FILED
United States Court of Appeals
Tenth Circuit

December 11, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JULIAN ASH,

Plaintiff - Appellant,

v.

PETE BUTTIGIEG, Secretary of U.S. Department of Transportation, et al.,

Defendants - Appellees.

No. 22-6195
(D.C. No. 5:22-CV-00371-R)
(W.D. Okla.)

ORDER

Before **TYMKOVICH**, **EID**, and **CARSON**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

Appendix B

Ash v DOT
22-6195

FILED
United States Court of Appeals
Tenth Circuit

September 27, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JULIAN ASH,

Plaintiff - Appellant,

v.

PETE BUTTIGIEG, Secretary of U.S. Department of Transportation; DOCR-EEOC, Associate Director, Equal Employment Opportunity; EMPLOYMENT AND LABOR LAW DIVISION AGC-100; OFFICE OF PERSONNEL MANAGEMENT, Appeals Officer-Retirement Services-Appeals; FEDERAL AVIATION ADMINISTRATION,

Defendants - Appellees.

No. 22-6195
(D.C. No. 5:22-CV-00371-R)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **EID**, and **CARSON**, Circuit Judges.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Appendix C

Ash v DOT
22-6195

Julian Ash appeals from the dismissal of his pro se employment action. The district court determined the action should be dismissed for lack of jurisdiction and failure to state a claim. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.[1]

I

Ash worked at the Federal Aviation Administration (FAA) until he resigned in 2018. He later filed this action, asserting claims for conspiracy under 42 U.S.C. § 1985; racketeering under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 to 1968; conspiracy to defraud the United States under 18 U.S.C. § 371; and violations of the Notification and Federal Employee Antidiscrimination and Retaliation Act (No FEAR Act), Pub. L. No. 107-174, 116 Stat. 556 (2002); the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§ 8101 to 8152; the Veterans Employment Opportunities Act (VEOA), 5 U.S.C. § 2108; Title VII, 42 U.S.C. §§ 2000e to 2000e-17; the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12112 to 12117, which the district court construed as a claim under the Rehabilitation Act, 29 U.S.C. § 794;[2] and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 to 634.

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[1] Ash filed this case in the United States District Court for the District of Columbia, which transferred it to the United States District Court for the Western District of Oklahoma.

[2] The district court explained that federal employees are excluded from the ADA and are covered instead by the Rehabilitation Act, which provides the same "substantive standards." Aplt. App. at 347 (quoting *Sanchez v. Vilsack*, 695 F.3d 1174, 1178 n.2 (10th Cir. 2012)).

The district court determined Ash asserted official-capacity claims against the agencies based on two sets of factual allegations. First, the complaint described the facts as follows:

> A Final Agency Decision for DOT Complaint No. 2019-28552-FAA-05 was secreted on 7/20/21 by the FAA's DOCR. The agency absolved itself of all reported and verified allegations of Discrimination, Retaliation, Waste, Fraud, and Abuse. The Office of Accountability took extreme measures to Avoid Acknowledgment of Whistleblower Violations that were exposed in the agency's own Report of Investigation. For ex. ROI Pg 422 of 663 HR Director states, none of my allegations were supported. However, ROI Pg 642 of 663 states: No Investigation was conducted? All allegations were dismissed based on TIMELINESS? However, ROI Pg 72 of 663 states TIMELINESS: N/A. Finally, Pg 2 of the Final Agency Decision, U.S. Supreme Court states: Reprisal Cases shall not be time barred, Conspiracy?

Aplt. App. at 13. Second, Ash attached to his complaint a final agency decision issued by the Department of Transportation (DOT), which listed nine instances of allegedly discriminatory or harassing conduct, none of which the DOT determined supported a finding of discrimination.

Given Ash's claims and allegations, the district court concluded his RICO and § 1985 claims were barred by sovereign immunity; there was no private cause of action to support his claims under § 371 and the No FEAR Act; the district court lacked jurisdiction to consider any claims covered by FECA, which Congress designated the Secretary of Labor to determine; and he failed to administratively exhaust his claims under the VEOA, Title VII, the Rehabilitation Act, and the ADEA. The district court therefore dismissed the action, and Ash appealed.[3]

[3] Appellees elected not to file a response brief.

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II

We review de novo the district court's various grounds for dismissal. *See Serna v. Denver Police Dep't*, 58 F.4th 1167, 1169-70 (10th Cir. 2023) (lack of private cause of action); *Hennessey v. Univ. of Kan. Hosp. Auth.*, 53 F.4th 516, 527 (10th Cir. 2022) (sovereign immunity); *Smith v. Cheyenne Ret. Invs. L.P.*, 904 F.3d 1159, 1164 (10th Cir. 2018) (failure to exhaust); *Tippetts v. United States*, 308 F.3d 1091, 1093-94 (10th Cir. 2002) (lack of jurisdiction over claim covered by FECA). Although we afford Ash's pro se materials a solicitous construction, *see Van Deelen v. Johnson*, 497 F.3d 1151, 1153 n.1 (10th Cir. 2007), we "cannot take on the responsibility of serving as [his] attorney in constructing arguments and searching the record," *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). Indeed, we have "repeatedly insisted that pro se parties follow the same rules of procedure that govern other litigants." *Id.* (internal quotation marks omitted).

Under Federal Rule of Appellate Procedure 28(a)(6), an appellant's opening brief must contain "a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record." Rule 28(a)(8)(A) further requires that an opening brief contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." "Consistent with this requirement, we routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief." *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007). "Issues will be

deemed waived if they are not adequately briefed." *Garrett*, 425 F.3d at 841 (brackets and internal quotation marks omitted). A generalized assertion of error without citation to supporting authority is not enough to preserve an argument for appeal. *Id.* Likewise, failing to address the district court's reasons for dismissal waives any challenge to the district court's ruling. *See Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1369 (10th Cir. 2015).

Here, even under a solicitous construction, Ash's opening brief fails to comply with our appellate rules. The first five pages of his brief appear to argue the merits of some of his claims. For example, on page 3 he writes:

> Claim 2: Failure To Investigate and Failure to take Appropriate Action
> Element 3: HR Director's email to EEOC dated 12/11/19 states:
> HR Director wasn't willing to discuss Plaintiff's concerns on 11/16/18.
> Claims: Allegations were investigated immediately and determined all allegations were Plaintiff's own feelings and not shared by staff.

Aplt. Br. at 3 (bold font and underlining omitted). We do not know what to make of these statements. We cannot tell what "Claim 2" refers to because the complaint did not delineate the claims by number. The complaint merely set forth the statutes Ash alleged were violated, *see* Aplt. App. at 11, and the district court identified his claims by reference to those statutory provisions. Moreover, Ash's appellate brief offers no factual background or legal authority from which we might discern which claim or issue his statements are intended to address.[4] At bottom, these and similar statements in Ash's

[4] Ash attempts to incorporate what he says is the factual background for his claims by reference to a district court pleading. But this is not an acceptable appellate practice because it circumvents the page limitations for appellate briefs and

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brief are undeveloped and untethered to the district court's reasons for dismissal, and we decline to consider them further. *See Nixon*, 784 F.3d at 1369; *Garrett*, 425 F.3d at 841.

Turning to page 5 of Ash's brief, he quotes a footnote from the district court's discussion of his § 1985 claims. *See* Aplt. Br. at 5 (quoting Aplt. App. at 342 n.3). This might signal he intended to challenge the district court's dismissal of those claims, but again, he provides no argument or authority explaining whether the district court erred in dismissing those claims based on sovereign immunity. Instead, without explanation, he questions FAA policies and practices regarding discrimination and the "solicitation of extremist activity," Aplt. Br. at 5, and then quotes the Fourteenth Amendment. Again, these undeveloped statements do not address the district court's rationale for dismissing his § 1985 claims, and they are inadequate to invoke our appellate review. *See Nixon*, 784 F.3d at 1369; *Garrett*, 425 F.3d at 841.

Next, on pages 6 and 7 of his appellate brief, Ash references the FECA and argues that the Department of Justice "has jurisdiction over a FECA Felony." Aplt. Br. at 6. But the district court did not address whether the Department of Justice has jurisdiction over FECA claims. The district court determined it lacked jurisdiction to consider a claim covered by FECA. To the extent Ash intended to challenge that ruling, his argument is unavailing. *See* 5 U.S.C. § 8145 ("The Secretary of Labor shall administer, and decide all questions arising under, [FECA]."); *Tippetts*, 308 F.3d at 1094 ("If a claim is covered by the FECA, the court is without jurisdiction to consider its merits.").

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complicates our judicial responsibilities. *See Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 623-24 (10th Cir. 1998).

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Finally, pages 9 and 10 of Ash's brief cite several regulatory provisions that ostensibly set forth the exhaustion requirements for bringing Title VII, Rehabilitation Act, and ADEA claims. Once again, however, Ash fails to develop any argument explaining how these regulatory provisions indicate the district court erred in concluding that he did not exhaust his administrative remedies. Ash does not even mention the district court's decision, let alone tell us how the district court's reasoning was flawed. And it is not our role to craft arguments on his behalf. *See Garrett*, 425 F.3d at 841. By failing to put forth any developed argument challenging the district court's exhaustion analysis, Ash has waived appellate review of that analysis. *See Nixon*, 784 F.3d at 1369; *Garrett*, 425 F.3d at 841.[5]

III

Accordingly, the district court's judgment is affirmed.

Entered for the Court

Timothy M. Tymkovich
Circuit Judge

[5] Ash references additional regulatory and statutory provisions in his brief, as well as other legal authorities, but none are accompanied by adequately developed legal arguments relevant to the district court's disposition. We have not expressly discussed each and every issue and statement contained in Ash's brief, but we have considered them and conclude they are insufficiently developed for purposes of invoking appellate review. *See Nixon*, 784 F.3d at 1369; *Garrett*, 425 F.3d at 841.

