IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DANIELS, Plaintiff, v. CHUGACH GOVERNMENT SERVICES, INC. – POTOMAC JOB CORPS CENTER, Defendant.	Civil Action No.: 1:14-cv-01667-EGS

DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT

Defendant Chugach Government Services, Inc., operator of the Potomac Job Corps Center ("CGSI" or "Defendant"), by counsel, hereby moves to dismiss Plaintiff's Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6), in accordance with the accompanying memorandum of points and authorities.

Dated: March 2, 2015

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CERTIFICATE OF SERVICE

I, Attison L. Barnes, III, hereby certify that on March 2, 2015, I caused a copy of the foregoing to be served via the Clerk of the Court's CM/ECF system to:

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MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT

Defendant Chugach Government Services, Inc., operator of the Potomac Job Corps Center ("CGSI" or "Defendant"), by counsel, submits this Memorandum in Support of its Motion to Dismiss Plaintiff's Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6), and states as follows:

PRELIMINARY STATEMENT

In this employment discrimination action, Plaintiff John Daniels ("Plaintiff" or "Daniels") asserts claims against CGSI for: (i) discrimination on the basis of national origin under Title VII; (ii) discrimination on the basis of age under the Age Discrimination in Employment Act ("ADEA"); and (iii) discrimination on the basis of race, ancestry, and ethnic considerations under 42 U.S.C. § 1981.[1] However, all claims should be dismissed. First, as a

[1] After review of CGSI's initial Motion to Dismiss the original complaint alleging claims under Title VII and ADEA, Plaintiff has now attempted to manufacture a new claim under Section 1981 in an Amended Complaint.

subsidiary of an Alaska Native Corporation ("ANC"), CGSI is exempt from the definition of "employer" under Title VII by an act of Congress, and therefore Count II is not a viable claim as a matter of law. Second, with respect to Count III, Plaintiff failed to exhaust any purported claim for age discrimination and is now barred from bringing any such claim in federal court. Third, Daniels's newly fashioned claim under Section 1981 is barred by the statute of limitations, does not apply to actions taken under the color of federal law, and is not a viable claim based on Plaintiff's own allegations. Finally, even if Plaintiff could salvage his claims under the arguments above (which he cannot), he fails to satisfy the basic pleading standards for claims of discrimination on the basis of national origin, age, or race.

FACTUAL BACKGROUND[2]

According to the Amended Complaint, Plaintiff Daniels, a native of Liberia, Africa, was hired by CGSI at the Potomac Job Corps Center as the Systems Administrator on October 26, 2009. Am. Compl. ¶¶ 2, 4, ECF No. 13. Daniels claims that Potomac Job Corps Center's IT Department consisted of two positions—his position and the Lead Systems Administrator, which was filled by a native of Ethiopia. *Id.* ¶ 4. Daniels alleges that in January 2011, CGSI announced that it was consolidating the Systems Administrator and Lead Systems Administrator positions into one position, the Senior IT Administrator. *Id.* ¶ 5. Daniels says that CGSI notified him that his position would be eliminated, but told him he could apply for the new consolidated position if he was eligible and met the position requirements. *Id.* Daniels contends that CGSI posted the Senior IT Administrator position on September 13, 2011, and that he and the Lead Systems Administrator applied. *Id.* ¶ 6. According to Daniels, he was in his mid-fifties, and the Lead Systems Administrator was sixty years old, when they applied for the position. *Id.* ¶ 4.

[2] Defendant assumes the facts alleged in the Complaint are true only for purposes of this Motion. *See Atherton v. D.C. Office of Mayor*, 567 F.3d 672, 677 (D.C. Cir. 2009).

Ultimately, CGSI hired another candidate, who was a "younger Caucasian male." *Id.* ¶ 6. Daniels contends that the applicant who was selected was less qualified than he was. *Id.* ¶ 7. Daniels states that he continued to work at the Potomac Job Corps Center after his position was eliminated to help train the new Senior IT Administrator. *Id.* ¶ 10. Daniels alleges that the Senior IT Administrator was terminated one month after he was hired, (*id.* ¶ 11), after which Daniels was made Acting Senior IT Administrator through February 2012. *Id.* ¶¶ 11-12.

