

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 12-0363

Laurance Kriegel and  
Kriegel, Inc.

Plaintiffs

v.

U.S. Department of Agriculture,  
Risk Management Agency,  
Farm Service Agency, and  
Office of the Assistant Secretary for Civil Rights,

Defendants

**Memorandum Opinion and Order of Dismissal**

On April 11, 2012, Laurance Kriegel and Kriegel, Inc., the Plaintiffs in this action, acting *pro se*, filed a pleading entitled “Civil Rights Violations, Equal Rights Opportunity Violations, 2009 FCIC EEO Review 2010W000084” with the Hearing Clerk’s Office of the Office of Administrative Law Judges. The pleading (a) asserts that the Plaintiffs were discriminated against on the basis of religion;<sup>1</sup> (b) requests that all previous administrative decisions be set aside and the programs be reviewed since 2003; (c) seeks a “correct” lawful program benefit payment; (d) requests that the yields on Farm 893 be raised to 1500 lbs for cotton, 200 bu. for corn, 100 bu. for wheat, 130 bu. for grain sorghum; and (e) asks for damages to be paid at four times the amount of program benefit payments not received.

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<sup>1</sup> Although Kriegel, Inc. has joined as a Plaintiff, it is difficult to comprehend how a corporation would have standing to claim religious discrimination.

A copy of the initial and subsequent pleadings were served upon the Assistant Secretary for Civil Rights (ASCR) and were advised to file a Response; however, despite the passage of significant time, no Response has been forthcoming.

The Plaintiffs filed additional submissions which were received by the Hearing Clerk on April 13, 2012 and July 26, 2012.<sup>2</sup> On August 7, 2012, Plaintiffs moved for Partial Summary Judgment specifically noting the failure on the part of the Department to respond to the action. Additional Fiduciary Violations were also submitted by the Plaintiffs and were received by the Hearing Clerk on September 4, 2012.

While I find the Government's failure to respond in this action both inappropriate and disturbing, a Response from the ASCR is not essential as the record is nonetheless sufficient to proceed to disposition without his input.

Provisions similar to those contained in the Federal Rules of Civil Procedure requiring articulation of grounds for the court's jurisdiction,<sup>3</sup> are found in §1.135(a) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings before the Secretary of Agriculture, 7 C.F.R. §1.135(a). That section requires a complaint (or other pleading initiating an action) to "state briefly and clearly the nature of the proceeding, the identification of the complainant and the respondent, **the legal authority and jurisdiction under which the proceeding is instituted**, the allegations of fact and provisions of law which constitute a basis for proceeding, and the nature of the relief sought." (Emphasis added).

Part 15d of 7 C.F.R. sets forth the nondiscrimination policy of USDA regarding programs or activities in which agencies of USDA provide benefits directly to persons,

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<sup>2</sup> Docket entries 3 and 4. Docket entry 4 is entitled Fiduciary Duty Violations.

<sup>3</sup> See: Civ. R. 8(a)(1), Federal Rules of Civil Procedure.

and establishes the process for administrative review of complaints of discrimination. 7 C.F.R. §15d.1. Individuals who believe that they have been subjected to discrimination on the grounds of race, color, religion, sex, age, national origin, marital status, familial status, sexual orientation, disability, or financial status may file a written complaint with the Director of the Office of Civil Rights, USDA, within 180 calendar days from the date of the discrimination. 7 C.F.R. §§15d.2, and 4 (a) and (b). The Director is authorized to investigate complaints and make final determinations as to the merits of the complaint and to order corrective actions arising from the complaints. 7 C.F.R. §15d.4 (b).

Plaintiffs' allegations arguably fall within the scope of Part 15d, as their allegations of discrimination concern eligibility for benefit programs and intentional discriminatory practices by FSA and RMA employees. The prevailing regulations however do not provide the right to a hearing regarding the ASCR's conclusions, as the rules specifically state that the Office of Civil Rights "will make final determinations as to the merits of complaints. . .and as to the corrective actions required to resolve program complaints." 7 C.F.R. §15d.4(b). Congress may authorize agencies to promulgate such regulations deemed necessary to implement a statute. U.S. Const., Article I, Section 8, Clause 18. In the instant circumstances, USDA's regulations specifically vest the ASCR and not OALJ with authority to make the final determination regarding complaints of program discrimination.

Some of Petitioners' allegations may be construed to fall within the auspices of USDA's regulations implementing title VI of the Civil Rights Act of 1964 ("the Act"), as the complaints ostensibly involve programs or activities. Part 15 Subpart A prohibits

discrimination against a participant in a USDA-assisted program or activity<sup>4</sup>. 7 C.F.R. §15.3. However, the rules that apply to discrimination in federal assistance programs do not automatically provide Petitioners with the right to a hearing. The regulations authorize the ASCR to determine the manner in which complaints under this Subpart shall be investigated, and whether remedial action is warranted. 7 C.F.R. §15.6.

