

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 13-3093

JUNHAO SU,

Petitioner

v.

UNITED STATES DEPARTMENT OF EDUCATION,
OFFICE FOR CIVIL RIGHTS, REGION XV,

Respondent

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

THE UNITED STATES DEPARTMENT OF EDUCATION'S
MOTION TO DISMISS THE PETITION FOR REVIEW
FOR LACK OF SUBJECT MATTER JURISDICTION

Petitioner Junhao Su, proceeding *pro se*, has petitioned this Court for review of a Reconsideration Letter dated December 5, 2012, issued by the United States Department of Education's (Department) Office of Civil Rights, Region XV (OCR). The Reconsideration Letter denied reconsideration of OCR's dismissal of Su's complaint filed pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (Title VI). See Reconsideration Letter (Attachment A). Pursuant to Federal Rule of Appellate Procedure 27 and Circuit Rule 27(d), the Department

respectfully moves this Court to dismiss Su's petition for review for lack of jurisdiction, because he does not have the right to seek review of the Reconsideration Letter in this Court.

BACKGROUND

On January 26, 2012, Junhao Su filed with OCR an administrative complaint against Bowling Green State University (Bowling Green). Su alleged that Bowling Green discriminated and retaliated against him based upon his Chinese national origin in violation of Title VI and its implementing regulation, 34 C.F.R. Part 100, which prohibit discrimination by recipients of federal financial assistance on the basis of race, color, or national origin.¹ On April 12, 2012, OCR completed its evaluation of Su's complaint and issued a Dismissal Letter. OCR determined that Su's allegations of harassment and retaliation during 2008 were untimely. In addition, OCR determined that Su's allegations of retaliation in 2011 did not provide sufficient information to initiate an investigation. Dismissal Letter 2-3 (Attachment B).

¹ The relevant Title VI regulation prohibits recipients of federal financial assistance from engaging in intimidating or retaliatory acts against any person for the purpose of interfering with any right or privilege secured under the regulation, or because the person has made a complaint or participated in any manner in an investigation or proceeding brought pursuant to the regulation. See 34 C.F.R. 100.7(e).

On May 18, 2012, Su wrote a letter to OCR requesting reconsideration of its dismissal of his complaint. Reconsideration Letter 1. On December 5, 2012, OCR issued a Reconsideration Letter denying Su's request. Reconsideration Letter 2. On January 25, 2013, Su petitioned this Court for review of the Reconsideration Letter. He tendered an informal opening brief on February 27, 2013.

DISCUSSION

This Court should dismiss the petition for review for lack of jurisdiction. Petitioner has cited no authority that authorizes direct appellate review of a funding agency's finding of insufficient evidence that a recipient of its financial assistance discriminated or retaliated against an individual in violation of Title VI. As we demonstrate below, no such authority exists.

1. "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Ibid.* (citations omitted). "[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. SEC, 482 F.3d 501, 505 (D.C. Cir. 2007)). Su does not attempt to satisfy his burden to show that this Court possesses jurisdiction over his petition for review, and such an attempt would be futile.

2. First, Title VI does not afford this Court jurisdiction to review the Reconsideration Letter. 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.” 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 or retaliation and are disappointed with the disposition of their complaints.

This does not mean, however, that such individuals have no opportunity for judicial resolution for their claims of prohibited discrimination or retaliation by recipients of federal financial assistance. It is settled that these persons have an implied private right of action under Title VI against recipients of federal financial assistance who engage in such prohibited conduct. *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001) (“Private individuals may sue to enforce [Title VI] and obtain both injunctive relief and damages.”); *Cannon v. University of Chi.*, 441 U.S. 677, 703 (1979) (same). Because aggrieved individuals may bring civil actions under

Title VI against recipients of federal financial assistance who engage in prohibited discrimination or retaliation, Congress reasonably limited direct appellate review under Title VI to those final agency decisions “terminating or refusing to grant or to continue financial assistance.” 42 U.S.C. 2000d-2. Accordingly, Title VI does not provide this Court jurisdiction to review the Reconsideration Letter.