Additionally, Daniels alleges that CGSI posted the Senior IT Administrator position again in February 2012 and failed to inform him that the position had been reposted. *Id.* ¶ 12. Daniels says that CGSI hired a younger African-American male to fill the position. *Id*. ¶ 13. According to Daniels, in the March 5, 2012 letter, CGSI offered him the position of Substitute Instructor in the Career Services Department. *Id.* ¶ 14.

Daniels filed a complaint with the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") on May 30, 2012, alleging discrimination on the basis of national origin. *Id.* ¶ 15. The OFCCP issued Daniels a right to sue letter on July 21, 2014. Daniels does not allege that he filed a charge of age or race discrimination at any time, nor does he allege that he received a right to sue letter with respect to an age-discrimination claim or a race-discrimination claim.

ARGUMENT

I. STANDARD OF REVIEW

"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.'" *Rollins v. Wackenhut Servs., Inc*., 703 F.3d 122, 129 (D.C. Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (alterations omitted). Dismissal under Rule 12(b)(6) is proper when "the plaintiff[] has

failed to allege all the material elements of [his] cause of action." *Guantanamera Cigar Co. v. Corporacion Habanos, S.A.*, 672 F. Supp. 2d 106, 108 (D.D.C. 2009) (alterations in original) (quoting *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 623 (D.C. Cir. 2001)). Moreover, a complaint is deficient "if it tenders naked assertions devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). Instead, a complaint must include "enough factual matter (taken as true) to suggest that [a violation of the law occurred]." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *see also Coley v. Bank of Am. Corp.*, 34 F. Supp. 3d 62, 65 (D.D.C. 2014) (Sullivan, J.) (reciting standard for motion to dismiss).

II. CGSI IS EXEMPT FROM THE DEFINITION OF "EMPLOYER" UNDER TITLE VII AS A WHOLLY OWNED SUBSIDIARY OF AN ALASKA NATIVE CORPORATION.

While Title VII applies to "employers," it is well-settled that Alaska Native Corporations and their subsidiaries are exempt from the definition of "employer" under Title VII. 43 U.S.C. § 1626(g). The statute provides:

> For the purposes of implementation of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000a et seq.], a Native Corporation and corporations, partnerships, joint ventures, trusts, or affiliates in which the Native Corporation owns not less than 25 per centum of the equity shall be within the class of entities excluded from the definition of "employer" by section 701(b)(1) of Public Law 88-352 (78 Stat. 253), as amended [42 U.S.C.A. § 2000e(b)(1)], or successor statutes.

43 U.S.C. § 1626(g). Courts reviewing the statute have reaffirmed that ANCs are exempt from Title VII. *See, e.g., Pratt v. Chenega Integrated Sys.*, No. C 07-01573 JSW, 2007 WL 2177335, at *3 (N.D. Cal. July 27, 2007); *Malabed v. N. Slope Borough*, 42 F. Supp. 2d 927, 934 (D. Alaska 1999), *aff'd*, 335 F.3d 864 (9th Cir. 2003).

At the time of the facts alleged in Plaintiff's Amended Complaint,[3] CGSI was a wholly-owned subsidiary of Chugach Alaska Corporation, an Alaska Native Corporation created pursuant to the terms of the Alaska Native Claims Settlement Act, organized under the laws of the state of Alaska, and headquartered in Anchorage, Alaska. Am. Compl. ¶ 3; *see also* 2011 Corporate Biennial Report[4], attached hereto as Exhibit A. By action of the United States Congress, Chugach Alaska Corporation (originally Chugach Natives, Inc.) is one of twelve Alaska Native Corporations created under the Alaska Native Claims Settlement Act of 1971. 43 U.S.C. § 1606(a)(9) (expressly naming Chugach Native Association which formed its ANC as "Chugach Natives, Inc."). The Articles of Incorporation for Chugach Natives, Inc., noting that it is incorporated pursuant to the Alaska Native Claims Settlement Act, are attached hereto as Exhibit B.[5] Chugach Natives, Inc. was renamed Chugach Alaska Corporation in 1985. The Certificate of Amendment to the Articles of Incorporation is attached hereto as Exhibit C.[6]

Because CGSI was a wholly-owned subsidiary of an ANC, CGSI is not an "employer" for purposes of Title VII. 43 U.S.C. § 1626(g). Thus, CGSI is exempt from Title VII by an act of Congress. Therefore, Plaintiff's claim for discrimination on the basis of national origin fails as a matter of law and should be dismissed with prejudice. *See Haddon v. Walters*, 43 F.3d

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[3] To determine whether an employer is covered by Title VII, the focus is on the time the alleged acts of discrimination took place. *See De Jesús v. LTT Card Servs., Inc.*, 474 F.3d 16, 19 (1st Cir. 2007).