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UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

September 27, 2023

Julian Ash
402 East Timonium Road
Timonium, MD 21093

RE: 22-6195, Ash v. Buttigieg, et al
Dist/Ag docket: 5:22-CV-00371-R

Dear Appellant:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Robert Don Evans Jr.
Alison Spurlock

CMW/djd

Appendix C

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

JULIAN ASH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. CIV-22-371-R**
	)	
PETE BUTTIGIEG, SECRETARY OF THE U.S. DEPARTMENT OF TRANSPORTATION, et al.,	)	
	)	
Defendants.	)	

ORDER

Before the Court is Defendants' Motion to Dismiss (Doc. No. 29), Plaintiff's Motion for Summary Judgment & Response for Motion to Dismiss (Doc. No. 30), Defendants' Motion to Strike Plaintiff's Motion (Doc. No. 31), "Plaintiff's Opposition for Motion to Strike" (Doc. No. 32), "Plaintiff's Response for Motion to Dismiss" (Doc. No. 33), Plaintiff's Motion for Summary Judgment (Doc. No. 34), Defendants' Reply in Further Support of their Motion to Strike (Doc. No. 35), and Defendants' Reply in Support of their Motion to Dismiss (Doc. 36). Upon consideration of the parties' filings, the Court GRANTS Defendants' Motion to Dismiss (Doc. No. 29) and DENIES all subsequently filed motions (Doc. Nos. 30-36).

On or about December 1, 2018, Plaintiff Julian Ash resigned from his position as a Human Resources Specialist at the Federal Aviation Administration ("FAA") in Oklahoma City, Oklahoma. He filed this action in the District of Columbia, *pro se*, seeking damages for alleged employment discrimination and retaliation based on his race, color, sex, age,

and disabilities.[1] (Doc. No. 1, at 4). Among other forms of relief, Plaintiff requests that the Court award him more than four hundred million dollars in damages, a new house built on forty acres of land, and an annual "Leadership Legacy Award given in [his] name for Dedication of Service and exposing this Conspiracy." (Doc. No. 1, at 6). In support of his Complaint, Plaintiff has attached (1) the Final Agency Decision by the U.S. Department of Transportation ("DOT") from his Equal Employment Opportunity ("EEO") complaint in which the agency found that Mr. Ash suffered no discrimination as to nine alleged incidents (Doc. No. 1, at 7-15), and (2) a short statement of the facts of this case alleging that:

> The Office of Accountability took extreme measures to Avoid Acknowledgement of Whistleblower Violations that were exposed in the agency's own Report of Investigation. For ex. ROI Pg 422 of 663 HR Director states, none of my allegations were supported. However, ROI Pg 642 of 663 states: No Investigation was conducted? All allegations were dismissed based on TIMELINESS? However, ROI Pg 72 of 663 states TIMELINESS: N/A. Finally, Pg 2 of the Final Agency Decision, U.S. Supreme Court states: Reprisal Cases shall not be time barred, Conspiracy?

(Doc. No. 1, at 5). This case was transferred to the Western District of Oklahoma (*See* Doc. No. 21). Defendants move to dismiss all claims. (*See* Doc. No. 29).

At the outset, the Court notes that Plaintiff has identified four Defendants—one by name, the remainder by email address or office title—without specifying the capacities in which they are sued. (*See* Doc. No. 1, at 2). After examining the course of proceedings and type of relief requested, the Court finds that Plaintiff intended to sue Pete Buttigieg (Secretary of the DOT), "DOCR-EEOC-HearingandAppealCorrespondence@dot.gov,"

[1] Because Mr. Ash is a *pro se* litigant, the Court affords his materials a liberal construction, but it does not act as his advocate. *See United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009).

the "Employment and Labor Law Division, AGC-100," and the "Office of Personnel Management" in their official capacities. (Doc. No. 1, at 2); *see Kolar v. Sangamon Cnty. of State of Ill.*, 756 F.2d 564, 568–69 (7th Cir. 1985) ("If a plaintiff intends to sue public officials in their individual capacities or in both their official and individual capacities, he should expressly state so in the complaint.") (internal citations omitted). The fact that three of the four Defendants were unidentified by name suggests an intent to sue them in their official capacities. Moreover, there appears to be no evidence implying that Pete Buttigieg—the only Defendant identified by name—has any knowledge or personal involvement in this matter. Accordingly, the Court construes this lawsuit as proceeding against Defendants solely in their official capacities.

In support of his Complaint, Plaintiff cites to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68; the Ku Klux Klan Act of 1871, 42 U.S.C. § 1985; conspiracy under 18 U.S.C. § 371; the No FEAR Act, 5 U.S.C. § 2301; the Federal Employees' Compensation Act ("FECA"); the Veterans Employment Opportunities Act ("VEOA"), 5 U.S.C. §§ 3300a-3300c; Title VII of the Civil Rights Act of 1964 ("Title VII"); the Americans with Disabilities Act of 1990 ("ADA"); and the Age Discrimination in Employment Act of 1987 ("ADEA"). (Doc. No. 1, at 3). Defendants seek dismissal of all claims asserting a variety of arguments.[2]

[2] The Court groups and addresses Plaintiff's claims in the following order to provide clarity.

I. Sovereign Immunity

Claims brought under RICO and 42 U.S.C. § 1985(3) for damages against government officials require a waiver of sovereign immunity. *See Land v. Dollar*, 330 U.S. 731, 738 (1947) (stating that a suit is against the sovereign, and thus barred, if "the judgment sought would expend itself on the public treasury or domain"). This is because a claim against a federal officer in his official capacity "is really a claim against the government that employs that officer." *Strepka v. Miller*, 28 F. App'x 823, 828 (10th Cir. 2001) (citing *Myers v. Okla. County Bd. of County Com'rs*, 151 F.3d 1313, 1316 n.2 (10th Cir. 1998)). "A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)).

a. Racketeer Influenced and Corrupt Organizations Act (RICO)

To bring a civil claim against a federal agency under RICO, the United States must agree to waive sovereign immunity. *See, e.g., Hoffmeister v. United Student Aid Funds, Inc.*, 818 F. App'x 802, 807 (10th Cir. 2020) ("[W]e've held that RICO did not expressly waive sovereign immunity.") (citing *Weaver v. United States*, 98 F.3d 518, 520 & n.2 (10th Cir. 1996) (concluding that RICO did not expressly waive sovereign immunity)). Plaintiff incorrectly asserts that Defendants have "claim[ed] RICO . . . should be dismissed for lack of Subject Matter Jurisdiction." (Doc. No. 30, at 8; Doc. No. 33, at 4). Defendants' argument rests on sovereign immunity, not subject-matter jurisdiction. (*See* Doc. No. 29, at 4-5). Plaintiff has provided no evidence to suggest that the United States has waived

sovereign immunity as to his RICO claim. Accordingly, the Court dismisses his RICO claims with prejudice for failure to plead a waiver of sovereign immunity.

b. Conspiracy under 42 U.S.C. § 1985(3)

Individuals injured by a conspiracy have a private right of action to recover damages under 42 U.S.C. § 1985(3). To successfully bring a § 1985(3) claim for damages against a government officer in his official capacity, sovereign immunity must be waived. *See Fay v. United States*, 389 F App'x 802, 803-04 (10th Cir. 2010) (stating that claims under § 1985 "are barred by sovereign immunity.") (citations omitted). Furthermore, the claimant is required to "allege that defendants conspired to deprive him of equal protection or equal privileges and immunities." *Strepka*, 28 F. App'x at 829. These claims "cannot stand on 'vague and conclusory allegations'; but rather, 'must be pled with some degree of specificity.'" *O'Connor v. St. John's College*, 290 F. App'x 137, 141 (10th Cir. 2008) (quoting *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 832 (6th Cir. 2007)).

In the present matter, Mr. Ash alleges that he is the victim of a conspiracy. (Doc. No. 1, at 3-6). His claims are based on: (1) a DOT Report allegedly confirming that his allegations of discrimination were never investigated; and (2) the DOT's decision to dismiss several allegations of discrimination for exceeding statutory time limits. (Doc. No. 1, at 5). Not only does Plaintiff fail to plead a waiver of the United States' sovereign immunity, but he neglects to allege involvement by any Defendant in the claimed conspiracy. Although he cites discrimination based on race, color, gender/sex, age, and disability, he fails to sufficiently allege race or class-based animus on the part of the DOT

or its employees. (Doc. No. 1, at 4-5). The fact that Mr. Ash's alleged offenders were "All White" and "All Women" is not sufficient to establish a conspiracy to discriminate against him based on his color, gender, or sex. (Doc. No. 1, at 4). Additionally, the "KKK Issue[,]" cited as the basis of his racial discrimination claim, is offered without explanation.[3] (Doc. No. 1, at 4). In short, the United States has not waived sovereign immunity, and Plaintiff's claims are conclusory and lack specificity. Accordingly, his conspiracy claims under 42 U.S.C. § 1985(3) are dismissed with prejudice.[4]

II. Failure to Plead a Cause of Action

a. Conspiracy under 18 U.S.C. § 371

Citing conspiracy, Plaintiff seeks relief pursuant to 18 U.S.C. § 371. Under § 371, conspiracy to defraud or commit an offense against the United States is punishable by a fine and imprisonment. Section 371 is a criminal statute—it does "not provide for a private right of action." *Andrews v. Heaton*, 483 F.3d 1070, 1076 (10th Cir. 2007) (citing *United States v. Claflin*, 97 U.S. 546, 547 (1878) ("That act contemplated a criminal proceeding,

[3] The Court notes that Plaintiff attached a Department of Labor (DOL) "Notice of Decision" in a response to a prior motion to dismiss before the United States District Court for the District of Columbia (Doc. No. 17) in which the DOL found that Plaintiff's allegation of seeing "someone drive through one of the gates at the Aeronautical Center with a license plate inscribed, 'TX KKK'" did not occur. (Doc. No. 17-1, at 29). This Court, however, has not been provided an explanation as to (1) whether Mr. Ash is referring to the same event in the Complaint, and, if so, (2) how Mr. Ash was discriminated against by the FAA as a result of this alleged incident.

