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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ELANA BARRON, Plaintiff, vs. ALASKA NATIVE TRIBAL HEALTH CONSORTIUM, Defendant.	)	Case No.: 3:18-cv-00118-SLG

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS: FED. R. CIV. PRO. 12(b)(1)

Defendant Alaska Native Tribal Health Consortium (ANTHC) is asking that this Court foreclose justice to an Alaskan Native, victimized by racial discrimination at the hands of her Caucasian supervisors. To achieve its objective, of denying a victim her day in court, ANTHC paints a false portrait of equivalency. First, ANTHC argues that 42 U.S.C. § 1981, based on the Civil Rights Act of 1866, is the same as Title VII of Civil Rights Act of 1964.[1] Next, ANTHC argues that the tribal sovereignty held by Indian tribes of the lower 48, and Metlakatla Indian Community, is the same sovereignty held by Alaska Native Corporations.[2] On both issues, ANTHC is wrong.

[1] Dkt. 10, at 1.
[2] *Id.*, at 8.

The District Court for the State of Alaska has previously held that Alaska Native Corporations are not immune against racial claims filed under 42 U.S.C. § 1981.[3] Although, ANTHC has presented an apparently well researched motion, it has failed to address the 2010 decision by U.S. District Judge Timothy Burgess in *Becker v. Kikiktagruk Inupiat Corporation*.[4] By omitting the *Becker* decision, ANTHC is essentially asking this Court to overrule the earlier case without specifically stating this goal. A careful review of *Becker*, contrasted with ANTHC's arguments, shows that this Court has no compelling reason to reach a different conclusion than that reached by Judge Burgess.

The issues that compel denial of ANTHC's motion to dismiss center around two legal conclusions. First, the Supreme Court has held that 42 U.S.C. § 1981 is discreet and separate from Title VII of the Civil Rights Act of 1964.[5] Second, "Alaska Native Corporations and their subsidiaries are not comparable sovereign entities" with Indian tribes.[6] In its motion to dismiss, ANTHC has merged concepts in order to artificially strengthen an argument that Judge Burgess ably addressed eight years earlier.

FACTUAL BACKGROUND

A few key facts are necessary as backdrop to ANTHC's motion. First, the plaintiff, Elana Barron, is an Alaskan Native, who worked as a respiratory therapist at ANTHC.[7] She suffered disparate treatment and retaliation on the basis of her race, Alaskan Native, by Caucasian

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[3] *Becker v. Kikiktagruk Inupiat Corporation*, 2010 WL 11619259 (D. Alaska 2010).
[4] *Id.*.
[5] *Johnson v. Railway Exp. Agency, Inc.*, 421 U.S. 454 (1975).
[6] *Seldovia Native Ass'n v. Lujan*, 904 F.2d 1335, 1350 (9th Cir. 1990).
[7] Dkt. 1.1, at 6.

supervisors.[8]

Ms. Barron's single claim alleges a violation under 42 U.S.C. § 1981.[9] The only remedy that Ms. Barron seeks are those remedies available under 42 U.S.C. § 1981.[10] It is critical to note that Ms. Barron has not alleged any claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, even though she initially sought redress from the Anchorage Equal Rights Commission and the U.S. Equal Employment Opportunity Commission. Further, Ms. Barron seeks compensatory damages against ANTHC solely as a remedy under 42 U.S.C. § 1981. Ms. Barron has made no separate claims under Alaska law, and she does not allege the tort of Intentional Infliction of Emotional Distress.

ARGUMENT

In its motion, ANTHC devoted several pages toward identifying the structural backdrop for the Alaska Native Tribal Health Consortium. To summarize the defendant's argument, it should suffice to say that ANTHC as an entity only has the level of sovereign immunity that is possessed by the Alaska Native Corporation that comprise the entity. As such, if an Alaska Native Corporation can be sued under 42 U.S.C. § 1981, then ANTHC can be sued under 42 U.S.C. § 1981.