[4] This Alaska state record is available at http://commerce.state.ak.us/CBP/Main/CorpDocumentViewer.aspx?r=60470&v=613558&d=801972. A court may take judicial notice of corporate records and filings maintained by a state agency. *See In re Lorazepam & Clorazepate Antitrust Litig.*, 900 F. Supp. 2d 8, 18 (D.D.C. 2012).

[5] This Alaska state record is available at http://commerce.state.ak.us/CBP/Main/CorpDocumentViewer.aspx?r=19019&v=35230&d=126374.

[6] This Alaska state record is available at http://commerce.state.ak.us/CBP/Main/CorpDocumentViewer.aspx?r=19019&v=35255&d=206323.

1488, 1490 (D.C. Cir. 1995) (per curiam) (holding questions as to coverage under Title VII go to sufficiency of complaint under Rule 12(b)(6)); *Thomas v. Choctaw Mgmt./Servs. Enter*., 313 F.3d 910, 911 (5th Cir. 2002) (per curiam) (affirming dismissal under Rule 12(b)(6) because defendant Indian tribe was exempt from Title VII's definition of employer); *Da Silva v. Kinsho Int'l Corp*., 229 F.3d 358, 365-66 & 365 n.9 (2d Cir. 2000) (holding fifteen-employee threshold for employer under Title VII is a substantive element of the claim subject to dismissal under Rule 12(b)(6)).

Therefore, Count II of the Amended Complaint should be dismissed. Further, because Plaintiff should not have refiled this claim after receipt of CGSI's initial Motion to Dismiss setting forth an indisputable basis for dismissal, CGSI reserves the right to seek its attorneys' fees and costs incurred in seeking dismissal of this claim.

III. PLAINTIFF FAILED TO EXHAUST HIS AGE-BASED CLAIM AND IS NOW BARRED FROM PURSUING AN ADEA CLAIM.

Noticeably absent from the Amended Complaint is an allegation that Plaintiff exhausted a claim for age-based discrimination with the Equal Employment Opportunity Commission ("EEOC") before filing suit. Such a failure to exhaust administrative remedies prohibits Plaintiff from pursuing an ADEA claim.

Before filing suit under the ADEA, a plaintiff must first exhaust his administrative remedies. *Washington v. Washington Metro. Area Transit Auth.*, 160 F.3d 750, 752 (D.C. Cir. 1998). No civil action under the ADEA may be commenced unless the plaintiff has timely filed a charge of unlawful discrimination with the EEOC. 29 U.S.C. § 626(d). This charge must be filed with the EEOC within 180 days from the date of the alleged violation. 29 U.S.C. § 626(d)(1). Failure to timely exhaust administrative remedies will bar a claim in district court. *Rann v. Chao*, 346 F.3d 192, 195 (D.C. Cir. 2003) (affirming the trial court's dismissal of the

plaintiff's ADEA claim for failure to exhaust administrative remedies); *Rodriguez v. Donovan*, 922 F. Supp. 2d 11, 16 (D.D.C. 2013) (Sullivan, J.) (granting motion to dismiss ADEA claim based on failure to exhaust administrative remedies). Daniels does not allege (and cannot allege)[7] that he filed any charge of discrimination with the EEOC, nor could he do so timely at this point as more than 180 days have passed since the alleged discriminatory acts. Accordingly, Plaintiff has failed to exhaust his administrative remedies and cannot bring a claim under the ADEA. *Washington Metro. Area Transit Auth.*, 160 F.3d at 752.

Moreover, Daniels's Charge with the OFCCP did not mention age in any way, so the charge could not possibly exhaust his administrative remedies under the ADEA. A lawsuit following an administrative charge is limited "to claims that are like or reasonably related to the allegations of the charge and growing out of such allegations." *Ahuja v. Detica Inc.*, 742 F. Supp. 2d 96, 106 (D.D.C. 2010). Daniels's Charge filed with the OFCCP, attached hereto as Exhibit D, did not state a single allegation remotely related to age-based discrimination.[8] He checked the box noting discrimination based on national origin. Moreover, in his self-described "statement for the cause of discrimination based on National Origin," Daniels did not mention "age" in any way. Rather, he stated, "I was discriminated against based on my National Origin." Thus, Daniels's OFCCP Charge could not possibly have exhausted his administrative remedies under the ADEA.