Nearly fifty statutes exist which expressly afford an individual or entity a hearing before an Administrative Law Judge under specific proceedings brought before the Secretary of Agriculture. (*See*: §1.131 of the Rules of Practice, 7 C.F.R. §1.131) As no action may be brought unless authorized, jurisdiction cannot be assumed absent express statutory or regulatory grant. *See: Reid v. United States*, 211 U.S. 529, 538 (1909); *Monro v. United States*, 303 U.S. 36, 41 (1938); *United States v. Sherwood*, 312 U.S. 584, 590 (1941); *United States v. Testan*, 424 U.S. 392, 399 (1976); and *Hercules, Inc. v. United States*, 516 U.S. 417, 422 (1996). In this instance, no such statutory jurisdictional basis has been identified which would entitle the Plaintiffs to the hearing they request.

In Title VII cases, Courts have generally applied the shifting burden analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a three part, burden shifting test, to determine whether there has been unlawful discrimination in a disparate treatment case. The Plaintiff bears the initial burden of making a *prima facie* showing of discrimination. The establishment of a *prima facie* case creates a presumption of discrimination. *McDonnell Douglas*, 411 U.S. at 802. At the next stage, the Agency may rebut the presumption of discrimination with a legitimate, non-discriminatory reason for

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<sup>4</sup> “Program” and “activity” are described at 7 C.F.R. § 15.2(k)(1)-(4) and a list of Federal Financial Assistance from USDA is set forth at Appendix A to Subpart A of Part 15.

its actions. At the third stage, the Complainant must persuade the fact finder that the Agency's explanation was a pretext for unlawful discrimination.

Although the Plaintiffs suggest that Section 741 provides jurisdiction, reliance upon that provision is also misplaced. While the Plaintiffs may well have observed that a number of Section 741 cases have been heard by Administrative Law Judges;<sup>5</sup> in such instances, those cases were "eligible complaints" brought under a limited waiver of the statute of limitations which were then referred to OALJ by the Assistant Secretary of Administration for USDA under 7 C.F.R. §2.24(a)(1)(F)(ix). No such referral has been made in the instant action and the ASCR retains jurisdiction of this action following any action taken by the National Appeals Division (NAD).<sup>6</sup>

In order to be eligible for consideration under § 741, a complaint must meet the following requirements:

1. Be a non-employment complaint
2. Be filed prior to July 1, 1997
3. Allege discrimination by USDA occurring between January 1, 1981 and December 31, 1996
4. Allege:
  - (a) A violation of the Equal Credit Opportunity Act (ECOA) in the administration of:
    - i. Farm Ownership Loan,
    - ii. Farm Operating Loan,
    - iii. Emergency Loan, or
    - iv. Rural Housing Loan; or
  - (b) Discrimination in the administration of a Commodity Program or Disaster Assistance Program. Eligible status areas of discrimination under § 741 are race, color, religion, national origin, sex or marital status, age.

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<sup>5</sup> Over 100 discrimination cases were heard by Administrative Law Judges from the U.S. Department of Housing and Urban Development. More recently, USDA Administrative Law Judges have heard such cases. *See: In re: Wilbur Wilkinson, ex rel. Ernest and Mollie Wilkerson*, 67 Agric. Dec. 241 (2008), *reversed by ASCR, In re Wilbur Wilkinson, et al. v. USDA*, 67 Agric. Dec. 1126 (2008); Pet. For Mandamus dismissed *sub nom. Wilkerson v. Vilsack*, 666 F. Supp 2d 118 (D.D.C. 2009); *In re: Robert A. Schwerdfeger*, 67 Agric. Dec. 244 (2008); and *Charles McDonald v. Vilsack*, 70 Agric. Dec. \_\_\_\_ (2010).

<sup>6</sup> In the past, the ASCR has reviewed Administrative Law Judge's decisions in discrimination cases. *See, eg. In re Wilbur Wilkinson, et al. v. USDA*, 67 Agric. Dec. 1126 (2008).

Summary Judgment is appropriate if the evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The allegations in this action fulfill the initial threshold § 741 requirement of being a non-employment claim as well as the requirement of seeking relief under the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691, *et seq.* on the basis of religion, which is a protected basis; however, aside from the conclusory allegation of religious discrimination; there is no evidence which would support a *prima facie* showing of such discrimination. Rather than providing information which might meet the required burden of proof, Plaintiffs suggest that the fact finder check with the Parmer County Sheriff Office and the USDA Office of Civil Rights and Adjudication for information about any employee who may be involved in occult practices or in the practice of witchcraft.

More importantly, examination of the allegations of acts of discrimination fails to reveal any alleged discrimination within the period of time specified by § 741 of being between January 1, 1981 and December 31, 1996. Accordingly, the allegations cannot be considered under § 741 and will be dismissed.

There being no jurisdictional grant of authority to hear the action, the pleading entitled “Civil Rights Violations, Equal Rights Opportunity Violations, 2009 FCIC EEO Review 2010W000084” will be found to be jurisdictionally deficient and this action will be **DISMISSED**.

Copies of this Opinion and Order will be served upon the parties by the Hearing Clerk.

January 10, 2013

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**Peter M. Davenport**  
Chief Administrative Law Judge

Copies to: Laurance Kriegel  
Kriegel, Inc.  
Jeffrey Knishkowry, Esquire  
Dr. Joe Leonard, Jr.