[4] Defendants argue that Plaintiff is preempted from stating a claim under § 1985(3) because his employment discrimination claims must proceed via Title VII. (*See* Doc. No. 29, at 8). The Court does not address the merits of this argument as Plaintiff's § 1985(3) claim is barred for failure to plead a waiver of sovereign immunity.

and not a civil action . . . . It is obvious, therefore, that its provisions cannot be enforced by any civil action . . . .") (further citations omitted)). Consequently, Plaintiff's claims under 18 U.S.C. § 371 are dismissed with prejudice for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

b. No FEAR Act

The No FEAR Act holds federal agencies accountable for violations of antidiscrimination and whistleblower protection laws by requiring them to regularly report employment discrimination data. No FEAR Act of 2002, Pub. L. No. 107-174, 116 Stat. 566; *see also* 29 C.F.R. §§ 1614.701-707. The Act does not, however, create a private cause of action or substantive rights for litigants to pursue damages against the federal government, its officers, or employees. *See, e.g., Glaude v. United States*, 248 F. App'x 175, 177 (Fed. Cir. 2007) ("[The] Act does not create a substantive right for which the government must pay damages . . . ."); *Mallard v. Brennan*, No. 1:14-CV-00342-JAW, 2015 WL 2092545, at *9 (D. Me. May 5, 2015) ("The cases the Court has found uniformly conclude that the NO FEAR Act does not create any private cause of action or substantive rights.").

To support his claims under the No FEAR Act, Plaintiff cites to the U.S. Equal Employment Opportunity Commission ("EEOC") website which states that the Office of Personnel Management ("OPM") is authorized "to issue rules regarding an agency's obligation to: 1) reimburse the Judgment Fund for payments made to employees, former employees, and applicants, because of actual or alleged violations of Federal

antidiscrimination laws, whistleblower protection laws, and retaliation claims."[5] (Doc. No. 30, at 10; Doc. No. 33, at 6-7). This language refers to the OPM's rulemaking authority—it does not recognize a private cause of action under the No FEAR Act. Accordingly, the Court dismisses Plaintiff's No FEAR Act claims with prejudice pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

III. Federal Employees' Compensation Act (FECA)

Plaintiff cites FECA, an act providing compensation benefits for work-related injuries or illnesses, as a basis for his employment discrimination claims. 5 U.S.C. § 8101 *et seq*. Under FECA, "injured federal employees seeking compensation from the United States must file a written claim with the Secretary of Labor, as provided in 5 U.S.C. § 8121." *Wideman v. Watson*, 617 F. App'x 891, 894 (10th Cir. 2015) (emphasis omitted). Congress designated the Secretary of Labor to "administer, and decide all questions arising under, [FECA]." 5 U.S.C. § 8145. Consequently, courts are without jurisdiction to consider the merits of a FECA claim. *See* 5 U.S.C. § 8128; *see also Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 90 (1991) ("FECA contains an 'unambiguous and comprehensive' provision barring any judicial review of the Secretary of Labor's determination of FECA coverage.") (quoting *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 780, and n.13 (1985); *see also Tippetts v. United States*, 308 F.3d 1091, 1094 (10th Cir. 2002) ("If a claim is covered by the FECA, the court is without jurisdiction to consider its merits.").

[5] Questions and Answers: No FEAR Act, https://www.eeoc.gov/no-fear/questions-and-answers-no-fear-act (last visited Oct. 21, 2022).

In a response to a previous motion to dismiss before the United States District Court for the District of Columbia (Doc. No. 17), Mr. Ash attached a "Notice of Decision" in which the Department of Labor ("DOL") denied his claim for compensation because it was "not sufficient to establish that [he] sustained an injury as defined by [FECA]." (Doc. No. 17-1, at 27-32). This Court lacks jurisdiction to review the Secretary of Labor's determination of Mr. Ash's FECA coverage. Thus, the Court dismisses Plaintiff's claims under FECA with prejudice for lack of jurisdiction.

IV. Veterans Employment Opportunities Act (VEOA)

The VEOA provides certain preferences to veterans seeking federal employment and a method for redress when preference rights have been violated in hiring decisions by the federal government. *See* 5 U.S.C. § 3330a; *Kirkendall v. Dep't of Army*, 479 F.3d 830, 837 (Fed. Cir. 2007). Individuals who may qualify as "preference eligible" include: (1) veterans who served on active duty during a war and were honorably discharged from the armed forces; (2) disabled veterans; and (3) the mother or spouse of certain veterans. *See* 5 U.S.C. § 2108.

Under the VEOA, a complainant must first exhaust his administrative remedies within the DOL before he may file an appeal with the Merit Systems Protection Board (MSPB). 5 U.S.C. § 3330a(d)(1). After appealing to the MSPB, § 3330b "allows a preference eligible person, '[i]n lieu of continuing the administrative redress procedure provided under section 3330a(d) … [to] elect, in accordance with this section, to terminate those administrative proceedings and file an action with the appropriate United States district court not later than 60 days after the date of the election.'" *Conyers v. Rossides*,

558 F.3d 137, 149 (2d Cir. 2009) (quoting 5 U.S.C. § 3330b(a)). The complainant may not make such an election either "(1) before the 121st day after the date on which the appeal is filed with the Merit Systems Protection Board under section 3330a(d); or (2) after the Merit Systems Protection Board has issued a judicially reviewable decision on the merits of the appeal." 5 U.S.C. § 3330b(b).

Here, Plaintiff's claims under the VEOA fail for several reasons. First, he has not alleged that after leaving the FAA, he applied for any federal government position.[6] Second, he has not established that he is "preference eligible" under the VEOA. Third, he has not demonstrated that he exhausted his administrative remedies within the DOL, filed an appeal with the MSPB, and then elected to terminate that appeal before bringing his VEOA claim in federal court in accordance with 5 U.S.C. § 3330b(b).[7] Accordingly, the Court finds that Plaintiff has not exhausted his administrative remedies under the VEOA and dismisses his VEOA claims with prejudice for lack of jurisdiction. Furthermore, even

[6] As noted in the DOT's Final Agency Decision, Plaintiff "explain[ed] that he retired from the Agency in December 2018 and that the September 2019 non-selections were for teaching, coaching and administrative jobs with the 'YMCA.'" (Doc. No. 1, at 10). In a response to a motion to dismiss before the United States District Court for the District of Columbia (Doc. No. 17), Plaintiff included generic emails from the Oklahoma City Thunder basketball organization (Doc. No. 17-1, at 129), the YMCA (Doc. No. 17-1, at 131), and Moore Public Schools (Doc. No. 17-1, at 133) thanking him for applying to various positions. Mr. Ash has not provided this Court with evidence suggesting that any of these jobs fall under the purview of the VEOA.

[7] The Court acknowledges Plaintiff's argument that "the FAA's DOCR dismissed my case by stating it should be heard by the MSPB, with full knowledge that the MSPB had dismissed my case by stating it should be heard by the EEOC." (Doc. No. 30, at 8; Doc. No. 33, at 4), however, the Court is unaware of any evidence suggesting that the MSPB ever heard, or dismissed, his case.

if he had exhausted his administrative remedies, Plaintiff has failed to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

V. Title VII, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA)

Plaintiff claims he was the victim of employment discrimination in violation of Title VII of the Civil Rights Act of 1964, the ADA, and the ADEA. (Doc. No. 1, at 3). Title VII prohibits employment discrimination "based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). The ADA and ADEA forbid discrimination based on disabilities and age, respectively. At the outset, the Court notes that Plaintiff's discrimination claim under the ADA is misguided because federal employees are "expressly excluded from coverage under the ADA." *Padilla v. Mnuchin*, 836 F. App'x 674, 676 n.1 (10th Cir. 2020) (citing 42 U.S.C. § 12111(5)); *see Vidacak v. Potter*, 81 F. App'x 721, 723 (10th Cir. 2003) (holding that "the Rehabilitation Act is the exclusive remedy for [a United States Postal Service employee's] claim of disability discrimination."). Thus, in construing Plaintiff's *pro se* filings liberally, the Court reads Mr. Ash's ADA claims as Rehabilitation Act claims. The Rehabilitation Act maintains the same "substantive standards" as the ADA "for determining whether an individual is disabled." *Sanchez v. Vilsack*, 695 F.3d 1174, 1177 n.2 (10th Cir. 2012). "[D]ecisions under both Acts apply interchangeably." *Vidacak*, 81 F. App'x at 723 (citing *Woodman v. Runyon*, 132 F.3d 1330, 1339 n.8 (10th Cir. 1997)).