Daniels was required to file any age-discrimination charge with the EEOC. *See Rodriguez*, 922 F. Supp. 2d at 16 (granting motion to dismiss ADEA claim based on failure to exhaust where Plaintiff did not file an administrative claim with the EEOC); *see also Braun v.*

[7] If such a claim had been filed, CGSI would have received notice of such a filing as well as an opportunity to be heard in such a proceeding.

[8] A court may take judicial notice of administrative complaints because these records are public documents. *Ahuja v. Detica, Inc*., 742 F. Supp. 2d 96, 101-02 (D.D.C. 2010).

CDW LLC, No. 12 C 7037, 2013 WL 1499031, at *3 (N.D. Ill. Apr. 10, 2013) (granting motion to dismiss ADEA claim where Plaintiff did not file charge with EEOC and allegations in his OFCCP complaint related only to disability); *Meckes v. Reynolds Metals Co.*, 604 F. Supp. 598 (N.D. Ala. 1985), *aff'd*, 776 F.2d 1055 (11th Cir. 1985).

In *Meckes*, the plaintiff filed an administrative claim with the OFCCP alleging sex and age discrimination. The Court held that *Meckes* was required to file her age claim separately with the EEOC, rather than with the OFCCP, and because she had not done so in time, her ADEA claim was time barred. *Id.* at 602. The court concluded that "[s]ince OFCCP was never a proper place to file any kind of age-discrimination claim, plaintiff's delivery to OFCCP of a charge of age and sex discrimination, though effective as a 'filing' of her sex discrimination claim, was not a 'filing' of an ADEA charge." *Id.* at 601. Therefore, it was not until *Meckes* filed a separate age-discrimination claim with the EEOC that the clock for the administrative deadlines stopped running. *Id.* Other courts have similarly concluded that a complaint filed with the OFCCP is not deemed to be filed with the EEOC. *See, e.g., NAACP Labor Comm. v. Laborers' Int'l Union of Am.*, 902 F. Supp. 688, 701 (W.D. Va. 1993) ("The case at bar demonstrates the fallacy of holding that a complaint filed with the OFCCP is a charge 'filed' with the EEOC."), *aff'd*, 67 F.3d 293 (4th Cir. 1995); *Granger v. Aaron's, Inc.*, No. 1:09-CV-01634, 2010 WL 2464832, at *3 (W.D. La. June 14, 2010) ("[T]he erroneous filing of a discrimination claim with the OFCCP does not constitute the 'constructive filing' of a claim with the EEOC."), *aff'd*, 636 F.3d 708 (5th Cir. 2011); *see also McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 274-75 (5th Cir. 2008) (holding that an OFCCP investigation cannot serve to exhaust administrative remedies before the EEOC).

Because Plaintiff did not pursue an age-discrimination claim before the EEOC, he may not bring an age-discrimination claim in federal court, and Count III of the Amended Complaint should be dismissed. Further, because Plaintiff should not have refiled this claim after receipt of CGSI's initial Motion to Dismiss setting forth an indisputable basis for dismissal, CGSI reserves the right to seek its attorneys' fees and costs incurred in seeking dismissal of this claim.

IV. PLAINTIFF'S SECTION 1981 CLAIM FAILS AS A MATTER OF LAW BECAUSE IT IS BARRED BY THE STATUTE OF LIMITATIONS AND IS NOTHING MORE THAN AN UNVIABLE CLAIM FOR DISCRIMINATION BASED ON NATIONAL ORIGIN.

Daniels did not raise the issue of race for more than three years. Indeed, Plaintiff did not mention race in his OFCCP Charge or in his original Complaint filed before this Court. Daniels now strains to make a claim for race discrimination solely to plead his way around the fatal defects in his Title VII and ADEA claims. But, like his other claims, Plaintiff's Section 1981 claim fails. First, he did not file his Section 1981 claim within three years, so it is barred by the applicable statute of limitations. Second, his race claim is nothing more than a national origin claim which is not actionable under Section 1981. Third, Section 1981 does not apply to actions taken under the color of federal law, nor does it permit suit against instrumentalities of the federal government.

