IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DANIELS **468 Possum Court** **Capitol Heights, MD 20743** **Plaintiff,** **v.** **CHUGACH GOVERNMENT SERVICES, INC - POTOMAC JOB CORPS CENTER** **1 D.C. Village Lane, SW** **Washington, D.C. 20032** **Defendant.**	**Civil Action No.: 1:14-cv-01667-EGS**

OPPOSITION TO CHUGACH'S MOTION TO DISMISS AMENDED COMPLAINT

Plaintiff, John Daniels, ("Plaintiff"), by his attorney Richard J. Hackerman, and Richard J. Hackerman, P.A., hereby files this Opposition to Defendant Chugach Government Services, Inc.'s ("Chugach") Motion to Dismiss the Amended Complaint, and for reason says:

I. Chugach fails to set forth an adequate basis to dismiss Plaintiff's Title VII claim

Chugach's argument that it is a subsidiary of an Alaska Native Corporation and therefore does not fall within the definition of employer under Title VII is defective for two reasons:

The exhibits attached to Chugach's motion do not set forth the relationship, if any, of the Defendant to Chugach Native Association, one of twelve groups identified pursuant to 43 U.S.C. Section 1606 (a)(9). Glaring by its omission is an affidavit affirming that the Defendant is a

wholly owned subsidiary of Chugach Alaska Corporation or any entity organized pursuant to the Alaska Native Claims Settlement Act.

Second the motion with respect to that purported fact that Chugach is a subsidiary of an Alaska Native Corporation is premature. Premature summary judgment motions, or in this case a motion dismiss, must be denied or deferred if the non-moving party, in this case the Plaintiff, has not had an opportunity to make full discovery. Pursuant to Federal Rule 56(d),

> When Facts Are Unavailable to the Nonmovant.
> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) defer considering the motion or deny it;
> (2) allow time to obtain affidavits or declarations or to take discovery; or
> (3) issue any other appropriate order.

Within Chugach's Motion to Dismiss, it has averred a material fact which Plaintiff has no way at this juncture to verify is true, not true or partially correct. Chugach is not entitled to an order granting a motion a motion to dismiss, though styled in various material respects as a motion for summary judgment until Plaintiff has had an opportunity to engage in discovery

II. Chugach's Statute of Limitations Defense is Meritless

Chugach erroneously claims that 42 U.S.C. § 1981 is governed by a three year statute of limitations, citing only a single unpublished decision from this Court. *Ivey v. Nat'l Treasury Emps. Union*, No. 05-1147 (EGS), 2007 WL 915229, at *4 (D.D.C. Mar. 27, 2007). Chugach completely ignores the Supreme Court's decision *Jones v. R.R. Donnelley & Sons Co*., 541 U.S. 369, 382, 124 S.Ct. 1836, 158 L.Ed.2d 645 (2004), which unequivocally held that § 1981 race discrimination claims for post-contract formation conduct are entitled to a four year statute of limitation period under 28 U.S.C. § 1658(a)'s four year "catch-all" provision governing the

statute of limitations arising under an Act of Congress. The *Jones* ruling and § 1981's four year statute of limitations have been repeatedly cited by this Court. *See, e.g., Hamilton v. Columbia*, 852 F.Supp.2d 139, 144 (D.D.C., 2012); *Welzel v. Bernstein*, 436 F.Supp.2d 110, 114 (D.D.C., 2006). Plaintiff's claims involve Chugach's racial discrimination against him which all arose after the formation of his employment relationship with Chugach, and thus all of his claims are undisputedly governed by the four year statute of limitations. All of Chugach's racially discriminatory conduct under § 1981 as described in Paragraphs 6 – 15 of the Amended Complaint are clearly within the four year statute of limitations. Chugach's statute of limitations arguments are groundless, which renders all its further arguments about the "staleness" of the claim and the relation-back doctrine equally invalid.

