.S. 875 (2009).

"[O]nly when a direct-review statute specifically gives the court of appeals subject-matter jurisdiction to directly review agency action' may a party seek initial review in an appellate court." *Micei Int'l v. Department of Commerce*, 613

F.3d 1147, 1151 (D.C. Cir. 2010) (quoting *Watts v. Securities & Exch. Comm'n*, 482 F.3d 501, 505 (D.C. Cir. 2007)).

2. Flores asserts that Rule 15 of the Federal Rules of Appellate Procedure provides this Court with subject matter jurisdiction over his petition for review. Doc: 4-1 at 16. It is well-settled, however, that Rule 15 does not confer jurisdiction upon the courts of appeals, but rather prescribes the procedures to be followed by courts of appeals in cases in which they are authorized by statute to review final agency decisions. See *Office of the Governor, Territory of Guam v. Department of Health & Human Servs., Admin. on Dev. Disability*, 997 F.2d 1290, 1292 (9th Cir. 1993); *Dillard v. United States Dep't of Hous. & Urban Dev.*, 548 F.2d 1142, 1143 (4th Cir. 1977) (per curiam); *Noland v. United States Civil Serv. Comm'n*, 544 F.2d 333, 334 (8th Cir. 1976) (per curiam). Flores's reliance on Rule 15 is therefore misplaced.

3. Flores is also incorrect in asserting that the APA affords this Court jurisdiction to adjudicate his petition for review. Doc: 4-1 at 20-21. The APA provides for judicial review of “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. 704. The APA, however, makes unreviewable “agency action [that] is committed to agency discretion by law.” 5 U.S.C. 701(a)(2).

a. At the outset, we note that OCR's denial of Flores's appeal is "agency action * * * committed to agency discretion by law," and is thus unreviewable under the APA. 5 U.S.C. 701(a)(2). In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Supreme Court explained that "an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)," unless the "substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 832-833. In other words, judicial "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Id.* at 830.

Nowhere in Title VI or its implementing regulations are there any substantive guidelines for the Department to follow in investigating and resolving individual discrimination complaints, or for a court to judge such actions. See 34 C.F.R. Pt. 100. Accordingly, OCR's denial of Flores's appeal challenging its decision to dismiss his complaints is a discretionary agency action for which the APA does not allow judicial review. See *Marlow v. United States Dep't of Educ.*, 820 F.2d 581, 582-583 (2d Cir. 1987) (per curiam) (no APA jurisdiction where anti-discrimination statute "provides no express guidelines for [determining liability and] neither the statute nor the regulations impose significant substantive limitations on the Department's investigation and resolution of individual

complaints of discrimination”), cert. denied, 484 U.S. 1044, and 484 U.S. 1045 (1988); cf. *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1124-1125 (6th Cir. 1996) (no jurisdiction under the APA for suit claiming that Department of Health and Human Services failed to collect specified racial data, where Title VI regulations indicated collection of such data was discretionary, not mandatory).

b. Even if OCR’s dismissal of Flores’s complaints were not considered a discretionary agency action, this Court would nonetheless lack jurisdiction to consider this petition for review. As indicated, the APA provides for judicial review of “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. 704.

Neither Title VI – nor any other statute of which we are aware – affords this Court jurisdiction to review OCR’s dismissal of Flores’s complaints.² Direct appellate review under Title VI is limited to those final agency orders “terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d-1 of this title.”

² Although Flores’s administrative complaints alleged discrimination on the basis of sex, see Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, and of age, see Age Discrimination Act of 1975, 42 U.S.C. 6101 *et seq.*, he failed to reiterate these allegations in his petition for review. Flores thus has waived these claims. See, e.g., *A Helping Hand, LLC v. Baltimore Cnty., Md.*, 515 F.3d 356, 369 (4th Cir. 2008) (“It is a well settled rule that contentions not raised in the argument section of the opening brief are abandoned.”) (emphasis omitted). In any event, these statutes afford no basis for appellate jurisdiction for essentially the same reasons that Title VI does not.

42 U.S.C. 2000d-2. By limiting direct appellate review in this fashion, Congress demonstrated an intent not to allow direct appellate review in circumstances such as this, in which individuals have filed administrative complaints with OCR alleging prohibited discrimination and are disappointed with the disposition of their complaints. Accordingly, appellate review of OCR's action is not "made reviewable by statute." 5 U.S.C. 704.