ANTHC has premised its motion to dismiss on the argument that if it is exempt from employment related civil rights claims under Title VII of the Civil Rights Act of 1964, then it is

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[8] *Id.*, at 8.
[9] *Id.*, at 7.
[10] *Id.*, at 8.

also exempt from claims filed under 42 U.S.C. § 1981.[11] To support its argument, ANTHC relied heavily on a decision by the Eleventh Circuit, which addressed facts dissimilar to Ms. Barron's and contradictory to a prior Supreme Court ruling.[12] In rendering his decision in *Becker*, Judge Burgess relied on a Fourth Circuit ruling, on facts far more similar to Ms. Barron's. ANTHC has provided no justification for why Judge Burgess' decision in *Becker* should be discarded in favor of an out-of-circuit decision, with dissimilar facts.

Title VII of the Civil Rights Act of 1964, has a backdoor exemption for Alaska Native Corporations, by selecting to exclude them from the definition of "employer." The Civil Rights Act of 1866, codified as 42 U.S.C. § 1981 does not exclude Alaska Native Corporations from the definition of employers. Likewise, when Congress passed the Civil Rights Act of 1991, which amended (and expanded) the Civil Rights Act of 1866, legislators chose not to exempt Alaska Native Corporations from coverage under 42 U.S.C. § 1981.

ANTHC's motion to dismiss must fail. As will be explained below, Alaska Native Corporations, and its health consortiums, are not exempted from suits filed under 42 U.S.C. § 1981. Likewise, Alaska Native Corporations, and its health consortiums, do not have sovereign immunity from suits filed under 42 U.S.C. § 1981. As such, Ms. Barron's lawsuit against ANTHC must be allowed to continue.

A. THE U.S. SUPREME COURT, HAVING ANALYZED THE ISSUE, HAS HELD THAT 42 U.S.C. § 1981 IS DISCRETE AND INDEPENDENT OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

In 1975, the Supreme Court decided a case questioning to what degree a claim filed 42

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[11] Dkt. 10, at 5-7.

[12] *Id.*.

U.S.C. § 1981 differed from a claim filed under Title VII.[13] The case, *Johnson v. Railway Express Agency, Inc.,* focused particularly on the issue of tolling of the statute of limitations, however, it presented the Court an opportunity to distinguish between these two civil rights acts.[14] In *Johnson*, the Supreme Court pointed out that Title VII and 42 U.S.C. § 1981 are separate and discrete causes of action.[15] As such, it is inappropriate to assume that the language in Title VII, and its exclusions, can be carried over to the language in 42 U.S.C. § 1981.

In its *Johnson* decision, the Supreme Court decided that Title VII and 42 U.S.C. § 1981 do not share the same statute of limitations. The Court held that a victim of racial discrimination will have two avenues to pursue legal redress (Title VII and/or 42 U.S.C. § 1981), but the procedural guidelines in each cause of action is separate and discrete. The Court stated that "[t]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other state and federal statutes."[16] Continuing the Court stated that "Congress noted 'that the remedies available to the individual under Title VII are co-extensive with the indiv(i)dual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive."[17]

It is important that the Supreme Court focused on the legislative intent as drawing a distinction between Title VII and 42 U.S.C. § 1981. In its motion, ANTHC implied that when

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[13] *Johnson v. Railway Exp. Agency, Inc.*, 421 U.S. 454 (1975).
[14] *Id.*, at 468.
[15] *Id.*, at 462.
[16] *Id.*, at 459, citing: *Alexander v. Gardner-Denver Co*, 415 U.S. 36, 48 (1974).
[17] *Id.*, citing: H.R. Rep. No. 92-238, p. 19 (1971).

Congress drafted Title VII it expected to subsume 42 U.S.C. § 1981, such that if something is exempt under Title VII it must be exempt under 42 U.S.C. § 1981. In contrast to ANTHC's theory, the *Johnson* Court stated that "in considering the Equal Employment Opportunity Act of 1972, the Senate rejected an amendment that would have deprived a claimaint of any right to sue under § 1981."[18] This Court also stated that "Section 1981 is not conextensive in its coverage with Title VII. The latter is made inapplicable to certain employers."[19]

In its motion, ANTHC disregarded the holding in the *Johnson* case, relying instead on the Eleventh Circuit case, *Taylor v. Alabama Intertribal Council Title VII J.T.P.A.*[20] In *Taylor*, the Eleventh Circuit addressed a claim by a Non-Indian former employee, who filed a claim of racial discrimination under 42 U.S.C. § 1981 against an Intertribal council's Indian tribal preference program. It is important to note that the policy in question related to "Indian tribal preference," which by its nature deals with issues of tribal membership that are what is termed "intramural" issues.[21] Consequently, the plaintiff in *Taylor* is not alleging the same cause of action that Ms. Barron is alleging.