A. Any Claim Under Section 1981 Is Barred by the Statute of Limitations.

This Court has held that a "three-year statute of limitations applies to claims brought under 42 U.S.C. § 1981[.]" *Ivey v. Nat'l Treasury Emps. Union*, No. 05-1147 (EGS), 2007 WL 915229, at *4 (D.D.C. Mar. 27, 2007) (Sullivan, J.). Because Daniels expressly alleges in the Amended Complaint that he was notified of his termination on October 7, 2011, (Am. Compl. ¶ 10), his claim under Section 1981 falls well beyond the applicable three-year statute of limitations and therefore fails as a matter of law.

Even if Plaintiff were to argue that such an amendment relates back to the filing of the original complaint, courts in this district will not permit such a new legal theory (race discrimination as opposed to national origin discrimination) to relate back. As this Court has held, notice to the opposing party of the basis for the claimed liability that is asserted in the amended complaint is a key inquiry. *See Hartley v. Dombrowski*, 744 F. Supp. 2d 328, 334 (D.D.C. 2010). Accordingly, "claims added to amended complaints are not permitted to relate back to initial complaints if such claims 'attempt[] to introduce a new legal theory based on facts different from those underlying the timely claims.'" *Jones v. Ottenberg's Bakers, Inc.*, 999 F. Supp. 2d 185, 189 (D.D.C. 2013) (Sullivan, J.) (quoting *United States v. Hicks*, 283 F.3d 380, 388 (D.C. Cir. 2002)).

Here, Daniels did not raise the issue of "race" ***for more than three years*** despite multiple opportunities to do so.[9] CGSI was therefore denied the requisite notice of the basis for the claimed liability, and CGSI was prevented during this three-year period from assessing and investigating such a theory while the allegations would have been fresh. Allowing Plaintiff's race claim to proceed would thwart the purpose of requiring claimants to come forward with alleged claims on a timely basis. *See Rudder v. Williams*, No. 09-CV-2174 (RJL), 2014 WL 2586335, at *4 (D.D.C. June 10, 2014) ("Statutes of limitations represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.") (quoting *United States v. Kubrick*, 444 U.S. 111, 117 (1979)).

In addition, courts have held that race or ethnicity is an entirely distinct concept factually from a person's national origin, and therefore, the set of facts to defend against a claim of race

[9] Indeed, Plaintiff's purported Section 1981 is difficult to fathom. Daniels concedes that he was asked to serve as the Senior IT Administrator when a Caucasian was fired.

discrimination is distinct from the set of facts to defend against a claim of national origin discrimination. For example, this Court dismissed a plaintiff's claim for race discrimination for failure to exhaust administrative remedies where she had exhausted her claim with regard to national origin, but not as to race. *Nyunt v. Tomlinson*, 543 F. Supp. 2d 25, 35 (D.D.C. 2008), *aff'd*, 589 F.3d 445 (D.C. Cir. 2009). In *Nyunt*, the Court held that because race and national origin "are ideologically distinct categories," Plaintiff's charge of national origin discrimination did not serve to exhaust her race claim. *Id*. Further, the Court explained that because race and national origin are "distinct," the defendant was not aware that race may be an issue, and thus was not able to investigate possible grounds of race discrimination. *Id*.

Because Daniels's Section 1981 claim was filed more than three years after the alleged incident of discrimination and because his race and national origin claims are ideologically distinct, Plaintiff's Section 1981 claim is barred by the statute of limitations. The Court should therefore dismiss Count I.

B. Daniels's Newly-Minted Race Claim Contradicts His Own Allegations Over a Three-Year Period.

Based on his own OFCCP Charge and his Amended Complaint in this action, Daniels has no viable claim for race discrimination. In his Charge with the OFCCP, attached hereto as Exhibit D, Plaintiff checked only the "national origin" box, even though a "race" box was available. Further, in his written factual statement to the OFCCP titled "*Statement for the cause of discrimination based on National Origin,*" he claims only that he was discriminated against based on his national origin, making no mention of his race or ethnicity—not even an occasional reference. The references in Plaintiff's OFCCP Charge are to national origin, not race:

- He describes the Defendant as "run by foreign nationals."
- He describes himself as a "Liberian" and his co-worker as an "Ethiopian."

- He describes the first selected candidate as an "American." Then he states, "[t]he second person again hired for the position [was] an American."