3. Su also does not have a right to appellate review of the Reconsideration Letter pursuant to the Administrative Procedure Act (APA). 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 the Reconsideration Letter is “agency action * * * committed to agency discretion by law,” and 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. Part 100. Accordingly, OCR's determination that Su failed to present sufficient evidence warranting reconsideration of its dismissal of his complaint 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 (1988); cf. *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1124-1125 (6th Cir. 1996) (no jurisdiction under the APA for suit claiming that HHS failed to collect specified racial data, where Title VI regulations indicated collection of such data was discretionary, not mandatory).

b. Even if the Reconsideration Letter were not considered a discretionary agency action, this Court would nonetheless lack jurisdiction to consider Su's petition for review. 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.

As indicated above, Title VI does not provide for direct appellate review of rulings like the Reconsideration Letter at issue here, and we are aware of no other statute that does. Thus, appellate review of the Reconsideration Letter is not “made reviewable by statute.”

Nor is the Reconsideration Letter “final agency action for which there is no other adequate remedy in a court.” First, the Reconsideration Letter is not “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.²

Moreover, the Reconsideration Letter is not an agency action “for which there is no other adequate remedy in a court.” As indicated (p. 4, *supra*), *Cannon*

² 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).

established the “other adequate remedy” of a civil action against the discriminating funding recipient. 441 U.S. at 703; see also *Garcia v. Vilsack*, 563 F.3d 519, 523 (D.C. Cir. 2009) (“Relief * * * will be deemed adequate ‘where there is a private cause of action against a third party otherwise subject to agency regulation.’”) (quoting *El Rio Santa Cruz Neighborhood Health Ctr. v. United States Dep’t of Health & Human Servs.*, 396 F.3d 1265, 1271 (D.C. Cir. 2005)), cert. denied, 130 S. Ct. 1138 (2010). 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). See also *Jersey Heights Neighborhood Ass’n v. Glendening*, 174 F.3d 180, 191-192 (4th Cir. 1999) (same). Accordingly, Su was entitled to file a Title VI suit in district court against Bowling Green, but may not seek review under the APA in this Court of the Reconsideration Letter’s denial of his request for reconsideration of OCR’s dismissal of his Title VI complaint.

CONCLUSION

For the foregoing reasons, this Court should dismiss the petition for review for lack of jurisdiction.³

Respectfully submitted,

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Assistant Attorney General

s/ Christopher C. Wang
DENNIS J. DIMSEY
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³ This Court should also dismiss as moot all of Su's pending motions.

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2013, 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 with the Clerk of the Court using the appellate CM/ECF system.

I further certify that petitioner Junhao Su is being served via e-mail pursuant
to Federal Rule of Appellate Procedure 25(c)(1)(D).

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney

Attachment A: Reconsideration Letter



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION XV

600 SUPERIOR AVENUE EAST, SUITE 750
CLEVELAND, OH 44114-2611

REGION XV
MICHIGAN
OHIO

DEC 05 2012

Mr. Junhao Su
P.O. Box 1261
Mount Vernon, Illinois 62864

Re: Case No. 15-12-2045
Bowling Green State University

Dear Mr. Junhao Su:

This is in response to your letter to the Director of the Cleveland Office for Civil Rights (OCR), U.S. Department of Education, dated May 18, 2012, requesting reconsideration of the dismissal of the above-referenced complaint against Bowling Green State University (the University).

Your complaint, filed on January 26, 2012, alleged that the University discriminated against you by subjecting you to harassment on the basis of your national origin (Chinese) between 2006-2009 and retaliated against you in 2008 and 2011 after you complained about the national origin harassment in 2008.

By letter dated April 12, 2012, OCR Cleveland dismissed your harassment allegations and retaliation allegation with respect to 2008, on ground that they were not timely filed and because you did not provide a sufficient reason to warrant a waiver of OCR's 180-day timeliness requirement. OCR also dismissed your retaliation allegation pertaining to 2011 for failure to raise an inference that retaliation occurred or may have occurred.