The Eleventh Circuit's holding in *Taylor* simply addressed a different set of facts than Ms. Barron presents. The issue of Indian preference programs, *Taylor* states in its decision, addresses political issues, not strictly racial issues. Given the factual backdrop of the *Taylor* decision, the Eleventh Circuit reached a conclusion that seemingly merged the protections of

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[18] *Johnson*, 421 U.S., at 459, citing: 118 Cong.Rec. 3371-3373 (1972).
[19] *Id.*, at 460, citing 42 U.S.C. § 2000e(b) (1970 ed., Supp. III).
[20] 261 F.3d 1032 (11th Cir. 2001).
[21] *Id.*, at 1035.

Title VII and 42 U.S.C. § 1981, thereby contradicting the Supreme Court's *Johnson* decision. The *Taylor* Court stated that "it would be wholly illogical to allow plaintiffs to circumvent the Title VII bar against race discrimination claims based on a tribe's Indian employment preference programs simply by allowing a plaintiff to style his claim as § 1981 suit."[22] In the rest of its decision, however, the *Taylor* court pointed out that the issue presented is also precluded by Indian tribes' strong interest in self government.[23] Indian self government is not an issue in Ms. Barron's claim.

The *Taylor* Court specifically pointed out that the Indian tribe preference policy at issue in its case related to "intermural tribal employment decisions."[24] It was not an intermural tribal employment decision to allow Caucasian supervisors to racially discriminate against Ms. Barron, as alleged in her case. Instead, Ms. Barron presents a clear-cut claim of disparate treatment and retaliation based on a racial, not political, classification.

In its motion, ANTHC argued that *Taylor* establishes the fact that Title VII and 42 U.S.C. § 1981 are the same. The decision, however, did not make such a finding. In the *Taylor* decision, the Eleventh Circuit argued that the plaintiff could not make out his claim because of the specific nature of his claim, which challenged an intermural-related policy. The *Taylor* decision did not make a blanket statement that at all times, under all circumstances, a § 1981 claim is barred if barred under Title VII. To make such a claim would be untenable. For instance, a gender claim cannot be filed under 42 U.S.C. § 1981, because it does not fit within

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[22] *Id.*, at 1035.
[23] *Id.*.
[24] *Id.*, at 1036.

the protections identified in the Civil Rights Act of 1866. Likewise, it cannot be said that the Alaska Native corporations are not classified as employers for purposes of 42 U.S.C. § 1981, simply because these entities are not classified as employers under Title VII. As *Johnson* pointed out, each of these civil rights statutes is individual and discrete, even though there is some overlay.

B. THE FOURTH CIRCUIT HAS HELD THAT A RACE-BASED CLAIM FILED UNDER 42 U.S.C. § 1981 IS PERMITTED AGAINST AN ALASKA NATIVE CORPORATION.

In *Aleman v. Chugach Support Services, Inc.*[25], the Fourth Circuit address the issue of whether 43 U.S.C. § 1626(g), and 42 U.S.C. § 2000e(b), control claims filed under 42 U.S.C. § 1981.

In *Aleman*, multiple plaintiffs brought suit against Chugach Alaska Corporation, which like is an Alaska Native Corporation, with the same rights as possessed by ANTHC. One of the plaintiff's, James Blasic, a Caucasian employee, alleged that Chugach "violated the anti-discrimination statutes by terminating him in retaliation for reporting racial discrimination in the company's operations."[26] Blasic filed his claim against Chugach under both federal civil rights statutes, Title VII, and 42 U.S.C. § 1981. Chugach argued that the court should dismiss Blasic's claims on the exemption identified at 43 U.S.C. § 1626(g), and 42 U.S.C. § 2000e(b).[27]

In its decision, the Fourth Circuit concluded that Blasic's retaliation claim under Title VII is barred, but his claim under 42 U.S.C. § 1981 is unaffected by the exemption identified in the

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[25] 485 F.3d 206 (4th Cir. 2007).