- Finally, he concludes, "I believe that I was discriminated against based on my National Origin."

For years, Plaintiff solely pursued a theory of national origin discrimination,[10] including in the original Complaint filed in this Court. Now, only when precluded from seeking relief under Title VII, does Plaintiff strain to make a claim for race discrimination under Section 1981.

In a case involving strikingly similar facts, this Court dismissed a plaintiff's complaint for failure to state a Section 1981 claim because the Plaintiff's own actions showed that Plaintiff's claim was really one for national origin discrimination. *Ndondji v. InterPark Inc.*, 768 F. Supp. 2d 263, 273 (D.D.C. 2011). As in this case, the Plaintiff in *Ndondji* had checked the "national origin" box on an EEOC charge, even though a "race" box was available. *Id*. There, the Court concluded that the plaintiff's "occasional reference to his race in his amended complaint [was] . . . insufficient to make out a section 1981 action." *Id*. at 274. The court concluded that "general, conclusory allegations that Ndondji was a victim of racial discrimination [we]re simply not enough to bring a section 1981 action, particularly when the clear thrust of his allegations [wa]s based on national origin discrimination." *Id*.

Just as with the plaintiff in *Ndondji*, Daniels cannot add a distinct race claim at this late date, and the Court should see the claim for what it really is—nothing more than a claim for national origin discrimination—which the Court should not allow. *Id.* at 275 ("[C]ourts should not strain to find that passing references to race are sufficient to state a section 1981 claim.").

[10] The law is clear that claims for discrimination based solely on national origin are not actionable under Section 1981. *See Saint Francis Coll. V. Al-Khazraji*, 481 U.S. 604, 613 (1987); *Amir v. Securitas Sec. Servs. USA, Inc.*, No. CV 12-2047 (RWR), 2014 WL 1289449, at *4 (D.D.C. Apr. 1, 2014); *Amiri v. Hilton Washington Hotel*, 360 F. Supp. 2d 38, 42 (D.D.C. 2003).

C. Daniels May Not Bring a Section 1981 Claim Against CGSI Because a Federal Job Corps Center Operates Under the Color of Federal Law.

Plaintiff alleges that he worked for and now files a claim against the "Chugach Government Services, Inc. - Potomac Job Corps Center." The federal Job Corps Program was created by Congress and is authorized under Title I, Subtitle C of the Workforce Investment Act of 1998 ("WIA"), 29 U.S.C. § 2801, *et seq*. The federally-funded Program is a free education and training program, implemented by the U.S. Department of Labor ("DOL"), which helps young people learn a career, earn a high school diploma or GED, and find and keep a good job. *See* 29 U.S.C. § 2881(1). Job Corps Centers are mandated to comply with the federal government's Job Corps Policy and Requirements Handbook (the "Handbook"), which is a 1,323-page document setting forth mandatory program operation guidelines for individual centers like the Potomac Job Corps Center. U.S. DEPARTMENT OF LABOR OFFICE OF JOB CORPS, POLICY AND REQUIREMENTS HANDBOOK, found at https://web.archive.org/web/20121209111616/http://www.jobcorps.gov/Libraries/pdf/prh.sflb.[11] The Handbook is supplemented with a 796-page Program Assessment Guide, which provides centers with quality indicators and a strategy for achieving these goals. U.S. DEPARTMENT OF LABOR OFFICE OF JOB CORPS, PROGRAM ASSESSMENT GUIDE, found at www.jobcorps.gov/Libraries/pdf/pag.sflb. The length and detail of these documents demonstrate the high degree of control that the DOL exercises over federal Job Corps Centers.

The law is clear that "Section 1981 does not apply to actions taken under the color of federal law, nor does it permit suit against instrumentalities of the federal government."

[11] The Court may take judicial notice of "information posted on official public websites of government agencies." *Pharm. Research & Mfrs. of Am. v. United States Dep't of Health & Human Servs.*, No. CV 13-1501 (RC), 2014 WL 2171089, at *3 (D.D.C. May 23, 2014) (collecting cases).

DynaLantic Corp. v. U.S. Dep't of Def., 885 F. Supp. 2d 237, 291 (D.D.C. 2012) (Sullivan, J.). As the operator of the Potomac Job Corps site, CGSI was necessarily acting under the direction and control of the United States Department of Labor at the time of the allegations in Plaintiff's Amended Complaint. Because Daniels has "not allege[d] impairment of rights by nongovernmental discrimination," he does not have a viable Section 1981 claim. *Williams v. Glickman*, 936 F. Supp. 1, 5 (D.D.C. 1996).

