

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

BOBBIE JO PEARSON	*	C.A. No. 09-227-JBS
	*	
Plaintiff,	*	
	*	
v.	*	
	*	
CHUGACH GOVERNMENT	*	
SERVICES, INC., a	*	
foreign corporation,	*	
and CHUGACH SUPPORT	*	
SERVICES, INC., a	*	
foreign corporation,	*	
	*	
Defendants.	*	

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION
TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION,
OR, IN THE ALTERNATIVE, FOR FAILURE TO STATE A CLAIM**

COMES NOW Plaintiff Bobbie Jo Pearson (hereinafter "Plaintiff"), by and through her attorneys, Schmittinger and Rodriguez, P.A., and hereby respectfully presents her Memorandum in Opposition to the Motion to Dismiss of Defendants Chugach Government Services, Inc. and Chugach Support Services, Inc. (hereinafter collectively "Defendants").

I. BACKGROUND

Plaintiff filed her Complaint in this Court on April 6, 2009, alleging violations of Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII"), the Americans With Disabilities Act (hereinafter "the ADA"), and the Family and Medical Leave Act (hereinafter "the FMLA"). Plaintiff began her employment with Defendant Chugach Support Services, Inc. on or

about August 24, 2004, as an administrative assistant at Defendants' business location at Dover Air Force Base, Delaware. Her employment was later transferred to Defendant Chugach Government Services, Inc., and she was terminated on April 29, 2008.

During her employment, Plaintiff was subjected to a hostile work environment on the basis of both sex and disability. With regard to Plaintiff's disability, Plaintiff's supervisor, Project Manager Richard Laird, frequently made demeaning and derogatory remarks regarding her disability (bipolar disorder/depression) in front of other employees and business associates.

In February 2008, Plaintiff took FMLA leave for a serious health condition unrelated to her disability. When Plaintiff returned to work in early March 2008, she was harassed and belittled by Laird and Assistant Project Manager Wayne Gordineer in retaliation for exercising her rights under the FMLA. Plaintiff also suffered retaliation from Laird for her complaints to him regarding discrimination and harassment on the basis of sex and disability, including unjustified disciplinary write ups. In addition, Laird falsely accused Plaintiff of not requesting permission for time off for a doctor's appointment.

On April 29, 2008, Laird terminated Plaintiff. (Compl. ¶22.)

II. ARGUMENT

A. **Standard of Review.**

Defendants have brought their Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(1), for lack of subject matter jurisdiction, and Fed.R.Civ.P. 12(b)(6), for failure to state a claim upon which relief may be granted.

When a party brings a motion to dismiss for lack of subject matter jurisdiction, the party may assert either a factual or a facial challenge to the court's jurisdiction. Boston Sci. Corp. v. Johnson & Johnson, Inc., 532 F.Supp. 2d 648, 652 (D.Del. 2008). Under a facial attack, the Defendant contends that, even if all the allegations in the complaint are true, they would be insufficient to establish the court's jurisdiction. Id. That is the form of attack pursued by Defendants in this case. When the Court considers a facial attack to its subject matter jurisdiction, it must view all of the allegations of the complaint as true, and it must determine whether such jurisdiction existed at the time the complaint was filed and thereafter. Id.

Similarly, when a court reviews a motion to dismiss under Rule 12(b)(6), it "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading

of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 664-65 (3d Cir. 1988), cert. denied, 489 U.S. 1065 (1989). When considering such a motion, the court should dismiss the claim "only if it appears to a certainty that no relief could be granted under any set of facts which could be proved." Russell v. Strick Corp., 1997 U.S. Dist. LEXIS 9562 (E.D. Pa.) (citing Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

B. Plaintiff concedes that her Title VII claims must be dismissed.

Plaintiff concedes that the Alaska Native Claims Settlement Act (hereinafter "the ANCSA"), 43 U.S.C. §1601 *et seq.*, excludes Alaskan Native Corporations (hereinafter "ANC's") and their wholly owned subsidiaries from the definition of "employer" in Title VII. Plaintiff further concedes that Defendants are wholly owned subsidiaries of Chugach Alaska Corporation, which is an ANC. Therefore, Plaintiff may not pursue her Title VII claims against Defendants.

C. The court should not dismiss Plaintiff's ADA and FMLA claims because Congress did not elect to exclude ANC's and their subsidiaries from the coverage of those statutes.

Defendants correctly state, at page 4 of their Memorandum, that "Congress expressly exempted Defendants, wholly owned subsidiaries of Alaska Native Corporation Chugach Alaska Corporation, from all Title VII liability and obligations...."

This is **not** the case, however, with respect to liability under the ADA and the FMLA.