In your request for reconsideration, you assert that OCR failed to include factual information in the letter, incorrectly analyzed the facts, and applied an inappropriate legal standard.

For the reasons set forth below, your request for reconsideration is denied.

In reviewing appeals, I determine whether OCR analyzed the facts of the case correctly and/or applied the correct legal standard in reaching its conclusion.

In your request for reconsideration, you contend that you provided sufficient information of discrimination that occurred within 180 days of your filing your OCR complaint. In the alternative, you contend that you should have been granted a waiver because you further contend that you filed an internal grievance with the University in 2008; that you provided facts to show that the discrimination was ongoing; that you were hospitalized for an undisclosed period of time in 2010 after your alleged constructive discharge from the University and continue to receive counseling for depression and anxiety; and that lawyers and/or medical practitioners that you consulted provided you with incorrect legal advice.


Under Section 107 of the OCR's Case Processing Manual (CPM), complainants may be granted a waiver of the 180-day filing requirement in certain, limited circumstances when good cause can be shown as to why the complainant was unable to timely file their complaint allegations. I do not find that to be the case here.

Based on my analysis of your arguments and review of the record, I find that OCR Cleveland's determination to deny your waiver request and dismiss your case was consistent with the laws and regulations enforced by OCR and its case processing procedures.

This concludes OCR's consideration of your request for reconsideration and constitutes 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. I regret that the Department will not be able to assist you further in this matter.

Sincerely,

A handwritten signature in black ink that reads "Catherine D. Criswell" followed by a slanted line and the letters "for".

Catherine D. Criswell
Director

Attachment B: Dismissal Letter



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION XV

600 SUPERIOR AVENUE EAST, SUITE 750
CLEVELAND, OH 44114-2611

REGION XV
MICHIGAN
OHIO

APR 12 2012

Mr. Junhao Su
P.O. Box 1261
Mount Vernon, Illinois 62864

Re: OCR Docket #15-12-2045

Dear Mr. Su:

This letter is to notify you of the disposition of the complaint that you filed with the U.S. Department of Education, Office for Civil Rights (OCR), against Bowling Green State University (the University) on January 26, 2012. Based on your complaint, and the information you provided subsequent to your complaint, you are alleging that the University discriminated against you based on national origin (Chinese) and retaliated against you. Specifically, you are alleging the following.

1. Two University instructors subjected you to harassment based on your national origin between 2006 and 2010.
2. The University retaliated against you in 2008 when it required you to complete your course of study on campus, rather than online, after you complained of national origin harassment.
3. The University retaliated against you in October 2011 when it required a readmission application fee of \$75 when you attempted to reenroll in the University to complete your master's degree in Leisure and Tourism.
4. The University retaliated against you in October 2011 when it informed you that you would be required to retake coursework if you reenrolled in the master's degree program.

OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and its implementing regulation at 34 C.F.R. Part 100. Title VI prohibits discrimination based on race, color, or national origin by recipients of Federal financial assistance from the Department. Title VI also prohibits retaliation against individuals who seek to enforce rights pursuant to this statute. As a recipient of Federal financial assistance from the Department, the University is subject to Title VI.

OCR notes that you filed a previous complaint against the University with OCR on September 13, 2011 (OCR Docket No. 15-11-2138). In that complaint, you also alleged retaliation and national origin discrimination. In a September 15, 2011 letter, OCR advised you that OCR's Case Processing Manual (CPM) provides that OCR will not investigate a complaint if the allegation(s) lack sufficient detail (i.e., who, what, where, when, how) for OCR to infer that discrimination on the basis of race, color, national origin, sex, disability and/or age is occurring or may have occurred within 180 calendar days prior to the date you filed the complaint. The letter further advised you that OCR may waive the 180-day period in certain limited circumstances. Accordingly, OCR asked you for clarifying information in the September 15 letter and advised you that it would close the complaint in 20 calendar days if you did not provide the information. OCR closed the complaint on October 7, 2011, because you did not respond to the request for additional information.