For all the reasons set forth above, Plaintiff's Section 1981 claim should be dismissed.

V. EVEN IF THE PLAINTIFF'S CLAIMS WERE NOT STATUTORILY BARRED, PLAINTIFF FAILS TO STATE A CLAIM UNDER TITLE VII, THE ADEA, OR SECTION 1981 BECAUSE HE HAS NOT ESTABLISHED A *PRIMA FACIE* CASE OF DISCRIMINATION.

In the Amended Complaint, Daniels fails to allege that CGSI intended to discriminate against him on the basis of national origin, age, or race. Thus, even if they were otherwise viable claims, all three of Plaintiff's claims fail for this additional reason as a matter of law.

Title VII makes it unlawful for an employer to discriminate against an employee on the basis of national origin, among other factors. 42 U.S.C. § 2000e–2(a)(1). The ADEA makes it unlawful for an employer to discriminate against any individual who is at least forty years old because of the individual's age. 29 U.S.C. § 623(a)(1). Section 1981 prohibits racial discrimination in "the making, performance, modification, and termination of contracts" and ensures the rights of all citizens to enjoy "all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

Evidence of intentional discrimination is required for each of these claims. Where direct evidence of discriminatory intent is not available, a party may rely on the familiar burden-shifting scheme first articulated in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-05 (1973). *Hall v. Giant Food, Inc*., 175 F.3d 1074, 1077 (D.C. Cir. 1999) (applying framework to

ADEA claim); *Montgomery v. Gotbaum*, 920 F. Supp. 2d 73, 80 (D.D.C. 2013) (applying framework to Title VII claim); *Sullivan v. Catholic Univ. of Am.*, 387 F. Supp. 2d 11, 13 (D.D.C. 2005) (explaining the framework "applies equally" to Section 1981 claims). Under the *McDonnell Douglas* framework, the employee must first establish a *prima facie* case of prohibited discrimination. If the employee succeeds in establishing a *prima facie* case, the burden "shifts to the employer to articulate legitimate, nondiscriminatory reasons for the challenged employment decision." *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1288 (D.C. Cir. 1998) (*en banc*). If the employer does so, the employee must demonstrate that the employer's reason for its action is a mere pretext for discrimination. *Hall*, 175 F.3d at 1077-78; *see also Koger v. Reno*, 98 F.3d 631, 634 (D.C. Cir. 1996). Plaintiff fails to allege facts sufficient to establish a *prima facie* case under Title VII, the ADEA, or Section 1981. All Plaintiff's claims therefore fail as a matter of law.

A. Daniels's Claims Related to the September 2011 Posting Fail to State a Claim Because He Does Not Allege Sufficient Facts of Intentional Discrimination on the Part of CGSI.

To state a claim under Title VII, the ADEA, or Section 1981, a plaintiff must set forth facts to show intentional discrimination on the part of the employer, and Daniels has failed to do so in this case. In a Title VII disparate treatment action, such as this, Plaintiff must show that CGSI "intentionally discriminated" against him. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Likewise, to state a claim under Section 1981, a plaintiff must allege that the defendant intended to discriminate against the plaintiff on the basis of race. *Mazloum v. D.C. Metro. Police Dep't*, 522 F. Supp. 2d 24, 37 (D.D.C. 2007); *see also Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389 (1982) (emphasizing that Section 1981 "reaches only

purposeful discrimination"). In an ADEA action, the plaintiff must show that he has been "the victim of intentional discrimination." *Hall*, 175 F.3d at 1078.

Daniels has failed to allege facts sufficient to establish a claim for intentional discrimination on the basis of national origin, age, or race. It is not sufficient to allege in conclusory fashion that a person of a certain national origin, age, or race was not hired for a particular position. "[A]t the motion-to-dismiss stage, conclusory allegations . . . 'are not entitled to the presumption of truth.'" *Johnson v. District of Columbia*, No. 13-1445 (JDB), 2014 WL 3057886, at *4 (D.D.C. July 8, 2014) (quoting *Iqbal*, 556 U.S. at 679). In the present case, Daniels merely alleges that CGSI chose one applicant over two other candidates based upon the candidates' answers during a formal interview process but fails to allege sufficient facts to show that CGSI's intent was to discriminate against Daniels when it hired the younger Caucasian applicant. Without factual support, Plaintiff makes the bald allegation that the selected candidate's qualifications were "far inferior" to Daniels's qualifications. Am. Compl. ¶ 7. But this conclusory allegation fails to establish a *prima facie* case of discrimination.

