

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
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 MOTIONS

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 May 29, 2014, letter to Flores dismissed and closed his complaint, which Flores filed pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (Title VI). See dismissal letter (Attachment A). Pursuant to Federal Rule of Appellate Procedure 27, 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 May 29 dismissal of his complaint 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, see p. 10, *infra*, and to dismiss as moot Flores's pending motions, see p. 11, *infra*.

BACKGROUND

1. On April 21, 2014, OCR's Dallas Office received Eric Flores's administrative complaint (Case No. 06142285) against the University of Texas El-Paso (UTEP). Flores alleged that UTEP discriminated and retaliated against him on the basis of, *inter alia*, race and national origin in violation of Title VI. Dismissal letter 1. On May 29, 2014, OCR dismissed and closed Flores's complaint. OCR determined that Flores had filed 23 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." Dismissal letter 1.

On June 4, 2014, Flores petitioned this Court for review of OCR's dismissal of his complaint. 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 this complaint for allegedly attempting to protect UTEP employees from lawful sanctions for noncompliance with Title VI; and to order the Department to refer Flores's complaint to the United States Department of Justice. Pet. for Rev. 353-355.

2. Prior to filing this petition for review, Flores twice petitioned this Court for review of OCR's adverse decisions on similar complaints of discrimination and/or retaliation in violation of Title VI (Case Nos. 06122112 and 06122188). In both cases, 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. This Court issued per curiam orders granting the Department's motions to dismiss.¹ See Order, *Flores v. United States Dep't of Educ.*, No. 13-60078

¹ Flores also filed a petition for writ of mandamus in the Fourth Circuit and a petition for review in the D.C. Circuit raising the same factual allegations and
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(May 3, 2013) (dismissing Case No. 06122112); Order, *Flores v. United States Dep't of Educ.*, No. 13-60303 (July 19, 2013) (dismissing Case No. 06122188).

DISCUSSION

This Court should dismiss the petition for review for lack of jurisdiction. As with the previous petitions for review Flores filed in this Court in Appeals Nos. 13-60078 and 13-60303, he has cited no authority that provides for direct appellate review of an agency's discretionary decision not to take enforcement action on an individual's discrimination complaint – in this case, its finding that the complaint lacked allegations that were sufficiently grounded in fact for the agency to infer that discrimination or retaliation occurred or is occurring. As we demonstrate below, no such authority exists.

1. “Federal courts are courts of limited jurisdiction” and “have no jurisdiction absent jurisdiction conferred by statute.” *Peoples Nat'l Bank v. Office of the Comptroller of the Currency of the U.S.*, 362 F.3d 333, 336 (5th Cir. 2004).

(...continued)

legal arguments, and requesting the same relief, as the petitions for review he filed in this Court of OCR's decision in Case No. 06122112. The Fourth Circuit denied Flores's petition for writ of mandamus. See Opinion, *In re: Eric Flores*, 519 F. App'x 150 (2013) (No. 13-1331). The D.C. Circuit dismissed Flores's petition for review on the ground of res judicata. See Order, *Flores v. United States Dep't of Educ.*, No. 13-1062 (per curiam) (Dec. 11, 2013). Flores also petitioned the D.C. Circuit for review of OCR's decision in Case No. 06122188. The D.C. Circuit granted the Department's motion to dismiss Flores's petition for review for lack of jurisdiction. See Order, *Flores v. United States Dep't of Educ.*, No. 13-1161 (per curiam) (Oct. 15, 2013).

“The party claiming federal subject matter jurisdiction has the burden of proving it exists.” *Ibid.* “[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. Pet. for Rev. 14. 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. Pet. for Rev. 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. See also *Peoples Nat’l Bank*, 362 F.3d at 336. 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 dismissal of Flores’s complaint 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 respective 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 dismissal of Flores’s 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, 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 HHS 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 complaint was not considered a discretionary agency action, this Court would nonetheless lack jurisdiction to consider Flores’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.

Neither Title VI – nor any other statute of which we are aware – affords this Court jurisdiction to review OCR’s dismissal of Flores’s complaint.² Direct appellate review under Title VI is limited to those final agency orders “terminating

² Although Flores’s administrative complaint 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 *Thuri v. Ashcroft*, 380 F.3d 788, 793 (5th Cir. 2004). In any event, these statutes afford no basis for appellate jurisdiction for the same reasons that Title VI does not.