III. Chugach is not an Instrumentality of the Federal Government

Equally baseless is Chugach's claim to be a federal instrumentality, i.e. a federal agency, immune from suit under § 1981. Under Chugach's strained logic, the mere fact that the Department of Labor post guidelines and policies by which private companies running Job Corps centers should abide, transforms such a company into a federal agency and an instrumentality of the federal government immune from § 1981 liability. Indeed, Chugach's argument would transform the sovereign immunity landscape, rendering any private company contracting with the federal government into a "federal instrumentality" merely if the government provides policies or guidelines for the company to follow. Section 1981 would be a toothless statute against practically any government contractor. Contractors could almost find some type of policy or guideline oversight by some federal department which would then, conveniently,

transform that contractor in an unassailable instrumentality and agency of the federal government.

The cases cited by Chugach are readily distinguishable because they involve real federal agencies, not a private entity like Chugach trying to masquerade as one. In *DynaLantic Corp. v. U.S. Dep't of Def.*, 885 F. Supp. 2d 237, 291 (D.D.C. 2012), the plaintiff attempted to sue the Department of Defense, undisputedly a federal instrumentality and agency, under § 1981. In *Williams v. Glickman*, 936 F. Supp. 1, 5 (D.D.C. 1996), the plaintiff sued the Secretary of the Department of Agriculture alleging racial discrimination under § 1981 for the Farmers Home Administration, which was properly deemed to be federal instrumentality. These cases are a far cry from what Chugach now asserts: that a mere affiliation of a private company with a federal agency's guidelines and policies renders that company sovereignly immune federal instrumentality.

Having addressed Chugach's most plainly erroneous arguments, Plaintiff will now address the remainder of the Motion to Dismiss.

IV. Plaintiff Adequately Alleges Race Discrimination Under § 1981

Chugach argues that Plaintiff's Amended Complaint fails to allege race discrimination based on ancestry or ethnic considerations. While Chugach is correct that national origin discrimination and race discrimination separately distinctive, that does not mean that they must inherently have a completely unrelated factual basis. *See Wesley v. Howard Univ.*, 3 F.Supp.2d 1, 3 (D.D.C.1998) (national origin discrimination claims can be raised under § 1981 only when based on "racial or ethnic characteristics associated with the national origin in question"). Chugach relies upon *Ndondji v. Interpark Inc.*, 768 F. Supp. 2d 263 (D.D.C., 2011), but that is a

case in which the Plaintiff presented no evidence of race discrimination in his complaint. By contrast, Plaintiff Daniels has properly alleged that Chugach intentionally discriminated against him based on his racial characteristics, heritage and ancestry, namely Chugach was trying to rid its staff of Black Africans, who present a different cultural and heritage from those of the unqualified Caucasian candidate Chugach hired – and then fired – before hiring an African-Amercan without informing Plaintiff of the existence of the re-posting of the position.

Plaintiff's Amended Complaint amply alleges § 1981 race discrimination on the basis of his ancestry, ethnicity as a Black African and African heritage. Paragraphs 6, 7, 8, 13, and 16 detail how Chugach effectually and intentionally eliminated both Plaintiff and another older Black African employee; instead hiring a clearly unqualified and younger Caucasian candidate over the much more credentialed and experienced Black Africans. The Amended Complaint alleges that Chugach took these steps to eliminate Black Africans of different ethnic and cultural heritages from the Caucasian and African-American candidates that were ultimately hired. Black Africans have an ethnic and ancestral heritage that is distinct from African-Americans, and the Amended Complaint adequately alleges race discrimination because of Plaintiff's ethnic and ancestral characteristics as a Black African. As Paragraph 8 states: "Chugach's actions were racially motivated and racially discriminatory, in that it intentionally hired an unqualified Caucasian over Mr. Daniels and his supervisor, another more qualified Black African."