Defendants have cited a Fourth Circuit decision regarding this issue, Aleman v. Chugach Support Servs., Inc., 485 F.3d 206 (4th Cir. 2007). In that case, the court rejected the contention that ANC's and their subsidiaries are immune from suit under 42 U.S.C. §1981, basing its decision upon two factors: (1) the Title VII exclusions in the ANCSA are expressly limited to Title VII, and (2) Section 1981 contains no such exclusions. Both of these reasons apply with full force to Plaintiff's ADA and FMLA claims, *i.e.*, (1) the ANCSA addresses exclusion from Title VII, not from the ADA and the FMLA, and (2) neither the ADA nor the FMLA exclude ANC's and their subsidiaries from liability.

Other reasons given by the Aleman court for not extending the Title VII exclusion to Section 1981 apply to the ADA and the FMLA as well:

(1) The Aleman court noted that Section 1981 does not apply solely to employment discrimination matters. Similarly, the ADA applies to situations beyond employment, such as public services and public accommodations. Moreover, the FMLA deals not with employment discrimination, but with the provision of certain types of leave to qualified employees.

(2) The Aleman court noted that Section 1981, unlike Title VII, does not give employees access to administrative remedies

offered through the Equal Employment Opportunity Commission. Similarly, an FMLA claimant has no right to file an EEOC claim.

Thus, there is no support for Defendants' argument that the exclusion from Title VII liability expressly authorized by Congress in the ANCSA should be extended to claims under the ADA and the FMLA, which are separate statutes addressing issues distinct from those addressed by Title VII.

In this regard, the decision in Wardle v. Ute Indian Tribe, 623 F.2d 670 (10th Cir. 1980) (which conflicts with the more recent holding in Aleman), is of no assistance to Defendants. The Wardle court extended the Title VII exclusion in the ANCSA to Section 1981 claims on the grounds that Section 1981 is a general prohibition of race discrimination, while Title VII prohibits race discrimination in employment, and specific statutory provisions control over more general ones. Id. at 673. However, the ADA and the FMLA are not more general provisions in contrast to Title VII's specific prohibitions of discrimination. Rather, the ADA specifically prohibits disability discrimination, and the FMLA is a specific provision of employment leave rights. Indeed, if anything, both the ADA and the FMLA are **more specific** statutory provisions than Title VII: while Title VII prohibits a number of different types of discrimination (*i.e.*, race, gender, national origin, religion), the ADA prohibits only one form of discrimination (*i.e.*,

discrimination on the basis of disability), and the FMLA addresses only employment leave rights in connection with certain qualifying events.

Defendants contend that Plaintiff's ADA and FMLA claims are "factual and legally identical to her Title VII claim." This is simply not true. Plaintiff's FMLA leave noted in the Complaint was not gender-related (*i.e.*, it was not pregnancy or maternity related). Neither was it related to Plaintiff's disability, as is specifically noted at paragraph 20 of the Complaint ("Plaintiff was required to take time off from work for a serious health condition **unrelated to her disability**") (emphasis supplied). Plaintiff's FMLA claim specifically addresses retaliation against her, after she returned from her leave, for exercise of her rights under the FMLA. See Complaint ¶20. Moreover, Plaintiff's ADA claims are discrete claims that address harassment and discrimination against her on the basis of her disability (bipolar disorder/depression) as distinguished from her gender. *See, e.g.*, Complaint ¶18 ("Laird also made demeaning and derogatory remarks regarding Plaintiff's disability (bipolar disorder/depression) in front of other employees and business associates in an effort to harass Plaintiff regarding her disability").

The most telling reason establishing why the Title VII exclusion in the ANCSA should not be extended to ANC's, however,

is that Congress had the opportunity to exclude ANC's and their subsidiaries from coverage under the ADA and the FMLA when those statutes were enacted, but chose not to do so. Section 1981 was enacted in 1866, more than a century before enactment of the ANCSA in 1971. By contrast, both the ADA and the FMLA were enacted **after** the ANCSA (the ADA in 1990 and the FMLA in 1993). Even though Congress had specifically excluded ANC's and their subsidiaries from coverage of Title VII when it enacted the ANCSA in 1971, Congress elected not to do so with respect to the ADA in 1990 and the FMLA in 1993. Extension of the Title VII exclusion to the ADA and the FMLA when Congress has chosen not to do so, as Defendants urge, would constitute judicial legislation of the starkest variety.

III. CONCLUSION

For the reasons stated in this Memorandum, the Court should dismiss only Plaintiff's Title VII claims against Defendants. Plaintiff should be allowed to proceed with her ADA and FMLA claims against both Defendants.

Respectfully submitted,

SCHMITTLINGER & RODRIGUEZ, P.A.

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