To bring a civil action under Title VII or the Rehabilitation Act, federal employees "must comply with specific administrative complaint procedures in order to exhaust their

administrative remedies." *Hickey v. Brennan*, 969 F.3d 1113, 1118 (10th Cir. 2020) (quoting *Showalter v. Weinstein*, 233 F. App'x 803, 804 (10th Cir. 2007)); *see also Ransom v. U.S. Postal Service*, 170 F. App'x 525, 527 (10th Cir. 2006) ("Federal courts do not have jurisdiction to review Title VII and ADA claims not exhausted administratively.") (citing *Annett v. Univ. of Kan.*, 371 F.3d 1233, 1238 (10th Cir. 2004)). Unlike Title VII or the Rehabilitation Act, a federal employee seeking to assert an age discrimination claim has the option to proceed via the EEOC's administrative process or "present the merits of his claim to a federal court in the first instance" by suing under the ADEA. *Stevens v. Dep't of Treasury*, 500 U.S. 1, 5–6 (1991). To sue under the ADEA, a claimant must provide the EEOC at least thirty days' notice of his intent to sue, and the alleged discriminatory incident must have occurred within 180 days of that notification. 29 C.F.R. § 1614.201. Here, Plaintiff chose to first pursue his age discrimination claims via the EEOC's administrative process.

The administrative process requires federal employees to "'initiate contact' with an Equal Employment Opportunity counselor at [their] agency 'within 45 days of the date of the matter alleged to be discriminatory'" before suing for employment discrimination or retaliation. *Green v. Brennan*, 578 U.S. 547, 549-50 (2016) (quoting 29 CFR § 1614.105(a)(1)); *see also Hickey*, 969 F.3d at 1124 (affirming dismissal of plaintiff's Title VII claims for "fail[ure] to initiate contact with an EEO counselor within forty-five days" of the discrete action of alleged discrimination). When an employee "resigns in the face of intolerable discrimination . . . the 45-day clock for a constructive discharge begins

running only after the employee resigns" beginning "when the employee gives notice of his resignation, not on the effective date of that resignation." *Green*, 578 U.S. at 550, 564.

Although failure to exhaust administrative remedies "does not bar a federal court from assuming jurisdiction over a claim," courts "must enforce this exhaustion requirement if the employer properly raises it" as an affirmative defense. *Hickey*, 969 F.3d at 1118 (quoting *Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1185 (10th Cir. 2018)) (citations omitted). In these instances, "equitable doctrines such as tolling or estoppel . . . are to be applied sparingly." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) (citing *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984) (*per curiam*) ("Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants").

Attached to Plaintiff's Complaint is the DOT's Final Agency Decision from his EEO complaint containing nine separate incidents of alleged discrimination and harassment which the Court construes as the basis for his Title VII, Rehabilitation Act, and ADEA claims herein. (Doc. No. 1, at 7-15). A finding of "no discrimination" was made by the agency as to each allegation. (Doc. No. 1, at 13). Mr. Ash claims he was subjected to discrimination and harassment when:

1. On or about January 2016, his supervisor stuck her tongue out in a sexual manner during an office party.
2. On or about September 2017, management failed to take appropriate action when he complained of a new office policy during an office meeting.
3. On September 29, 2017, his leave request was denied.
4. On or about October 3, 2017, management failed to take appropriate action when a coworker (initials L.M.) barged into the supervisor's office while he and the supervisor were meeting.

5. On or about May 2018, management failed to take appropriate action when coworker L.M. barged in late while he was conducting a student orientation and took over the presentation.
6. On or about October 2018, during an office meeting, his former supervisor (initials J.W.) pretended to skip him after asking if anyone had questions, which prompted laughter from the other employees.
7. In December 2018, he retired from the Agency and was denied social security and disability, based on false statements.
8. In September 2019, he was not selected for at least fifteen to twenty positions for which he applied.
9. On September 14, 2019, he learned that J.W. provided false statements in relation to his Worker's Compensation, that resulted in the request being denied.

(Doc. No. 1, at 7-8).[8]

a. Incidents One through Seven

Defendants contend that because Plaintiff contacted an EEO counselor on September 16, 2019, "he may only proceed in this litigation with discrete actions that occurred within a 45-day window from August 2, 2019, to September 16, 2019." (Doc. No. 29, at 12). Seven of Plaintiff's nine alleged incidents of discrimination occurred prior to August 2, 2019. Mr. Ash has provided no explanation as to why he failed to bring these allegations within the forty-five-day time limit for initiating contact with an EEO counselor which would justify an extension of time under 29 C.F.R. § 1614.105(a)(2).

Furthermore, Plaintiff has not established that the alleged incidents occurring prior to August 2, 2019, were "part of the same actionable hostile work environment practice" as those incidents allegedly occurring afterward. *Morgan*, 536 U.S. at 120; *see also Duncan*

[8] Based on the DOT's Final Agency Decision, the Court infers that Plaintiff's former supervisor "J.W." is a reference to Ms. Josephin Williams. (*See* Doc. No. 1, at 10). The Court is unable to ascertain the identity of "L.M." who is cited in Incidents Four and Five. Neither of these individuals are named as Defendants in this lawsuit.

v. Manager, Dep't of Safety, City & Cnty. of Denver, 397 F.3d 1300, 1308-14 (10th Cir. 2005) (affirming summary judgment, in part, because plaintiff was not subject to a hostile work environment). "Hostile environment claims are different in kind from discrete acts" because they involve "repeated conduct." *Morgan*, 536 U.S. at 115. In determining whether Incidents One through Seven are sufficiently related to Incidents Eight and Nine so as to constitute a hostile work environment, the Court may examine whether the "pre—and post-limitations period incidents involve[d] the same type of employment actions, occurred relatively frequently, and were perpetrated by the same managers." *Morgan*, 536 U.S. at 120 (internal quotation marks omitted). Mr. Ash claims that in September 2019, "he was not selected for at least fifteen to twenty positions for which he applied" (Incident Eight). (Doc. No. 1, at 8). The Court cannot grasp—and Mr. Ash does not explain—how his supposed non-selections for employment in September 2019 relate to alleged Incidents One through Seven occurring at the FAA from 2016 through 2018.

In Incident Nine, Mr. Ash claims that on September 14, 2019, "he learned that J.W. provided false statements in relation to his Worker's Compensation, that resulted in the request being denied." (Doc. No. 1, at 8). While these false statements might conceivably connect Incident Nine to Incident Seven, in which Plaintiff claims he was denied Social Security disability benefits "based on false statements," Mr. Ash neglects to clarify the connection. (Doc. No. 1, at 8). For example, he does not allege that the same perpetrator, Josephin Williams, provided false statements in both incidents, or that the false statements were even related. In short, Plaintiff has not demonstrated that the alleged pre-limitations period incidents (Incidents Eight and Nine), were part of a continuing discriminatory

practice related to the post-limitations period incidents (Incidents One through Seven) occurring before August 2, 2019. Accordingly, Mr. Ash's untimely Title VII, Rehabilitation Act, and age discrimination claims based on Incidents One through Seven—brought under the EEOC administrative process—are dismissed with prejudice for failure to comply with the statutorily mandated forty-five-day window for initiating contact with an EEO counselor. Mr. Ash's claims under the ADEA are dismissed with prejudice, pursuant to 29 C.F.R. § 1614.201, for failure to notify the EEOC of his intent to sue in federal court within 180 days of the alleged act of age discrimination.

a. Incident Eight

Mr. Ash claims that "he was not selected for at least fifteen to twenty positions for which he applied" in the private sector in September 2019 because of alleged "poor references" from "the Agency." (Doc. No. 1, at 10). He does not provide any evidence, however, suggesting that the DOT—or any of its employees—was ever contacted regarding his job applications. Mr. Ash resigned his position with the FAA on or about December 2018—he was not terminated. Not only does Incident Eight make no reference to Mr. Ash's race, color, religion, sex, national origin, disabilities, or age, *none* of the nine alleged incidents described in the EEO complaint make such a reference.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Absent additional facts, the Court dismisses with prejudice Plaintiff's Title VII, Rehabilitation Act, and age-discrimination claims based on Incident Eight for failure to

state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Mr. Ash's claims under the ADEA are dismissed with prejudice pursuant to 29 C.F.R. § 1614.201 for failure to notify the EEOC of his intent to sue in federal court within 180 days of the alleged act of age discrimination.

b. Incident Nine

In Incident Nine, Plaintiff alleges that he was denied workers' compensation due to false statements made by his supervisor, Josephin Williams. (Doc. No. 1, at 8). According to the Final Agency Decision, Plaintiff asserted in his EEO complaint that Ms. Williams falsely "told the Department of Labor (DOL) and the Office of Personnel Management (OMP) that she was unaware of his medical condition." (Doc. No. 1, at 11). As discussed previously, FECA governs workers' compensation claims for federal employees. 5 U.S.C. § 8101 *et seq.* Under FECA, the Secretary of Labor has exclusive jurisdiction, and his denial of payment is "(1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise." 5 U.S.C. § 8128(b). Consequently, the Court dismisses Plaintiff's Incident Nine claim with prejudice for lack of jurisdiction.

Conclusion

As set forth above, Plaintiff's claims are dismissed with prejudice. Defendants' Motion to Dismiss (Doc. No. 29) is GRANTED. All subsequently filed motions (Doc. Nos. 30-36) are DENIED. Judgment shall be entered accordingly.

IT IS SO ORDERED this 24th day of October 2022.

David L. Russell

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

JULIAN ASH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. CIV-22-371-R**
	)	
PETE BUTTIGIEG, SECRETARY OF THE U.S. DEPARTMENT OF TRANSPORTATION, et al.,	)	
	)	
Defendants.	)	

JUDGMENT

In accordance with the Court's Order entered this date, Plaintiff's action is dismissed with prejudice. Judgment in favor of Defendants.

ENTERED this 24th day of October 2022.

David L. Russell

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

JULIAN ASH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. CIV-22-371-R**
	)	
PETE BUTTIGIEG, SECRETARY OF THE U.S. DEPARTMENT OF TRANSPORTATION, et al.,	)	
	)	
Defendants.	)	

ORDER

Before the Court is Plaintiff Julian Ash's Motion for Sanctions (Doc. No. 39). His Motion—filed one day after the Court granted Defendants' Motion to Dismiss (Doc. No. 37) and entered judgment accordingly (Doc. No. 38)—provides no basis for sanctions. Therefore, the Motion (Doc. No. 39) is DENIED.