Another determinative factor in *Ndondji* decision was the fact that the plaintiff's complaint "never identifie[d] the races of the InterPark employees who allegedly discriminated against him or, more importantly, the races of other similarly situated employees who were allegedly treated more favorably than he was." *Ndondji* 768 F. Supp. 2d at 275. By contrast, Plaintiff Daniels has identified races of the unqualified Caucasian applicant, and the

subsequently appointed African-American candidate who replaced the Caucasian after Chugach failed to give Plaintiff any notice of the reposting of the Senior IT Administrator position.

V. Plaintiff Has Not Failed To Exhaust His Age Discrimination Claim

Chugach's claim that Plaintiff failed to exhaust his age discrimination claim is without merit. As stated in paragraph 15, on May 30, 2012, Mr. Daniels filed his complaint with the OFCCP. According to the November 9, 2011 updated Memorandum of Understanding between the EEOC and the OFCCP, OFCCP is authorized to receive and decide all Title VII related complaints against a government contractor such as Chugach, on behalf of the EEOC. Paragraph 7a of the MOU, published online by the EEOC states:

> (a) Dual-Filed Complaints/Charges -- Pursuant to this MOU, OFCCP shall act as EEOC's agent for the purposes of receiving the Title VII component of all complaints/charges. All complaints/ charges of employment discrimination filed with OFCCP alleging a Title VII basis (race, color, religion, sex, national origin, or retaliation) shall be received as complaints/charges simultaneously dual-filed under Title VII. In determining the timeliness of such complaint/charge, the date the matter is received by OFCCP, acting as EEOC's agent, shall be deemed the date it is received by EEOC.[1]

Although the MOU does not specifically refer to age discrimination, it makes little sense for a complainant to have the burden of filing two separate complaints with the EEOC for age discrimination and with OFCCP for Title VII violations when the discrimination alleged arises from the same operative actions undertaken by the government contractor. Moreover, Plaintiff first contacted the EEOC by phone and timely reported Chugach's race/national original and age discrimination directed toward him. The EEOC representative told Plaintiff that he needed to file his entire complaint before the OFCCP.

[1] http://www.eeoc.gov/laws/mous/eeoc_ofccp.cfm

Accordingly, this is a situation where the time to file the age discrimination allegations before the EEOC should be equitably tolled to allow Plaintiff time to file his ADEA claim before the EEOC, since Plaintiff filed his complaint with OFCCP, at the EEOC's direction. The D.C. Circuit has "allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period. . . . We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Washington v. Washington Metro. Area Transit Auth.*, 160 F.3d 750, 752 (D.C. Cir. 1998). Any defect in Plaintiff's filing age discrimination claims with OFCCP (which does not provide a age discrimination category in its complaint form) arises from the EEOC's own direction to him to file all of his allegations with OFCCP, and distinguishes it from the cases cited by Chugach in which a plaintiff erroneously filed with OFCCP on his own accord.

VI. Plaintiff Properly Alleges Intent and Other Statutory Elements for All Claims

Chugach selectively highlights and quotes from various portions of the Amended Complaint to claim Plaintiff has not adequately alleged a *prima face* case of discriminatory intent for his three claims. Chugach's arguments in this regard are unavailing. Plaintiff clearly alleges discriminatory intent and animus for both age and national origin discrimination and race discrimination under § 1981. For example, Chugach falsely claims that Plaintiff baldly asserts in Paragraph 7 of the Complaint that the selected candidate's qualifications were "far inferior." Chugach then remarkably (1) ignores all of the specific requirements for the position listed in Paragraph 7; (2) ignores Plaintiff's assertion at the end of Paragraph 7 stating "upon information and belief, the Caucasian candidate's qualifications listed literally none of these specific and

mandatory experience requirements;" and (3) most importantly, ignores Paragraph 16, stating: "In findings made on December 6, 2013 OFFCP stated that Chugach violated EO 11246 by hiring the first Caucasian candidate over Mr. Daniels, a more qualified candidate, when the first candidate did not meet the minimum requirements of the Senior IT Administrator." It is meritless for Chugach to assert that the Caucasian candidate's qualifications were "far inferior" is without factual support.

Chugach also ignores the allegations of intentional discrimination in Paragraph 8, alleging "Chugach's actions were racially motivated and racially discriminatory, in that it intentionally hired an unqualified Caucasian over Mr. Daniels and his supervisor, another more qualified Black African." Likewise, Chugach ignores Paragraph 9, alleging that Chugach demonstrated intent and discriminatory animus as evidenced by "the interview note sheet indicated that the Director specifically noted that the Caucasian candidate only had an Associate's Degree, but the Director failed to give the Caucasian candidate a rating/ranking for that portion of the interview. In contrast, the Director did rate Mr. Daniels on this portion of the interview, and Mr. Daniels clearly possessed the mandatory Bachelor's degree required for the Senior IT Administrator position." These were among the specific findings of OFFCP in its ruling that Chugach had violated the executive order, and OFFCP's findings certainly supports and is an integral part of Plaintiff's *prima facie* evidence of discriminatory intent.

Next Chugach attempts to assert that Plaintiff's allegations of intent are undermined by the fact that Chugach took its discriminatory actions against him "only" approximately two years after he was hired. Chugach cites the same actor inference, finding an employee who hires and then allegedly takes discriminatory actions against an employee, particularly when the hiring and firing is not separated by much time, is probative evidence against" a finding of intentional

discrimination. *Ragsdale v. Holder*, 668 F. Supp. 2d 7, 23 (D.D.C. 2009). This argument is specious. Two years between Plaintiff's hiring and Chugach's discrimination is hardly a short time, and Chugach could certainly form the discriminatory animus necessary to take the actions against Plaintiff's during that time frame. In any event, such factual assertions are meant for discovery, not motions to dismiss on the pleadings.

Finally, Chugach's claim that Plaintiff's national origin claim is undermined by Chugach's offer of another position, utterly ignores the fact that Paragraph 14 of the Amended Complaint explains that Chugach's substitution position was an enormous reduction in compensation and hours for Plaintiff, forcing him to accept low paying employment at Wal-Mart.

Chugach next claims that the ADEA, Title VII, and § 1981 claims are not properly pled, arguing that Plaintiff cannot show he was disadvantaged by the hiring of a younger person because Plaintiff did not reapply for the position. Once again, Chugach's ignores the material portions of the Amended Complaint in paragraphs 12 and 13, including the fact that Mr. Daniels was notified of the first job posting by Chugach but that Chugach completely failed to notify him of the re-opening of the position, <u>despite</u> the fact that Plaintiff was the Acting Senior IT Administrator, the <u>very same position</u> for which Chugach was advertising. Plaintiff is certainly entitled to the very reasonable inference that Chugach was intentionally excluding him and his former supervisor – who was also from Africa and even older than Plaintiff – from consideration due to their age and different ethnic background and characteristics. *See* Amended Complaint, paragraph 16. Plaintiff was serving as the Acting Senior IT Administrator, and the fact that Chugach intentionally failed to inform him of the reposting in order to exclude him from consideration is a quintessential example of intentional race and age discrimination. Chugach is

just as responsible for its discriminatory failure to notify Plaintiff of the reposting of the position in its effort to rid itself of an unwanted older Black African employee. Chugach's self-serving claims to the contrary are specious and easily rebutted.

For the foregoing reasons, Chugach's Motion to Dismiss should be denied. Likewise, its reservation of its rights to seek attorney's fees for the ADEA claim and the national origin claim under Title VII is unwarranted. The Court has never ruled on these claims and Plaintiff has a good faith basis in bringing them, regardless of Chugach's counter-positions in its earlier Opposition to the original Complaint.

Respectfully Submitted, Dated: March 16, 2015

_____/s/_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, THAT A COPY OF THE AFOREGOING WAS MAILED POSTAGE PREPAID, FIRST CLASS MAIL, AND ELECTRONICALLY, THIS 16TH DAY OF MARCH, 2O15, UNTO: Attison L. Barnes, III, Esquire, Wilen Rein, LLP, 1776 K. Street, N.W., Washington, D.C. 20006.

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