You filed an online complaint with OCR on January 24, 2012, along with additional information on January 25, 2011, stating that you were re-filing your original complaint and providing information in response to our September 15, 2011, letter requesting additional information. You subsequently sent OCR a series of emails that you stated supported your complaint. Additionally, Ms. Kelly McHargh, a senior attorney with OCR, contacted you by email, and spoke with you by telephone, to obtain additional clarification regarding your allegations.

You advised OCR that two University instructors harassed you based on your national origin between 2006 and 2009. You also stated that one of the University instructors stalked you when you returned to the University campus during the fall of the 2009-2010 academic year. Finally, you said that the University retaliated against you in 2011, for complaining about national origin harassment in 2008, when it advised you that there was a \$75 readmission application fee and that you needed to retake classes that you had already taken. You stated that the last time you attended the University was in 2010, more than four terms prior to your attempt to reapply to the University.

Allegations of National Origin Harassment and 2008 Retaliation

As you have been previously advised, OCR will take action only with respect to those complaint allegations that have been filed within 180 calendar days of the date of the last act of alleged discrimination unless OCR grants a waiver for good cause. OCR has determined that your allegation of national origin harassment was untimely filed as the last incident of discrimination you identified occurred during the 2009-2010 academic year. OCR has also determined that your allegation that the University retaliated against

you in 2008 was untimely filed. You requested a waiver of OCR's filing requirement with respect to both of these allegations, asserting that the University also retaliated against you in 2011. OCR has determined that your assertion regarding retaliation in 2011 does not constitute good cause for granting a waiver of OCR's filing requirement with respect to your national origin harassment allegations or your 2008 retaliation claims. OCR is therefore closing these allegations as of the date of this letter.

Allegation of 2011 Retaliation

OCR has previously advised you that, in order for OCR to proceed to complaint investigation, OCR must be able to infer from the information you provide that discrimination or retaliation is occurring or may have occurred within 180 calendar days from the date of filing. In order for OCR to proceed to investigate a claim of retaliation under Title VI, the complainant must provide information that an individual engaged in an activity protected by Title VI (e.g., the complainant asserted rights under Title VI or participated in a complaint regarding Title VI); the recipient institution had notice of the protected activity; and the recipient institution engaged in an adverse action against the individual because she engaged in that protected activity. In order for OCR to infer that a recipient institution engaged in an adverse action, the information provided by the complainant must indicate that the alleged adverse action significantly disadvantaged an individual's status as a student; adversely affected the individual's ability to gain the benefits of the recipient's program; or reasonably acted as a deterrent to further protected activity.

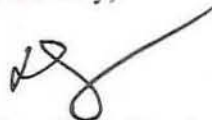
OCR has determined that the information you provided is insufficient to allow OCR to infer that the University is retaliating, or may have retaliated against you in 2011. Although OCR has determined that your 2008 complaint regarding national origin harassment constitutes a protected activity for the purposes of Title VI, OCR is unable to infer that the University's readmission application fee constitutes an adverse action. OCR has reviewed the University's readmission policy and found that students seeking readmission who have had no registration activity for four or more terms (including summer) must reapply to the Graduate College before continuing the degree program. Additionally, OCR found that the readmission policy requires all international students to pay a \$75 application fee, including those, such as yourself, who are seeking readmission after more than a four-term period of absence.

Further, the University's policy requires students to revalidate courses (i.e., retake the courses) for a master's degree program if more than six years has lapsed from the end of the earliest course. The policy also provides that courses in which the student did not receive an A, B, S, or P may not be revalidated, nor may internships, practicums, and courses taken at other institutions. In this instance, you did not allege that the University was applying this policy differently to you than to similarly situated students. Accordingly, OCR is unable to infer that the application fee or revalidation requirements are adverse actions. Accordingly, OCR is closing these allegations as of 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.

If you have any questions, you may contact Ms. McHargh, Senior Attorney, at (216) 522-2675 or at Kelly.McHargh@ed.gov.

Sincerely,

A handwritten signature in black ink, appearing to read 'Donald S. Yarab', with a long, sweeping line extending upwards and to the right.

Donald S. Yarab
Team Leader