IT IS SO ORDERED this 17th day of November 2022.

David L. Russell

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

December 19, 2023

Carmelita Reeder Shinn
United States District Court for the Western District of Oklahoma
Office of the Clerk
200 NW 4th Street
Oklahoma City, OK 73102

RE: 22-6195, Ash v. Buttigieg, et al
Dist/Ag docket: 5:22-CV-00371-R

Dear Clerk:

Pursuant to Federal Rule of Appellate Procedure 41, the Tenth Circuit's mandate in the above-referenced appeal issued today. The court's September 27, 2023 judgment takes effect this date. With the issuance of this letter, jurisdiction is transferred back to the lower court.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Julian Ash
Robert Don Evans Jr.
Alison Spurlock

CMW/djd

Appendix A

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22-6195

U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
OFFICE OF CIVIL RIGHTS

JULIAN ASH, Complainant, v. FEDERAL AVIATION ADMINISTRATION U.S. DEPARTMENT OF TRANSPORTATION, Agency.	) Agency No. 2019-28552-FAA-05

FINAL AGENCY DECISION

This is the final Departmental decision in the discrimination complaint filed by Julian Ash (hereinafter the Complainant) against the Federal Aviation Administration (FAA), U.S. Department of Transportation (DOT), (hereinafter the Agency).[1] Based on the underlying record, and for the reasons set forth below, we find no discrimination in this matter.

I. CLAIMS[2]

Whether the Complainant was subjected to discrimination and harassment (sexual and non-sexual) based on disability (physical), sex, age (age-56), and in reprisal (for prior EEO activity) when:

1. On or about January 2016, his supervisor stuck her tongue out in a sexual manner during an office party.

[1] The following abbreviations apply throughout this decision. ROI = Report of Investigation; Ex(s) = Exhibit(s); SROI = Supplemental Report of Investigation; p(p). = page(s); FAD = Final Agency Decision; EEOC = U.S. Equal Employment Opportunity Commission; EEO = equal employment opportunity; OFO = EEOC's Office of Federal Operations; AJ = EEOC Administrative Judge.

[2] By decision dated August 3, 2020, several other claims were dismissed from further processing. (ROI Ex. C1) We concur with those dismissal decisions.

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2. On or about September 2017, management failed to take appropriate action when he complained of a new office policy during an office meeting.
3. On September 29, 2017, his leave request was denied.
4. On or about October 3, 2017, management failed to take appropriate action when a coworker (initials L.M.) barged into the supervisor's office while he and the supervisor were meeting.
5. On or about May 2018, management failed to take appropriate action when coworker L.M. barged in late while he was conducting a student orientation and took over the presentation.
6. On or about October 2018, during an office meeting, his former supervisor (initials J.W.) pretended to skip him after asking if anyone had questions, which prompted laughter from the other employees.
7. In December 2018, he retired from the Agency and was denied social security and disability, based on false statements.
8. In September 2019, he was not selected for at least fifteen to twenty positions for which he applied.
9. On September 14, 2019, he learned that J.W. provided false statements in relation to his Worker's Compensation, that resulted in the request being denied.

II. PROCEDURAL BACKGROUND

Date Initial Counseling Contact Occurred:	09/16/2019
Date Notice of Right to File Received:	05/27/2020
Date Formal Complaint Filed:	06/03/2020
Date Claims Accepted:	08/03/2020
Dates Investigation Conducted:	12/07/2020-01/14/2021
Date ROI Issued:	03/17/2021
Date Complainant Requested EEOC Hearing:	03/18/2021
Date Complainant Withdrew from EEOC Hearing:	03/22/2021
Date EEOC Remanded Complaint for a FAD:	04/28/2021

This decision is being issued pursuant to Title 29, Code of Federal Regulations, (C.F.R.) Part 1614.110(b).

III. PROCEDURAL DISMISSAL

A. Applicable Law

EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination be brought to the attention of the EEO Counselor within forty-five (45) days of the alleged discriminatory event, or the effective date of an alleged discriminatory personnel action. The Supreme Court of the United States has held that a complainant alleging a hostile work environment will not be time barred if all

acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period. See Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 2061, 2074 (Jun. 10, 2002). EEOC Regulation 29 C.F.R. § 1614.107(a)(2) states that an agency shall dismiss a complaint that fails to comply with the applicable time limits contained in 29 C.F.R. § 1614.105. The same regulation also states that an agency shall dismiss a complaint which raises a matter that has not been brought to the attention of an EEO Counselor, and is not like or related to a matter on which the complainant has received counseling. A later claim or complaint is "like or related" to the original complaint if the later claim or complaint adds to or clarifies the original complaint and could have reasonably been expected to grow out of the original complaint during the investigation. See Scher v. U.S. Postal Serv., EEOC Request No. 05940702 (May 30, 1995); Calhoun v. U.S. Postal Serv., EEOC Request No. 05891068 (March 8, 1990). In addition to the above dismissal reasons, the EEOC Regulations also state that the agency shall dismiss an entire complaint that fails to state a claim. See 29 C.F.R. § 1614.107(a)(1)

The Commission has determined that the acceptance of a complaint for investigation does not preclude an agency from dismissing the complaint pursuant to 29 C.F.R. § 1614.107. An agency may reject a formal complaint as procedurally defective prior to a determination on the merits, even if it has taken processing actions on the allegations up to that point. See Owens v. Dep't of the Navy, EEOC Request No. 05920648 (Jan. 14, 1993) (citing Oaxaca v. Roscoe, 641 F.2d 386, 390 (5th Cir. 1981) (In the absence of a finding of discrimination, an agency does not waive its objection to a failure to comply with prescribed time limitations by accepting and investigating a complaint.), and Hill v. Gen. Serv. Admin., EEOC Request 05890383 (Sept. 12, 1989) (The Commission finds the agency did not waive the ability to reject untimely EEO complaint allegations by investigating them.); See also Complainant v. Dep't of the Air Force, Appeal No. 0120180225 (June 11, 2019) (citing Tanski v. Def. Investigative Serv., EEOC Appeal No. 05840036 (Apr. 18, 1985) (The Commission recognizes that an agency can raise issues of timeliness at any time prior to a finding of discrimination by an Administrative Judge or the agency itself.); Grieco-Kolb v. Dep't of Transp., EEOC Appeal No. 0120090673 (Apr. 30, 2009) (Affirming the final agency decision dismissing complaint because claims were untimely raised to the attention of an EEO Counselor or not ever raised to the attention of the EEO Counselor and were not like or related to other claims that were counseled). Based on our review of the instant complaint file, we find that the complaint is procedurally defective on several fronts, and therefore, it must be dismissed.

IV. ANALYSIS

A. Failure to Raise Claims to the Attention of an EEO Counselor and Failure to State a Claim

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The Complainant alleges a pattern of harassing conduct and discrimination. The date of his EEO counselor contact was September 16, 2019. Based on the cited EEOC Regulations, he must identify a discriminatory act which occurred within the 45 days prior to that date in order to have made timely EEO Counselor Contact, otherwise the complaint should be dismissed. The Complainant must identify an event that occurred between August 2, 2019 and September 16, 2019 to demonstrate that he made timely EEO Counselor Contact regarding this complaint. The accepted allegations include two events alleged to have occurred within this time period, claims 8 and 9; however, Claim 8 was not raised with the EEO Counselor during counseling and Claim 9 constitutes an impermissible collateral attack on another forum.(ROI Exs. A1, B1, C1).

Claim 8

The EEO Counselor's Report indicates that on the Complainant sought counseling on the following issues: on September 14, 2019, he learned that his former supervisor, Josephin Williams, submitted a false statement concerning him to the U.S. Office of Workers' Compensation Programs (OWCP). The Report also includes assertions from the Complainant that his workmen's compensation benefits were denied and that Ms. Williams' "treated him like a dummy" and made sexually inappropriate gestures toward him. Claim 8 is an allegation that the Complainant was not selected for fifteen to twenty positions for which he applied in September 2019. We recognize that these non-selections could have occurred after the Complainant initiated EEO Counseling. However, the Counselor's Report indicates that counseling was completed on December 12, 2019. These non-selections are not included in the Counselor's Report as being raised by the Complainant for counseling during the period from September 16, 2019 when the EEO Counselor Contact was initiated and December 12, 2019 when counseling was completed. (ROI Ex. B1)

As noted above, if the uncounseled claims are like or related to the counseled claims, they may be considered timely counseled. In order to be deemed like or related to the issues that were raised at counseling, the September 2019 non-selections must add to or clarify the issues raised at counseling such that they could have reasonably been expected to grow out of the counseled issues. In his testimony, the Complainant explains that he retired from the Agency in December 2018 and that the September 2019 non-selections were for teaching, coaching and administrative jobs with the "YMCA." He provides no connection between his application for the YMCA jobs and any specific management official or Agency employee, except that he felt forced to list "the Agency" as a reference because his military retirement occurred in 2004. When asked why he believes "the Agency" gave him a poor reference, he answers that him receiving no response to his applications from YMCA was sufficient for him to figure out what was going on. (ROI Ex. F1)

The Complainant's explanation of what occurred does not support a determination that the 2019 YMCA non-selections add to or clarify the issues counseled; namely, the allegedly false statement from Ms. Williams in his workers' compensation proceedings, or her alleged harassing sexual and non-sexual conduct. Indeed, the Complainant did not specify that Ms. Williams was the Agency reference that he listed on his YMCA applications and Ms. Williams testified that she was not contacted for a job reference for the Complainant, as did the other Agency managers, Alison Wint and James Anderson. The Complainant does not identify anything that the YMCA told him that suggests that the YMCA received a negative reference from Ms. Williams or any Agency employee. There is no evidence in the record to show that any management official received or responded to a reference check request regarding the Complainant. (ROI, Exs. B1, F1, F2, F3, F4)

There is nothing in the record from which to draw a nexus between the counseled issues and this claim that was not raised to the EEO Counselor. As such, the claim must be dismissed under 29 C.F.R. § 1614.105 because it was not raised to the attention of an EEO Counselor and it is not like or related to the issues that were counseled. In addition, the Commission has held than an EEO complaint based merely on speculation or a hunch fails to state a claim. Complainant v. Dep't of Agric., EEOC Appeal No. 2020002373 (September 11, 2020); Complainant v. Dep't of Def., EEOC Appeal No. 0120122055 (Sep. 25, 2015). Consequently, Claim 8 is dismissed for failure to present to the attention of an EEO Counselor and failure to state a claim. The regulatory basis for this decision is found at 29 C.F.R. § 1614.107(a)(1) and 29 C.F.R. § 1614.107 (a)(2). (ROI Exs. B1, F1)

Claim 9

Turning to the other possibility of a timely claim on which to attach the other claims in this complaint, we will now consider Claim 9. The Complainant asserts that on September 14, 2019, he learned that Ms. Williams told the Department of Labor (DOL) and the Office of Personnel Management (OPM) that she was unaware of his medical condition. He asserts that Ms. Williams' statement was false and that it was a factor in his OWCP claim and disability retirement claim being denied. (ROI Exs. B1, F1)

The Commission has determined that when a complainant alleges that an agency discriminated by its actions relative to the merits of a workers' compensation claim, the complaint does not state an EEO claim. Pirozzi v. Dep' of the Navy, EEOC Appeal No. 05970146 (Oct. 23, 1998) (allegedly false statements made by agency to OWCP during OWCP's processing of a workers' compensation claim goes to the merits of compensation claim); Reloj v. Dep't of Veterans Affairs, EEOC Appeal No. 05960545 (Jun. 15, 1998) (claim that agency providing false information to the OWCP resulted in denial of benefits is a collateral attack on OWCP's decision and, thus, fails to state a claim); Hogan v. Dep't of the Army, EEOC Appeal No. 05940407 (Sept. 29, 1994) (reviewing a claim that agency officials provided

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misleading statements to OWCP would require the Commission to essentially determine what workers' compensation benefits the complainant would likely have received, which is beyond the Commission's purview). The EEOC has determined that a complaint which attempts to utilize the EEO process to influence events related to another proceeding is considered an impermissible collateral attack and fails to state a claim. See Hannon v. Dep't of the Treasury, EEOC Appeal No. 05A01149 (May 8, 2003) and Williams v. U.S. Postal Serv., EEOC Appeal No. 05990747 (Apr. 26, 2001) (affirming final agency decisions because complaints related to agency actions in the context of an OWCP process constituted collateral attacks which failed to state a claim).

Based on a review of the record, the subject of Claim 9 is the agency's action to challenge the Complainant's worker's compensation and disability retirement claims. The proper forum for the Complainant to have raised his challenges to actions which occurred during the OWCP proceeding or OPM proceeding was at those proceedings, as any remedial relief available to the Complainant would be through the OWCP or OPM process. There is no remedial relief available through the EEO complaint process. It is not permissible to attempt to utilize the EEO process to collaterally attack actions which occurred during the OWCP or OPM processes. See Cooper v. Dep't of the Army, EEOC Appeal No. 0120122536 (Oct. 10, 2012); Penticuff v. U.S. Postal Serv., EEOC Appeal No. 0120121931 (Jul. 27, 2012); Pagliuso v. U.S. Postal Serv., EEOC Appeal No. 0120120974 (Apr. 30, 2012); Kennedy v. Dep't of Transp., EEOC Appeal No. 0120111025, (May 2, 2013) Accordingly, Claim 9 is dismissed because it fails to state a claim. The regulatory basis for this determination is at 29 C.F.R. § 1614.107(a)(1).

Having dismissed Claims 8 and 9 on the previously explained procedural bases, there is not a timely event on which to attach the earlier occurring, untimely claims, Claim 1 through 7. As a result, the remainder of the complaint must be dismissed for untimely EEO Counselor Contact. A discussion of the adjudication of those claims follows.

B. Untimely EEO Counselor Contact

In Claim 1 through Claim 7, the Complainant alleged incidents of sexual harassment and non-sexual harassment. Claim 1 is an allegation of sexual harassment by Ms. Williams in January 2016. As discussed, the Complainant initiated EEO Counseling on September 16, 2019, more than three years later. Claims 2 through 7 are allegations of non-sexual harassment which occurred between September 2017 and December 2018, which is also more than 45 calendar days prior to the Complainant's September 16, 2019 EEO Counselor contact. (ROI Exs. A1, B1)

We note that the Agency was closed due to a government furlough from December 22, 2018 through January 25, 2019, which could have impacted the Complainant's

ability to contact an EEO Counselor. However, even if we assume that the Complainant was not able to make EEO Counselor Contact prior to January 26, 2019, we arrive at the conclusion that the Complainant should have initiated EEO Counseling by March 12, 2019. Based on the foregoing, We find that the Complainant's claims of sexual and non-sexual harassment in Claim 1 through Claim 7 are not actionable because none of the acts occurred within the regulatory time period for timely EEO Counselor Contact and, as discussed above, there is no viable timely claim which is part of the same alleged unlawful practice. As such, Claim 1 through Claim 7 are dismissed for untimely EEO Counselor Contact pursuant to EEOC Regulation 29 C.F.R. § 1614.107(a)(1). Dennison v. Dep't of Health and Hum. Serv., EEOC Appeal No. 0120083803 (May 21, 2010)

V. CONCLUSION

Based on the foregoing, we determine that the Complainant presented no viable incidents occurring within 45 days of his EEO Counselor contact, and for this reason all of the claims have been procedurally dismissed as set forth above. Therefore, it is the final decision of the Department of Transportation that a finding of no discrimination is made in this matter.

Date:
2021.07.20
09:13:01 -04'00'

July 20, 2021

Angela Williams
Associate Director
EEO Complaints Adjudication and
Program Evaluation Division
Departmental Office of Civil Rights

Date

Appendix D

ASHR DOT
22-6195

U.S. Department of
Transportation

Office of the Secretary
of Transportation

1200 New Jersey Ave., S.E.
Washington, D.C. 20590

July 20, 2021

By Electronic Transmission Only

Julian R. Ash
15 Old Knife Ct.
Baltimore, MD 21220

RE: DOT Complaint No. 2019-28552-FAA-05

Dear Mr. Ash:

This transmits the U.S. Department of Transportation's final agency decision in the subject discrimination complaint filed against the Federal Aviation Administration (FAA). A finding of no discrimination is made. If you are dissatisfied with this decision, you have the following appeal rights:

-- Within 30 calendar days of your receipt of this final decision, you may appeal this decision to the Director, Office of Federal Operations[1], Equal Employment Opportunity Commission, P.O. Box 77960, Washington, D.C. 20013. You may file your appeal online at: https://publicportal.eeoc.gov/Portal/Login.aspx (EEOC Form 573, Notice of Appeal/Petition, is enclosed for reference purposes only)[2]

-- Within 90 calendar days of your receipt of this final decision or after 180 days from the date of filing an appeal with the EEOC if there has been no final decision by the EEOC, you may file a civil

[1] As of March 16, 2020, the EEOC has been unable to obtain complaint information sent by U.S. mail services, thus the agency has requested the submission of any previous or subsequently submitted case information through the portal listed above. All appeal requests must be filed electronically until further notice.

[2] The Equal Employment Opportunity Commission provided instructions, dated April 6, 2020, concerning Federal EEO complaints being processed under the COVID-19 pandemic. Please review the following instructions https://www.eeoc.gov/processing-information-all-parties- federal-eeo-processing-under-29-cfr-part-1614 as it may have implications regarding your EEO complaint and applicable timeframes. On July 27, 2020, the EEOC provided updated instructions which lifted the moratorium on Final actions; thus, the Department is issuing the following Final Agency Decision in this matter. See https://www.eeoc.gov/update-april-6-2020-memorandum-processing-information.

action in an appropriate U.S. District Court. The Court, at your request, may appoint and authorize legal counsel in circumstances that it deems just without the payment of fees, costs or security. The granting or denial of the request is within the sole discretion of the Court.

You must name the person who is the official agency head and his or her official title as the defendant in your appeal. In your case, you must name the following official as the defendant:

The Honorable Pete Buttigieg
Secretary of Transportation
1200 New Jersey Ave., S.E.
Washington, DC 20590

Failure to provide the name or official title of the agency head may result in dismissal of your case. Please be advised that at the time you file an appeal or civil action, you must furnish a copy of the documents to the following officials:

For the Departmental Office of Civil Rights[3] send to:

DOCR-EEOC-HearingandAppealCorrespondence@dot.gov

Associate Director, Equal Employment Opportunity
Complaints and Investigations Division (S-34)
Departmental Office of Civil Rights
Department of Transportation

For the Agency send copy to:

Employment and Labor Law Division, AGC-100
The Office of the Chief Counsel
Federal Aviation Administration (FAA)
US Department of Transportation
800 Independence Ave., S.W.
Washington, DC 20591

Sincerely,

Date: 2021.07.20 10:25:17 -04'00'

Angela Williams
Associate Director
Complaints Adjudication and Program Evaluation Division
Departmental Office of Civil Rights, Office of the Secretary
U.S. Department of Transportation

[3] Due limited access to Federal buildings, DOCR is requiring correspondence regarding your complaint sent via electronic mail. If you decide to appeal the Final Agency Decision submit your request to the electronic mail address listed.

Appendix D

ASH v DOT
22-6195

From: HOTLINE, DOT-OIG HOTLINE@oig.dot.gov
Subject: EM210716-01 - RE: {From External} Re: Ash - 2019-28552-FAA-05 - FAD status update - RE: EEOC Compel FAD.pdf
Date: Jul 19, 2021 at 08:14:38
To: Julian JRthequietstorm@yahoo.com

Thank you for contacting the U.S. Department of Transportation (DOT), Office of Inspector General (OIG) regarding your concerns. The hotline is designed to report allegations of fraud, waste and abuse, regarding U.S. Department of Transportation (DOT) programs and DOT federally funded projects or grants. Based on our review of the material provided we have determined that we do not have oversight over your concerns and we are not in a position to provide advice regarding these matters. We anticipate no further action from our office regarding this matter. Thank you for bringing this information to our attention.

Sincerely,

US DOT/OIG, Complaint Center Operations

From: Julian <jrthequietstorm@yahoo.com>
Sent: Friday, July 16, 2021 10:05 AM
To: Robertson, Tyler (OST) <tyler.robertson@dot.gov>; johnp.benison@faa.gov
Cc: Williams, Angela (OST) <angela.williams@dot.gov>; Fields, Patricia (OST) <patricia.fields@dot.gov>; craig.blum@faa.gov; Lewis, Matthew (OST) <matthew.lewis@dot.gov>; Terronez, CTR Sandra (OST) <sandra.terronez.ctr@dot.gov>; Buggele, CTR Jean (OST) <jean.buggele.ctr@dot.gov>; Naki Frierson <Naki_Frierson@vanhollen.senate.gov>; HOTLINE, DOT-OIG <HOTLINE@oig.dot.gov>
Subject: {From External} Re: Ash - 2019-28552-FAA-05 - FAD status update - RE: EEOC Compel FAD.pdf

Mr Robertson I appreciate your response, but I was supposed to have the FAD at least by June 28, 2021.

Ms Williams said July 15, 2021 that you would have it ready, you didn't respond yesterday?

Now this new directive, advised by whom to say maybe another week?

I really would like a name, thanks!

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Appendix E

Julian R. Ash

Sent from my iPhone

On Jul 16, 2021, at 09:42, Robertson, Tyler (OST) <tyler.robertson@dot.gov> wrote:

Good morning Mr. Ash,

Regarding your DoT Complaint No. 2019-28552-FAA-05, I had been advised that your Final Agency Decision (FAD) draft is undergoing the final stages of revisions and edits prior to finalization for issuance. I also had been advised that we anticipate being able to issue you your FAD sometime this coming week.

Thank you very much.

Best regards,

Tyler W. Robertson
Program Assistant
U.S. DOT - Departmental Office of Civil Rights
W78-105, 1200 New Jersey Avenue, S.E.
Washington, DC 20590
202-366-1945 (work)

From: Julian <jrthequietstorm@yahoo.com>
Sent: Friday, July 16, 2021 9:02 AM
To: Williams, Angela (OST) <angela.williams@dot.gov>; Fields, Patricia (OST) <patricia.fields@dot.gov>; craig.blum@faa.gov
Cc: Lewis, Matthew (OST) <matthew.lewis@dot.gov>; Terronez, Sandra CTR (OST) <sandra.terronez.ctr@dot.gov>; Buggele, Jean CTR (OST) <jean.buggele.ctr@dot.gov>; Robertson, Tyler (OST) <tyler.robertson@dot.gov>
Subject: Re: EEOC Compel FAD.pdf

Good morning Ms Williams,

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Yesterday was July 15, 2021
Yesterday I contacted Mr Tyler Robertson
Yesterday no reply from Mr Robertson!

Almost 3 weeks after the court ordered 60 day deadline, I still don't have the Final Agency Decision???

Can you please offer a solution?

Thanks
Julian R. Ash

Sent from my iPhone

On Jul 9, 2021, at 15:33, Fields, Patricia (OST) <patricia.fields@dot.gov> wrote:

Good afternoon Mr. Ash,

DOCR is in receipt of your email and attachment, this information will be added to your complaint of discrimination file. Thanking you in advance.

From: Julian <jrthequietstorm@yahoo.com>
Sent: Thursday, July 8, 2021 6:16 PM
To: Williams, Angela (OST) <angela.williams@dot.gov>; Lewis, Matthew (OST) <matthew.lewis@dot.gov>; Fields, Patricia (OST) <patricia.fields@dot.gov>; Terronez, Sandra CTR (OST) <sandra.terronez.ctr@dot.gov>; Buggele, Jean CTR (OST) <jean.buggele.ctr@dot.gov>; craig.blum@faa.gov; Robertson, Tyler (OST) <tyler.robertson@dot.gov>; Sterling, Patricia (OST) <Patricia.Sterling@dot.gov>
Subject: EEOC Compel FAD.pdf

APPENDIX E

ASH v DOT
22-6155

Letter to judge and your boss, my parting plea.

Looking forward to moving on from this experience with a smile and salute !

Julian R. Ash

Sent from my iPhone

Appendix E

ASH v DOT
22-6195

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

September 23, 2019

The President
The White House
Washington, D.C. 20500

Re: OSC File No. DI-19-2964

Dear Mr. President:

I am forwarding a report from the Department of Transportation (DOT), involving allegations that numerous Federal Aviation Administration (FAA) Operations Aviation Safety Inspectors (ASIs) were not appropriately accredited to certify pilots or to assess pilot training on procedures and maneuvers.[1] These serious allegations, which were substantiated by an agency investigation, may have significant bearing on the competency of pilots certified to fly several aircraft, including the Boeing 737 MAX and the Gulfstream VII.

The FAA's response to congressional inquiries regarding these allegations, which were included as part of FAA's report to the Office of Special Counsel (OSC), also raises significant concerns. As part of a separate investigation, OSC obtained internal FAA communications suggesting that official agency responses regarding the qualifications of ASIs, including those associated with the 737 MAX, was not in line with the independent investigation's findings. FAA's official responses to Congress appear to have been misleading in their portrayal of FAA employee training and competency.

The Allegations

The whistleblower, [redacted], an Aviation Safety Inspector who consented to the release of his name, alleged serious deficiencies in ASI training and certifications, which affected their ability to participate in Flight Standardization Boards (FSB). Notably, [redacted] raised concerns involving the qualifications of Aircraft Evaluation Group (AEG) ASIs, including those who may have sat on FSBs for the Boeing 737 MAX and the Gulfstream VII.

[redacted] explained that FSBs, which are staffed by ASIs, are critically important to aviation safety as they ensure flight crewmember competency to operate the aircraft by developing pilot type ratings. These ratings ensure that aircraft are flown only

[1]The whistleblower's allegations were referred to Secretary of Transportation Elaine Chao pursuant to 5 U.S.C. § 1213(c) and (d). DOT General Counsel, Steven G. Bradbury, was delegated the authority to review and sign the agency report.

APPENDIX F

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by pilots with appropriate experience and training. Beyond this, noted that ASIs are responsible for assessing pilot training on aircraft procedures and maneuvers.

asserted that pursuant to FAA Orders, ASIs must have formal classroom training as well as On-the-Job Training (OJT). *See* FAA Order 8900.1 Volume 5, Chapter 1, Section 2. The first part of this section states ASIs *must* complete formal training as well as OJT and cites to another FAA Order which states OJT "does not substitute for required classroom training." *See* FAA Order 3140.20C.

In sum, provided OSC with the following specific allegations, which were referred to Secretary of Transportation Elaine Chao for investigation:

- ASIs on the Flight Standardization Board for the Gulfstream VII lacked required OJT;
- 11 out of 17 Operations ASIs in the Seattle AEG had not completed OJT and other formal training, and this may include ASIs on the FSB assigned to review and certify the Boeing 737 MAX;
- Four ASIs in the AEG Long Beach Office and one ASI in the AEG Kansas City Office have not completed required formal training;
- OJT for ASIs in AEG does not provide OJT tasks required to issue certain types of ratings in violation of FAA orders;
- AEG Offices are not completing Qualification Assessments Required by FAA Order 3410.26, which requires review of ASI qualifications when they transfer between specialties; and
- The unqualified inspectors at issue in this matter administered hundreds of certifications, known as "check rides," that qualified pilots to operate new or modified passenger aircraft.

FAA's Congressional Communications Regarding Accreditation and Training

Prior to OSC's referral of these allegations to Secretary Chao on April 30, 2019, the Senate Committee on Commerce, Science, and Transportation (the Committee) made inquiries with the FAA concerning ASI and FSB training and certifications, with a focus on inspector certifications for the 737 MAX FSB. On April 4, 2019, the FAA provided an interim response to the Committee. In this response, the agency stated that the "allegations were specific to [AEG]- and not about inspectors with the [FSB] for the Boeing 737 MAX, who have their own specific training requirements. Further, we can confirm that all of the flight inspectors who participated in the Boeing 737 MAX Flight Standardization Board certification activities were fully qualified for these activities."

This statement appears inaccurate, however, as both the AAE investigation and the evidence obtained by OSC shows the 737 MAX FSB was staffed by undertrained AEG ASIs. Further, the 737 MAX ASIs do not have their own unique training

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requirements and were apparently not fully qualified to participate in the FSB certification duties. Finally, while asserting that there were no issues with the 737 MAX FSB, the letter noted that "particular, different concerns" regarding other ASI's were substantiated.

On May 2, 2019, the agency provided a supplemental response to the Committee. FAA reiterated that ASIs working on 737 MAX certification activities were fully qualified. The letter further states, in an apparent contradiction of its April 4 letter, that "upon review, the FAA determined those ASIs who worked on other aircraft were in fact qualified for the activities they performed."