[26] *Aleman*, 485 F.3d, at 210.

[27] *Id.*.

Native Claims Settlement Act, and Title VII.[28] The court identified two reasons for permitting the § 1981 claim against the Native corporation.[29] The court held the following: 1) "[b]y their own terms, the Title VII exclusions are limited to Title VII itself," and 2) "Section 1981 – which the Supreme Court instructed us to treat as a separate and distinct cause of action – contains no exemption corresponding to those in Title VII."[30] Continuing, the court stated, "[w]hile the definition of 'employer' in Title VII excludes Indian tribes and Alaska Native Corporations, these exclusions state that they are limited to the section of federal law that contains Title VII."[31]

The court observed that in contrast to Title VII, "Section 1981 contains no similar exception for Alaska Native Corporations."[32] While Title VII derives from the Civil Rights Act of 1964, Section 1981 was enacted as part of the Civil Rights Act of 1866.[33] "The Supreme Court has long held the Civil Rights Act of 1866 'to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein."[34] Even though Congress amended the statute in 1991, 'Section 1981 makes no mention of Alaska's Native Corporations or Indian tribes, and it includes no terms that could be constructed to set such entities outside the statute's reach."[35]

The Fourth Circuit pointed out that Title VII is intentionally more narrow than § 1981,

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[28] 485 F.3d, at 211.
[29] *Id.*.
[30] *Id.*.
[31] *Id.*.
[32] *Id.*.
[33] *Id.*.
[34] *Id.*.
[35] *Id.*.

rather than the other way around. The Fourth Circuit pointed out that in *Johnson v. Railway Express Agency, Inc.*, the Supreme Court held that "'Section 1981 is not coextensive in its coverage with Title VII,' in part because 'the latter is made inapplicable to certain employers.'"[36] The Fourth Circuit argued that "[t]he Supreme Court has foreclosed such a reading of Title VII as intended to amend Section 1981 sub silentio in the area where Title VII is more specific, holding 'that the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent."[37]

Dealing with Alaska Native Corporations, the case of *Aleman* is far more instructive to this case than the *Taylor* decision. The plaintiffs in *Aleman* presented a claim of retaliation based on race related issues, just like Ms. Barron has alleged against ANTHC. The claims presented by the *Aleman* plaintiff's did not address intermural Indian affair issues, but rather presented a claim of race related retaliation. Ms. Barron's claim, likewise, does not address any intermural Indian affair issues. As such, this Court should give greater persuasive effect to the *Aleman* decision than to the *Taylor* decision, especially on those issues where *Taylor* clearly is at odds with the holding in *Johnson*.

C. THE District Court FOR ALASKA HAS HELD THAT A RACE-BASED CLAIM FILED UNDER 42 U.S.C. § 1981 IS PERMITTED AGAINST AN ALASKA NATIVE CORPORATION.

In *Becker v. Kikiktagruk Inupiat Corporation*,[38] Judge Burgess addressed the question of whether Alaska Native corporations can be sued for race related claims under 42 U.S.C. § 1981.

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[36] *Aleman*, 485 F.3d, at 212, citing: *Railway Express*, 421 U.S. 454, 460 (1975).
[37] *Aleman*, 485 F.3d, at 212, citing *Railway Express*, 421 U.S., at 461.
[38] 2010 WL 11619259 (D. Alaska 2010).

One of the allegations by plaintiff in *Becker* alleged that he was retaliated because he complained about race-related discrimination. The defendant in *Becker* was Kikiktagruk Inupiat Corporation (KIC), an Alaska Native corporation. In defending against Becker's claims, KIC argued that as a Alaska Native corporation it was exempt from claims made under Title VII, and that claims made under 42 U.S.C. § 1981 fell under the same exemption. Judge Burgess rejected KIC's argument, holding that Native corporations are not exempt from racial discrimination claims under 42 U.S.C. § 1981.