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 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 dismissal of Flores’s complaint “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 complaint 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

Moreover, OCR’s dismissal of Flores’s complaint 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 suit in district court against UTEP asserting Title VI and Title IX allegations, but may not seek review under the APA in this Court of OCR’s

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).

dismissal of his complaint.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 resources on a task that may prove to be unnecessary, the Department respectfully requests that the deadline for filing the administrative record, which this Court set at July 14, 2014, be held in abeyance until after the Court rules upon the Department's motion to dismiss in this matter. 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. Undersigned counsel contacted the pro se petitioner via e-mail on July 2, 2014, to ask whether he intends to oppose this motion. Petitioner's e-mail response indicated that he opposes this motion and intends to file an opposition.⁵

⁴ Consistent with this view, the dismissal letter informed Flores that he "may have the right to file a private suit in Federal court whether or not OCR finds a violation." Dismissal letter 1.

⁵ As noted above (see p. 2, *supra*), Flores has filed 23 OCR complaints against UTEP since 2012. In addition (see pp. 3-4 & n.1, *supra*), he has made five previous attempts in three different federal courts of appeals to seek judicial review of OCR decisions rejecting similar complaints of discrimination and/or retaliation in violation of Title VI. Each attempt was summarily dismissed. In *Flores v. United States Attorney General*, 434 F. App'x 387, 388 (5th Cir. 2011) (*per curiam*), this Court warned Flores that "the filing of further frivolous appeals will result in sanctions" that "may include dismissal, monetary sanctions, and

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CONCLUSION

For the foregoing reasons, this Court should dismiss the petition for review for lack of jurisdiction. This Court should also dismiss as moot all of Flores's pending motions.

Respectfully submitted,

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s/ Christopher C. Wang

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restrictions on his ability to file pleadings in this court and any court subject to this court's jurisdiction." Given Flores's repeated frivolous filings, and this Court's warning in Appeal No. 11-50008, this Court may wish to consider imposing appropriate sanctions in this case.

CERTIFICATE OF SERVICE

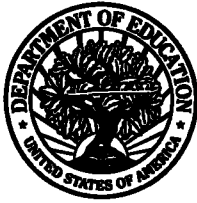
I hereby certify that on July 7, 2014, I electronically filed the foregoing THE UNITED STATES DEPARTMENT OF EDUCATION'S MOTION TO DISMISS THE PETITION FOR REVIEW FOR LACK OF SUBJECT MATTER JURISDICTION, MOTION TO DEFER FILING OF THE ADMINISTRATIVE RECORD, AND MOTION TO DISMISS AS MOOT PETITIONER'S PENDING MOTIONS 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

Attachment A: 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

MAY 29 2014

Reference No: 06142285

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 April 21, 2014, 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 twenty-three OCR complaints against UTEP. In several recent complaints (06142274, 06142267, 06142262, and 06142078), 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

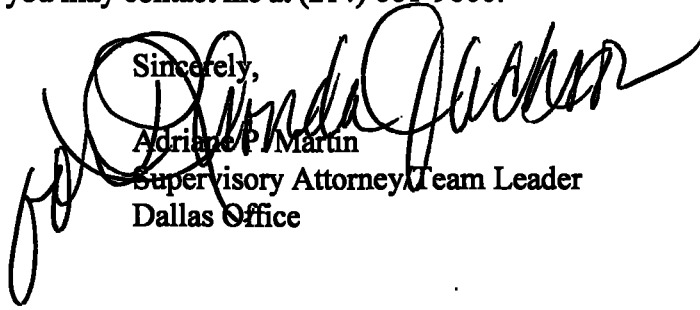
If you have any questions, you may contact Ms. Rhonda Jackson, the assigned investigator, at (214) 661-9625, or you may contact me at (214) 661-9600.

Sincerely,

Adriane P. Martin

Supervisory Attorney Team Leader

Dallas Office

A handwritten signature in black ink, appearing to read "Adriane P. Martin", is written over the typed name and title. The signature is fluid and cursive, with a large initial "A" and "M".