Moreover, Plaintiff's bare allegations of discriminatory intent are undermined by the Plaintiff's own allegation that CGSI had hired Daniels less than two years before. In employment discrimination actions, courts in this jurisdiction recognize that "when the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute to that person an invidious motivation that would be inconsistent with the decision to hire, especially when the firing has occurred only a short time after the hiring." *Vatel v. Alliance of Auto. Mfrs.*, 627 F.3d 1245, 1247 (D.C. Cir. 2011) (internal quotation marks and alterations omitted). This principle, known as the same actor inference, "is probative evidence against" a finding of intentional discrimination. *Ragsdale v. Holder*, 668 F. Supp. 2d 7, 23 (D.D.C. 2009).

In this case, CGSI hired Plaintiff as the Systems Administrator in October 2009. Am. Compl. ¶ 4. CGSI's decision to hire him only two years before the allegations of discrimination contradicts any claim that CGSI intentionally discriminated against him. Moreover, Plaintiff's allegations of discrimination are further undermined by Plaintiff's own allegation that CGSI offered Daniels another position in March 2012 (*id.* ¶ 14), after the alleged acts of discrimination.

Because Daniels has not alleged sufficient facts to show that CGSI's hiring decision in September 2011 was the result of intentional discrimination on the basis of national origin, age, or race, all three counts of Plaintiff's Amended Complaint should be dismissed.

B. Daniels's Claims Related to the February 2012 Posting Fail as a Matter of Law Because He Does Not Allege that He Applied for the Position, Nor Has He Established that CGSI Intentionally Discriminated Against Him.

Because Plaintiff admits that he did not apply for the position in February 2012, his claims relating to this posting fail as a matter of law. To establish a *prima facie* case of discrimination under the ADEA, Daniels must show that (i) he belongs in the statutorily protected age group, (ii) he was qualified for the position, (iii) he was terminated, and (iv) he was disadvantaged in favor of a younger person. *Hall*, 175 F.3d at 1077. Similarly, in order to establish a *prima facie* case of discrimination under Title VII (and likewise Section 1981),[12] Daniels must show, among other things, that he applied and was qualified for the position. *Lester v. Natsios*, 290 F. Supp. 2d 11, 20 (D.D.C. 2003). Here, Plaintiff expressly alleges that he did not apply for the Senior IT Administrator position, and he therefore cannot establish that he was disadvantaged in favor of a younger person. Am. Compl. ¶¶ 12-13. Thus, Plaintiff does not plead "sufficient facts to show a plausible entitlement to relief," *Spaeth v. Georgetown Univ.*,

[12] Courts rely on Title VII and its jurisprudence when evaluating Section 1981 claims. *Burt v. Nat'l Republican Club of Capitol Hill*, 828 F. Supp. 2d 115, 122 (D.D.C. 2011).

839 F. Supp. 2d 57, 63 (D.D.C. 2012), and all claims arising from the February 2012 posting must be dismissed.

Even if the Court were to find Daniels's allegations sufficient despite the fact that he did not apply for the position, Plaintiff has not alleged facts to support a finding that CGSI intentionally discriminated against him when it hired the African American applicant. Again, Plaintiff does not state a single discriminatory basis for CGSI's selection of the second Senior IT Administrator. The mere allegation that a younger, African-American candidate was selected instead of Plaintiff, when Plaintiff did not even apply for the position, utterly fails to establish the necessary element of intentional discrimination. Accordingly, Plaintiff's claims arising from the February 2012 posting should be dismissed.

VI. CONCLUSION

For the reasons set forth above, Defendant CGSI requests that the Court grant CGSI's motion to dismiss Plaintiff's Amended Complaint in its entirety and grant such further relief as this Court deems proper.

DATED: March 2, 2015

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CERTIFICATE OF SERVICE

I, Attison L. Barnes, III, hereby certify that on March 2, 2015, I caused a copy of the foregoing to be served via the Clerk of the Court's CM/ECF system to:

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