Nor is OCR's denial of Flores's appeal "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. First, OCR's dismissal of the complaints is not a "final agency action" within the meaning of the APA. Title VI's implementing regulations define this term for purposes of the APA to require a decision by a hearing examiner. See 34 C.F.R. 101.104, 101.106. The Title VI regulations further limit the opportunity for a hearing to review decisions terminating or refusing to grant or to continue federal financial assistance. See 34 C.F.R. 100.8(c), 100.9. Thus, under these Title VI regulations, only those decisions concerning the termination of, or refusal to grant or continue, federal financial assistance may constitute "final agency action" that would be subject to direct review by this Court under the APA.³

³ Because the Department is charged with enforcing Title VI, its interpretation of the statute is entitled to *Chevron* deference. *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1033 (9th Cir. 1998); *Peters v. Jenney*, 327 F.3d 307, 315-316 (4th Cir. 2003).

Moreover, OCR's dismissal of Flores's complaints is not an agency action "for which there is no other adequate remedy in a court." 5 U.S.C. 704. To the contrary, it is settled that individuals have an implied private right of action under Title VI against recipients of federal financial assistance who engage in prohibited discrimination. *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001) ("[P]rivate individuals may sue to enforce [Title VI] and obtain both injunctive relief and damages."); *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979) (same). Indeed, in a decision authored by then-Circuit Judge Ruth Bader Ginsburg, the D.C. Circuit concluded that "*Cannon* suggests that Congress considered private suits to end discrimination not merely adequate but *in fact the proper means* for individuals to enforce Title VI." *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 751 (D.C. Cir. 1990) (emphasis added). Accordingly, Flores was entitled to file a Title VI suit in district court against UTEP, but may not seek review under the APA in this Court of OCR's dismissal of his complaints.⁴

4. In the event that the Department's motion to dismiss is granted by the Court, this proceeding will be dismissed and there will be no need for the agency to prepare and file an administrative record. To avoid the expenditure of time and

⁴ The OCR letter denying Flores's administrative appeal informed him that he "may have the right to file a private suit in Federal court whether or not OCR finds a violation." Denial letter 1.

resources on a task that may prove to be unnecessary, the Department respectfully requests the Court to defer the filing of the administrative record until after it rules upon the Department's motion to dismiss. Should the Department's motion to dismiss be denied, we respectfully request that the administrative record be due 40 days from the date of the denial of the motion.

5. Flores has filed a motion to proceed in forma pauperis. See p. 2, *supra*. Because this Court lacks jurisdiction to consider the petition for review, it should dismiss this motion as moot.

6. Undersigned counsel contacted the pro se petitioner via e-mail on July 30, 2014, to ask whether he intends to oppose these motions. Petitioner's e-mail response indicated that he opposes these motions and intends to file an opposition.

CONCLUSION

For the foregoing reasons, this Court should dismiss the petition for review for lack of jurisdiction and dismiss Flores's pending motion to proceed in forma pauperis as moot. The Court should also defer the filing of the administrative record until after it rules upon the motion to dismiss.

Respectfully submitted,

JOCELYN SAMUELS
Acting Assistant Attorney General

s/ Christopher C. Wang
DENNIS J. DIMSEY
CHRISTOPHER C. WANG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-9115

Attachment A: Denial letter



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

1999 BRYAN STREET, SUITE 1620
DALLAS, TEXAS 75201-6831

REGION VI
ARKANSAS
LOUISIANA
MISSISSIPPI
TEXAS

Mr. Eric Flores
General Delivery
8401 Boeing Dr.
El Paso, TX 79910

Re: Case Nos.: 06142007, 06142015, 06132386, 06132370, 06132356,
06132324, 06132262, 06132377
University of Texas at El Paso

Dear Mr. Flores:

This is in response to your appeal dated January 16, 2014, regarding closure of the above-referenced complaints you filed against the University of Texas at El Paso.

After careful consideration, I find that the issues raised in your appeal do not warrant a change in OCR Dallas's disposition of your case under the laws and regulations enforced by OCR. Accordingly, your appeal is denied.

This concludes OCR's consideration of your appeal and is the final agency determination. Final agency determinations are not formal statements of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and are made available to the public.

You have now exhausted all avenues of review within the U.S. Department of Education regarding your above-referenced complaints and OCR's determinations. You may have the right to file a private suit in Federal court whether or not OCR finds a violation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Sincerely,

Taylor D. August
Director, Dallas Office
Office for Civil Rights

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

Attachment B: Case No. 06142007 Dismissal letter



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

1999 BRYAN ST., SUITE 1620
DALLAS, TX 75201-6810

REGION VI
ARKANSAS
LOUISIANA
MISSISSIPPI
TEXAS

December 4, 2013

Reference No: 06142007

Mr. Eric Flores
8401 Boeing Dr.
El Paso, TX 79910

Dear Mr. Flores:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), Dallas Office, has completed its evaluation of the above-referenced complaint that you filed on October 17, 2013, against the University of Texas at El Paso (UTEP), located in El Paso, Texas. Your complaint alleges that UTEP discriminated against you on the bases of race, national origin, sex, and age. You also alleged retaliation.

