

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-60390

ERIC FLORES,

Petitioner

v.

UNITED STATES DEPARTMENT OF EDUCATION,

Respondent

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

THE UNITED STATES DEPARTMENT OF EDUCATION'S
RESPONSE IN OPPOSITION TO PETITIONER'S
MOTION FOR INJUNCTION PENDING APPEAL

The United States Department of Education (Department) respectfully responds in opposition to petitioner Eric Flores's motion for an injunction pending appeal, pursuant to Federal Rule of Appellate Procedure 27(a)(3). In support of this response, the Department submits the following:

1. On June 4, 2014, pro se petitioner Eric Flores filed a petition for review (Pet. for Rev.) in this Court requesting review of the May 29, 2014, discretionary decision of the Department's Office of Civil Rights (OCR) dismissing and closing

his Title VI OCR complaint against the University of Texas El-Paso (UTEP). The petition asked this Court, *inter alia*, to issue a preliminary injunction prohibiting UTEP faculty members from using “advanced [satellite] technology” to cause “severe mental or physical pain * * * equivalent in intensity to organ failure or impairment of body functions” to Flores or his immediate relatives in retaliation for his “invocation of [his] constitutional rights.” Pet. for Rev. 353-354. On July 7, 2014, the Department filed in this Court a motion to dismiss Flores’s petition for lack of subject matter jurisdiction (Mot. to Dismiss), 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.

On July 14, 2014, Flores filed in this Court a motion (Mot.) he characterized as a “renewal of motion seeking relief from imminent danger such as death in the public interest of health and safety.” This motion reiterates Flores’s request that the Court preliminarily enjoin UTEP faculty members “during the pendency of the petition for review” from using “deadly technology to torture to death” Flores or his immediate relatives in retaliation for his seeking judicial review of the Department’s dismissal of his complaint. Mot. 1-2. This Court treated this motion as a motion for injunction pending appeal and ordered the Department to respond by July 28, 2014.

2. As the Department's motion to dismiss makes clear, this Court lacks jurisdiction to consider Flores's petition for review because neither the APA nor any other statute confers authority on this Court to review OCR's dismissal of Flores's complaint. This Court therefore should dismiss Flores's petition for review for lack of appellate jurisdiction, and dismiss his motion for injunction pending appeal as moot. See Mot. to Dismiss 11.

3. Alternatively, denial of Flores's motion is warranted because it fails to comply with Federal Rule of Appellate Procedure 18, which governs stays pending review of agency orders. Rule 18(a) provides that a party moving for a stay pending review of an agency order "must ordinarily move first before the agency," Federal Rule of Appellate Procedure 18(a)(1), unless it shows in its motion to the court of appeals "that moving first before the agency would be impracticable," Federal Rule of Appellate Procedure 18(a)(2)(A)(i). In addition, Rule 18(a) requires a party that has unsuccessfully moved the agency for a stay to (1) state in its motion that the party moved the agency for relief and that "the agency denied the motion or failed to afford the relief requested" and (2) provide "any reasons given by the agency for its action." Fed. R. App. P. 18(a)(2)(A)(ii). Because Flores has neither moved the Department for a stay nor shown that doing so would be impracticable, this Court should deny his motion. Cf., e.g., *Securities & Exch. Comm'n v. Dunlap*, 253 F.3d 768, 774 (4th Cir. 2001) (denying motion for

injunction pending appeal for failing to comply with similarly worded Federal Rule of Appellate Procedure 8(a) governing appeals from district court orders);

Hirschfeld v. Board of Elections, 984 F.2d 35, 38 (2d Cir. 1993) (same).

4. Procedural defects aside, Flores's motion for a stay pending review fails on the merits because it is frivolous and incredible on its face. See *Denton v. Hernandez*, 504 U.S. 25, 32-33 (1992) (court may dismiss claim as factually frivolous when its allegations are "fanciful, fantastic, and delusional" – *i.e.*, "the facts alleged rise to the level of the irrational or the wholly incredible") (internal quotation marks and citations omitted). Flores alleges in his motion that UTEP faculty members have threatened to use "deadly technology" to torture him or his immediate relatives in retaliation for his seeking judicial review of the Department's dismissal of his complaint, and that a preliminary injunction is necessary because their use of this technology to torture his grandmother to death demonstrates a "substantial likelihood" that they will carry out this threat. Mot. 2-3. This Court has previously dismissed as frivolous a pro se appeal by Flores that made similar fantastic and baseless claims. See *Flores v. United States Att'y Gen.*, 434 F. App'x 387 (5th Cir. 2011). As noted in the Department's motion to dismiss, this Court may wish to sanction Flores to preclude his future filing of such irrational claims. See Mot. to Dismiss 10-11 n.5.

For the foregoing reasons, the Department respectfully requests that this Court dismiss the petition for review for lack of appellate jurisdiction and dismiss Flores's motion for an injunction pending appeal as moot. Alternatively, if this Court elects not to decide the jurisdictional issue at this time, the Court should deny Flores's motion for injunction pending appeal.

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

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2014, I electronically filed the foregoing
THE UNITED STATES DEPARTMENT OF EDUCATION'S RESPONSE IN
OPPOSITION TO PETITIONER'S MOTION FOR INJUNCTION PENDING
APPEAL 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