Judge Burgess stated that since both the plaintiff and the defendant relied on circuits that seemed to be split, his Court needed to "determine for itself whether entities exempt from Title VII employment discrimination suits should likewise be immune under § 1981."[39] In its analysis, the *Becker* Court started with statutory interpretation. The Court stated that "[o]n its face, § 1981 contains no exemption for Alaska native corporations."[40] Next, the Court following the Supreme Court instructions for statutory interpretation stated that "if a literal construction of the words of a statute be absurd, the act must be so construed as to avoid absurdity."[41] As such, the *Becker* Court held that it could "read a Native corporation exemption into § 1981 if and only if any other reading would be absurd."[42]

In its analysis, the *Becker* court relied on the reasoning as outlined in the *Aleman* Court. In part, the *Aleman* Court concluded that it was reasonable that a "legislature could easily desire

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[39] *Id.*, at 5.
[40] *Id.*.
[41] *Id.*.
[42] *Id.*.

to subject only certain entities to the additional strictures of Title VII, while leaving in place the more limited cause of action in Section 1981 that has long been a part of our anti-discrimination law."[43] Relying on the reasoning by the Fourth Circuit, the *Becker* Court held that "[g]iven the lack of any stated exemption within the plain language of § 1981, the Court is unwilling to read an exemption for Native corporations into the statute when there is at least some reasonable explanation why Congress might exempt them from one discrimination statute and not another."[44]

The *Becker* Court's reasoning seems to fit exactly within the *Johnson* Court's holding that § 1981 and Title VII are discrete and individual claims. ANTHC's argument that Title VII's exemption carries over to § 1981 is merely a self-serving effort at avoiding liability for the bad conduct of its supervisors. A statute's scope and definition are critical to the concept of law. While ANTHC has attempted to rely on a theory that Congress simply forgot to exempt them from § 1981, the implications behind its argument is quite profound. If this Court were to adopt ANTHC's argument, then what would prevent a gender discrimination claimant, who missed the deadline for filing under Title VII, from arguing that § 1981 ought to also include protections under gender discrimination. The argument ANTHC has pursued in its motion is just as unsubstantiated as a gender discrimination claimant's argument that § 1981 and Title VII, both being civil rights laws, ought to cover the same protected classes.

CONCLUSION

ANTHC has presented a shotgun approach in its motion to dismiss. It has argued that

[43] *Id.*.
[44] *Id.*.

Title VII's exemptions bleed over to § 1981, somehow making § 1981 a mere subset of the Civil Rights Act of 1964. Standing in the way of ANTHC's argument, however, is the Supreme Court's holding in *Johnson*, which stated that Title VII and § 1981 are discrete and individual. Also, standing in the way of ANTHC's argument are the decisions in *Aleman* and *Becker*, which both hold specifically that Alaska Native corporations are not immune for § 1981 claims.

On the other issues ANTHC has presented, these fail on the facts. ANTHC argued that Indian sovereign immunity bars a § 1981 claim. The *Aleman* court dismissed the claim that Alaska Native Corporations have sovereign immunity such as to avoid § 1981 claims.[45] The *Becker* Court agreed with *Aleman*, since it allowed the suit against KIC. Likewise, ANTHC's argument that Ms. Barron is alleging a claim under intentional infliction of emotional distress, or a similar tort, is simply incorrect. Under 42 U.S.C. § 1981, there can be made out a claim for compensatory damages, which includes emotional stress. Obtaining a remedy for emotional stress does not automatically mean that a plaintiff alleged a claim of intentional infliction of emotional distress.

On all issues, ANTHC's motion fails. This Court should deny ANTHC's motion to dismiss and allow this case to continue toward Ms. Barron's day before the trier of fact.

DATED: July 12, 2018.

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[45] *Aleman*, 485 F.3d, at 213, citing: *Seldovia Native Ass'n v. Lujan*, 904 F.2d 1335, 1350 (9th Cir. 1990).

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I CERTIFY that on the 12th of July 2018,
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