According to OCR's *Case Processing Manual*, OCR may close a complaint that is a continuation of a pattern of complaints previously filed by the complainant or someone other than the complainant involving the same or similar allegations against the same recipient or against another recipient that have been found to be without merit by OCR. Since 2012, you have now filed sixteen OCR complaints against UTEP. In several recent complaints (06132324, 06132335, 06132356, 06132370, and 06132377), OCR found your allegations to be without merit, dismissing them on the ground that your allegations were so incoherent that they were not sufficiently grounded in fact for OCR to infer that discrimination or retaliation occurred. Because your current complaint consists of incoherent allegations similar to those that have been addressed and found to be without merit in previous OCR complaints, OCR is dismissing your complaint and will not pursue it further. This complaint is closed, effective the date of this letter.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. You may have the right to file a private suit in Federal court whether or not OCR finds a violation.

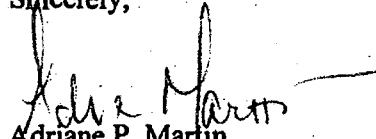
Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

Page 2 – Mr. Eric Flores

If you have any questions, you may contact Ms. Rhonda Jackson, the assigned investigator, at (214) 661-9625, or you may contact me at (214) 661-9600.

Sincerely,

A handwritten signature in black ink, appearing to read "Adriane P. Martin", with a horizontal line extending to the right.

Adriane P. Martin
Supervisory Attorney/Team Leader
Dallas Office

Attachment C: Case No. 06142015 Dismissal letter



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

1999 BRYAN ST., SUITE 1620
DALLAS, TX 75201-6810

REGION VI
ARKANSAS
LOUISIANA
MISSISSIPPI
TEXAS

December 4, 2013

Reference No: 06142015

Mr. Eric Flores
8401 Boeing Dr.
El Paso, TX 79910

Dear Mr. Flores:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), Dallas Office, has completed its evaluation of the above-referenced complaint that you filed on October 29, 2013, against the University of Texas at El Paso (UTEP), located in El Paso, Texas. Your complaint alleges that UTEP discriminated against you on the bases of race, national origin, sex, and age. You also alleged retaliation.

According to OCR's *Case Processing Manual*, OCR may close a complaint that is a continuation of a pattern of complaints previously filed by the complainant or someone other than the complainant involving the same or similar allegations against the same recipient or against another recipient that have been found to be without merit by OCR. Since 2012, you have now filed sixteen OCR complaints against UTEP. In several recent complaints (06132324, 06132335, 06132356, 06132370, and 06132377), OCR found your allegations to be without merit, dismissing them on the ground that your allegations were so incoherent that they were not sufficiently grounded in fact for OCR to infer that discrimination or retaliation occurred. Because your current complaint consists of incoherent allegations similar to those that have been addressed and found to be without merit in previous OCR complaints, OCR is dismissing your complaint and will not pursue it further. This complaint is closed, effective the date of this letter.

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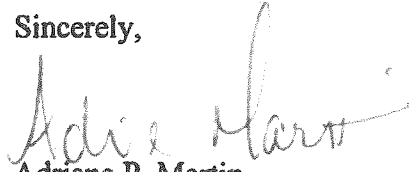
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Page 2 – Mr. Eric Flores

If you have any questions, you may contact Ms. Rhonda Jackson, the assigned investigator, at (214) 661-9625, or you may contact me at (214) 661-9600.

Sincerely,

A handwritten signature in cursive script, appearing to read "Adriane P. Martin".

Adriane P. Martin
Supervisory Attorney/Team Leader
Dallas Office

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2014, I electronically filed the foregoing THE UNITED STATES DEPARTMENT OF EDUCATION'S MOTION TO DISMISS THE PETITION FOR REVIEW FOR LACK OF SUBJECT MATTER JURISDICTION, MOTION TO DEFER FILING OF THE ADMINISTRATIVE RECORD, AND MOTION TO DISMISS AS MOOT PETITIONER'S PENDING MOTION TO PROCEED IN FORMA PAUPERIS with the Clerk of the Court using the appellate CM/ECF system.

I further certify that petitioner listed below will be served via e-mail and U.S. Mail postage prepaid at the following address:

Eric Flores
8401 Boeing Drive
El Paso, TX 79910

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney