IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BOBBIE JO PEARSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Cause No. 1:09-CV-00227-JBS**
	)	
CHUGACH GOVERNMENT SERVICES, INC., a foreign corporation, and CHUGACH SUPPORT SERVICES, INC., a foreign corporation,	)	
	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, OR, IN THE ALTERNATIVE, FOR FAILURE TO STATE A CLAIM

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendants Chugach Government Services, Inc. and Chugach Support Services, Inc. ("Defendants"), by undersigned counsel, respectfully reply to Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss ("Plaintiff's Opposition").

I. OVERVIEW

Defendants are wholly owned subsidiaries of Chugach Alaska Corporation, an Alaska Native Regional Corporation formed pursuant to the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. § 1601 *et seq*. See Exhibits A, B and C to Defs.' Mem. in Supp. of Mot. to Dismiss. ANCSA exempts Defendants from "employer" obligations and liability under federal laws relating to unlawful discrimination in employment. Plaintiff concedes that Defendants are explicitly exempt from Title VII liability. Based on Plaintiff's own analysis, Defendants also are exempt from liability under the ADA and FMLA. As a result, Plaintiff's

Complaint must be dismissed for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), or, in the alternative, dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

II. ARGUMENT

A. Plaintiff Concedes that this Court Must Dismiss Her Title VII Claim.

Plaintiff concedes that ANCSA exempts Defendants, as wholly-owned subsidiaries of an Alaska Native Corporation ("ANC"), from Title VII liability. See Pl.'s Mem. in Opp'n to Defs.' Mot. to Dismiss at 4. Accordingly, this Court must dismiss Count I of Plaintiff's Complaint with prejudice. See ANCSA § 1626(g), 43 U.S.C. § 1626(g).

B. This Court Must Dismiss Plaintiff's ADA and FMLA Claims Because the ANCSA Exemption Applies to Claims Alleged Under These Federal Employment Discrimination Statutes.

Plaintiff asserts that Defendants are not exempt from liability under the ADA and FMLA and supports her position with the Fourth Circuit decision in Aleman. See Pl.'s Mem. in Opp'n to Defs.' Mot. to Dismiss at 5. See also Aleman v. Chugach Support Servs., Inc., 485 F.3d 206 (4th Cir. 2007). Plaintiff's position is based on two principles. First, the ADA and FMLA, similar to Section 1981 (the statute at issue in Aleman), are broader than Title VII and fail to deal solely with employment discrimination. See Pl.'s Mem. in Opp'n to Defs.' Mot. to Dismiss at 5. Second, Title VII established additional remedial provisions that Congress chose not to impose on ANCs, unlike Section 1981 and, as Plaintiff analogizes, the ADA and FMLA. See Pl.'s Mem. in Opp'n to Defs.' Mot. to Dismiss at 5-6. See also Aleman, 485 F.3d at 212.

Under Plaintiff's own analysis, this Court must dismiss Plaintiff's ADA and FMLA claims. The purpose of Titles I and V of the ADA, under which Plaintiff's claim is alleged, is to combat unlawful employment discrimination in "job application procedures, the hiring,

advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Similarly, the FMLA was enacted to "minimize[] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis." 29 U.S.C. § 2601(b) (emphasis added). Titles I and V of the ADA and the FMLA solely pertain to employment discrimination and fall squarely with the Aleman court's analysis.

Plaintiff's argument regarding Title VII's remedial provisions also fails. See Pl.'s Mem. in Opp'n to Defs.' Mot. to Dismiss at 5-6. As Plaintiff points out, the Aleman court refused to apply the Title VII exemption in part because of Section 1981's less stringent remedial and procedural requirements. Id. This analysis does not apply to the ADA. Instead, the ADA explicitly applies the identical remedial and procedural requirements as Title VII. 42 U.S.C. § 12117(a). See also Downie v. Revco Discount Drug Centers, Inc., 448 F. Supp. 2d 724, 729 n.2 (W.D. Va. 2006) (citing EEOC v. Waffle House, Inc., 534 U.S. 279, 285 (2002)) ("The enforcement provisions of the ADA are essentially identical to those of Title VII."); Walsh v. Nevada Dept. of Human Resources, 471 F.3d 1033, 1038 (9th Cir. 2006) ("The statutory scheme and language of the ADA and Title VII are identical in many respects."). Applying the Aleman court's analysis to the ADA would result in an inconsistent application of the law.

This Court must dismiss Counts I and II of Plaintiff's Complaint based on Plaintiff's application of Aleman alone. Titles I and V of the ADA and the FMLA solely address issues of employment discrimination. Further, the ADA specifically incorporates Title VII's remedial provisions. Along with these two principles relied upon by Plaintiff, the Aleman court lends additional support for the dismissal of Plaintiff's claims. The court observed that "the limitation

of Title VII to those defined as employers is one way in which Title VII is narrower than Section 1981." Aleman, 485 F.3d at 212. Titles I and V of the ADA and the FMLA are similarly limited to employers. See ADA § 12111(5), 42 U.S.C. § 12111(5); FMLA § 2611(4), 29 U.S.C. § 2611(4). In fact, the ADA's definition of an employer is identical to Title VII's, and the FMLA's definition is virtually identical, applying to a slightly larger employer. Id. The Aleman court's three factors, two of which are relied upon by Plaintiff, support the dismissal of Plaintiff's claims.

Plaintiff also asserts that Wardle v. Ute Indian Tribe, 623 F.2d 670 (10th Cir. 1980), fails to support Defendants' position. See Pl.'s Mem. in Opp'n to Defs.' Mot. to Dismiss at 6. Plaintiff takes the position that Title VII's ANC exemption extends, if at all, only to a more general statutory provision. Id. Plaintiff argues that the ADA and FMLA are, if anything, more specific statutory provisions. Id. This argument is inconsistent with Plaintiff's analysis of the ADA and FMLA under Aleman. Id. at 5. Applying Aleman, Plaintiff argues against extending the ANC exemption to the ADA and FMLA because of the statutes' broad application outside of employment discrimination. Id. Plaintiff now argues that the Wardle reasoning cannot apply because the ADA and FMLA are more specific, tailored statutes. Id. at 6. These positions cannot be reconciled.

Legal precedent supports this Court's application of the ANC exemption. Specifically, the Ninth Circuit applied a different Title VII exemption to an ADA claim. Walsh, 471 F.3d at 1037-38. In Walsh, defendant argued for personal exemption from liability under the ADA based on a similar exemption for individuals found in Title VII. 471 F.3d at 1037. The Ninth Circuit had not addressed this issue under the ADA, but agreed that individuals face no personal liability under Title VII. Finding the statutes "identical in many respects," the court reasoned

that "[b]ecause Title I of the ADA adopts a definition of "employer" and a remedial scheme that is identical to Title VII, [Title VII's] bar on suits against individual defendants also applies to suits brought under Title I of the ADA." Id. at 1038. The Ninth Circuit decision applied Title VII's individual personal liability exemption to claims alleged under the ADA. Defendants seek identical relief here.

Regardless of the specificity or generality of the ADA and FMLA in relation to Title VII, adherence to the Aleman decision is consistent with a dismissal of Plaintiff's ADA and FMLA claims. The primary reason that the court in Aleman refused to extend the ANC exemption to a claim brought under Section 1981 is the statute's broad application to areas well outside employment discrimination issues. In contrast, Titles I and V of the ADA and the FMLA solely pertain to issues of employment discrimination. Additional factors influencing the Aleman court's decision are Title VII's remedial provisions and the limitation to employers. Consistent with the Aleman analysis, the ADA specifically incorporates Title VII's remedial provisions and the application of Titles I and V of the ADA and the FMLA is limited to employers. As a result, this Court must apply the ANC exemption and dismiss Plaintiff's ADA and FMLA claims with prejudice.

This Court's application of the ANC exemption to the ADA and FMLA does not constitute judicial legislation, as Plaintiff suggests. See Pl.'s Mem. in Opp'n to Defs.' Mot. to Dismiss at 8. The very case on which Plaintiff relies contemplates such an application. See Aleman, 485 F.3d 206. The Aleman decision is not a wholesale rejection of the application of the ANC exemption outside of Title VII. Quite the contrary, it holds that the ANC exemption is inappropriately applied to Section 1981. Id. It does not hold that the ANC exemption may never apply outside of Title VII. Wardle, albeit in conflict with the Aleman decision, not only

contemplates but also applies the ANC exemption outside of Title VII. 623 F.2d 670. These two courts do not encourage judicial legislation. They merely interpret the existing statutory framework. Defendants ask this Court to do the same.

C. The Application of Title VII to Other Employment Discrimination Statutes to Establish Liability Necessitates the Application of Title VII's Defenses.

In non-Title VII employment discrimination suits, courts generally invoke a dependency on Title VII, transfusing the attributes of Title VII claims and defenses into the second statute. See Bryant v. Bell Atlantic Md., Inc., 333 F.3d 536, 544-45 n.3 (4th Cir. 2003), *cert. denied*, 540 U.S. 1106 (2004) (framework of proof for disparate treatment claims is the same for actions brought under Title VII). See also Anderson v. Westinghouse Savannah River Co., 406 F.3d 248, 268 n.4 (4th Cir. 2005). In fact, "courts addressing the allocations of burdens of proof and persuasion under the ADA uniformly have looked for guidance to Title VII." Newman v. GHS Osteopathic, Inc., Parkview Hosp. Div., 60 F.3d 153, 157 (3rd Cir. 1995). See also New Directions Treatment Servs. v. City of Reading, 490 F.3d 293, 301 n.6 (3rd Cir. 2007). Courts recognize the incorporation of Title VII enforcement provisions into the ADA and apply Title VII procedures. Henry v. Guest Servs., Inc., 902 F. Supp. 245, 250 (D.D.C. 1995). Similarly, Title VII informs and provides guidance to FMLA retaliation claims. Collier v. Target Stores Corp., No. CUV. 03-1144-SKR, 2005 WL 850855 at *5-6 (D. Del. Apr. 13, 2005). See also Chapman v. UPMC Health System, 516 F. Supp. 2d 506, 524 (W.D. Pa. 2007).

The application of Title VII to the ADA and FMLA to establish liability necessitates a similar application of Title VII defenses and exemptions. See Walsh, 471 F.3d at 1037-38. If courts look to Title VII for guidance on issues of liability and burdens of proof, courts must also give defendants the right to employ Title VII's defenses, particularly in light of Title VII's

burden-shifting defenses. See id. Otherwise, the court would abrogate Title VII's statutory exemptions, including the ANC exemption at issue here.

D. Plaintiff Fails to Properly Allege Her FMLA Claim.

Plaintiff alleges that Defendants "retaliated against [her] for her exercise of her rights under the FMLA." See Pl.'s Compl. at ¶ 36. The FMLA anti-retaliation provision makes it "unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter." 29 U.S.C. § 2615(a)(2) (emphasis added). For a plaintiff to establish a prima facie case for retaliation under the FMLA, she must show that (1) she opposed a practice made unlawful under the FMLA, (2) she suffered an adverse employment decision, and (3) the adverse decision was causally related to her opposition of the practice. Brungart v. BellSouth Telecommc'ns, Inc., 231 F.3d 791, 798 (11th Cir. 2007). Plaintiff never alleges retaliation for her opposition to a practice outlawed by the FMLA. Plaintiff fails to meet the basic pleading requirements for a retaliation claim under the FMLA. As a result, Plaintiff's FMLA claim must be dismissed for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

III. CONCLUSION

For the reasons stated above, Defendants Chugach Government Services, Inc. and Chugach Support Services, Inc. respectfully request that this Court dismiss with prejudice Counts I, II, and III of Plaintiff's Complaint for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1), or in the alternative, dismiss for failure to state a claim for which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6); and that the Court grant Defendants such other relief to which Defendants are entitled.

Respectfully submitted,

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