The FAA based this conclusion on an inconsistency in FAA Order 8900.1 which FAA management resolved in favor of relaxing safety inspector training requirements and allowing inspectors to obtain either formal classroom training or OJT. As noted above, FAA Order 8900.1 and FAA Order 3140.20C require both types of training. Notwithstanding these requirements, the agency cites to a subsequent section of FAA Order 8900.1, which in contradiction to language directly above it, states that ASIs must meet only one of the listed conditions, which include formal classroom training, OJT, or a written waiver of training for proper certification. According to this interpretation, an ASI who has waived out of training has the same authority to issue pilot certifications as an ASI who has completed extensive classroom education and OJT.

The Agency Response to OSC

OSC referred [redacted] allegations on April 30, 2019. On May 14, 2019, DOT responded to OSC by transmitting documents generated by "FAA's Office of Audit and Evaluation (AAE) and addressed as appropriate by FAA." As these documents, including the aforementioned congressional correspondence, were provided to OSC in response to a referral made under 5 U.S.C. § 1213, they constitute the agency's report and thus were reviewed to determine whether the findings appear reasonable. The documents, which were accompanied by a cover letter signed by DOT General Counsel Steven G. Bradbury, included:

- Committee Chairman Roger F. Wicker's initial inquiry to FAA;
- FAA's April 4, 2019 interim response to Chairman Wicker;
- FAA's May 2, 2019 final response to Chairman Wicker; and
- The AAE report and management response.

I note that despite FAA's assertions in its May 2, 2019 letter to the Committee, the investigation conducted by AAE, and provided to OSC, established that Operations ASIs have not completed required formal training and required OJT enabling them to

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conduct check rides.[2] Significantly, the investigation determined that 16 out of 22 ASIs, or 73 percent of inspectors, including those at Seattle AEG[3], had not completed formal training classes. The investigation found that these employees were not even qualified to enroll in remedial training classes because their formal training was so deficient. This information directly contradicts FAA's statements to the Committee.

These training issues were particularly acute for the Gulfstream VII Flight Standardization Board, which was tasked with developing pilot certification criteria for this aircraft. The report noted that "the findings are very serious and could have far-ranging ramifications regarding the type ratings of hundreds of certificate holders." Additionally, the report found that AEG management was not correctly applying training requirements, and FAA management was aware of training shortcomings since July 2018 and management "failed to adequately address the missing training requirements for the 16 Operations ASIs identified."

Despite being one of the core allegations by the whistleblower, the AAE report is silent regarding the accreditation and training issues and the applicability to pilots certified to fly the 737 MAX. However, the agency's correspondence to the Committee repeatedly asserts that Operations ASIs working on the 737 MAX FSB were fully qualified and had their own "specific training requirements" despite the absence of evidence confirming this assertion.

Contradictory Internal FAA Communications

During a related and ongoing OSC investigation conducted into possible prohibited personnel practices committed against [redacted], OSC obtained internal FAA communications and conducted employee interviews, which adduced credible information directly contradicting the agency's assertions to the Committee. This information specifically concerns the 737 MAX and casts serious doubt on the FAA's public statements regarding the competency of agency inspectors who approved pilot qualifications for this aircraft. With the consent of involved individuals, this material was provided to OSC's Disclosure Unit to assist in its review of FAA's report and to better inform my findings in this matter.

This information provided to OSC indicates that AAE determined that the ASIs assigned to the 737 MAX had not met qualification standards. Specifically, these ASIs had not received formal classroom training as required by FAA Order 8900.1 and FAA Order 3140.20C. According to witness interviews, this determination was supported by FAA's Office of Safety Standards, General Aviation and Commercial Division, who resolved the contradiction in FAA Order 8900.1 in favor of requiring additional training.

[2]This report was also appended to the FAA's May 2, 2019 letter to the Committee.
[3]ASIs at the Seattle AEG office staffed an FSB that certified the 737 MAX.

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This information does not appear in the final AAE report and directly contradicts the agency's statements to the Committee.

Despite AAEs independent, evidence-based determination concerning the qualifications of 737 MAX ASIs, FAA's communications to Congress appear to reject the factual findings of highly-qualified and independent individuals who investigated these matters. By statute, AAE serves as an independent avenue for oversight and is tasked with conducting objective, impartial investigations and evaluations of such allegations. Emails obtained by OSC show serious concerns within AAE regarding the veracity of the agency's public statements, particularly after the FAA's final response was transmitted to the Committee. Instead of basing FAA's public statements on the independent investigations findings, the agency appears to have relied upon a questionable policy interpretation generated by FAA's Aircraft Evaluation Division that resolved the above-referenced contradiction in FAA Order 8900.1 in favor of less inspector training. Further, the statement that "FAA determined those ASIs who worked on other aircraft were in fact qualified for the activities they performed" is directly contravened by AAE's report that was enclosed with FAA's May 2, 2019 response.

The Whistleblower's Comments

[redacted] comments closely align with the original position of AAE investigators. With respect to the April 4, 2019 letter, he noted that this communication was silent with respect to special emphasis training necessary for the 737 MAX's Maneuvering Characteristics Augmentation System (MCAS), which has been implicated in the crashes of Lion Air Flight 610 and Ethiopian Airlines Flight 302. [redacted] further highlighted the inconsistent statements in this letter concerning 737 MAX ASI training, correctly noting that these inspectors were also FSB members and belonged to AEG. He stated the assertion that these individuals "have their own, specific training requirements" was incorrect.

[redacted] also took exception to the characterization of FAA's findings in the May 2 letter. He also asserted that a statement concerning the cessation of Gulfstream VII FSB work was simply not true. According to [redacted], no work stoppage occurred. He gave credit to AAE for concluding that almost 75 percent of operations ASIs were not properly trained or credentialed and expressed his incredulity that the agency had not taken these matters more seriously. [redacted] further noted that at present, the FAA has enrolled the majority of untrained ASIs in remedial classes, which he believes undermined the agency's position.

The Special Counsel's Analysis and Findings

The FAA is entrusted with a critically important safety and oversight role of civil aviation activities and technology. Its position in the present matter suggests that, rather

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than taking ownership and accountability for confirmed systemic deficiencies, the FAA has not appropriately fulfilled its safety mandate.

First FAA's assertion that ASIs on the 737 MAX FSB had their own "specific training requirements," which are different from other AEG Operations ASIs, is misleading. According to the only difference in training for 737 MAX ASIs was a limited training module these individuals completed, and he noted they still lacked required foundational training. As seen in internal communications, AAE also confirmed that the 737 MAX FSB members lacked the formal training that their positions required.

In his comments, notes that FAA's letters obfuscates the fact that 737 MAX ASIs were also FSB members and belonged to AEG, and the questionable assertion that they had their own specific training requirements diverts attention away from the likely truth of the matter: that they were neither qualified under agency policy to certify pilots flying the 737 MAX nor to assess pilot training on procedures and maneuvers.

Next, I note that FAA's April 4 letter contains statements that were later contradicted in its May 2 letter, and which were similarly discredited by AAE's own investigation into these matters. It is particularly shocking that the agency asserted that "the FAA determined those ASIs who worked on other aircraft were in fact qualified for the activities they performed," when prior correspondence states the opposite and an official independent internal investigation into these matters—which was attached to the May 2 letter—directly refutes this conclusion. The FAA now seems to adopt a position that encourages less qualified, accredited, and trained safety inspectors. Despite these public assertions, I note that FAA has enrolled affected ASIs in remedial training, which suggests they have not yet been properly trained.

The agency's position, as evidenced in its May 2 letter to the Committee, is that contradictions in FAA Order 8900.1 are resolved by management in favor of allowing objectively less qualified inspectors to sit on FSBs. These FSBs develop credentialing and training requirements for aircraft and pilots, a vitally important component of ensuring a safe airspace environment. Beyond this, these ASIs assess pilot training for procedures and maneuvers. Given the important safety role of FSBs, and the need for the most qualified inspectors to participate, it is difficult to understand how less trained and educated safety inspectors are permissible.

I further note that deficiencies in crew competency and procedures associated with the MCAS system are thought to have contributed to the two above-referenced disasters cited in comments, which killed almost 350 people. These incidents resulted in a worldwide grounding of this airliner and are closely linked with crew training resources and familiarity with operational procedures. These items were the

chief responsibility of the 737 MAX FSB, which was apparently staffed by underqualified safety inspectors.

In this matter, AAE's report confirmed that 16 out of 22 ASIs lacked proper training and accreditation and internal FAA communications and OSC witness interviews indicate that this number included members of the 737 MAX FSB. Beyond this, AAE's investigation confirmed serious problems in the certification of hundreds of Gulfstream VII pilots due to improperly credentialed ASIs. The FAA's failure to ensure inspector competency for these aircraft subjected the flying public to substantial and specific danger.

Accordingly, I question the conduct of the agency and have determined that the agency's findings, which rely on conflicting documents, do not appear reasonable. In coming forward with these allegations, [redacted] made a commendable effort to ensure public safety. I strongly urge Congress to continue their already robust oversight efforts in this area. Going forward, the agency must also ensure that safety inspectors certifying aircraft, including those participating in the recertification of the 737 MAX, are fully qualified to do so.

As required by 5 U.S.C. § 1213(e)(3), I have sent a copy of this letter, a copy of the agency report, and the whistleblower's comments to the Chairman and Ranking Member of the Senate Committee on Commerce, Science, and Transportation and the Chairman and Ranking Member of the House Committee on Transportation and Infrastructure. I have also filed redacted copies of these documents in OSC's public file, which is available online at www.osc.gov. This matter is now closed.

Respectfully,

Henry J. Kerner
Special Counsel

Enclosures

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