IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FILED
JUN 2 8 2010
CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

TONY FOX,)
Plaintiff,)
)
v.) **No. 1:10cv399**
)
PORTICO REALITY SERVICES OFFICE,)
Defendant.)

ORDER

This race discrimination case brought pursuant to Title VII of the Civil Rights Act of 1964[1] presents the question—not yet addressed in the federal courts—whether the indirect subsidiary of an Alaska Native Corporation is excepted from the scope of Title VII's prohibition on unlawful employment practices on the ground that the indirect subsidiary is not a Title VII "employer" under 43 U.S.C. § 1626(g). In this case, defendant Portico Reality Services Office ("Portico")[2] argues on summary judgment that it is not an "employer" subject to Title VII because it is a wholly-owned, indirect subsidiary of NANA Regional Corporation, an Alaska Native Corporation.[3] For the reasons stated here, the Native Corporations exception applies only where, unlike here, the Native Corporation *directly* owns the subsidiary, and thus Portico's motion must be denied.

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[1] 42 U.S.C. §§ 2000e to 2000e-17 (2006).

[2] It is worth noting that Portico refers to itself as "Portico *Realty* Services," rather than "Portico *Reality* Services Office," the latter being the style of plaintiff's complaint and thus the docketed style of the case.

[3] Plaintiff, proceeding *pro se*, was provided notice of the motion consistent with *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), and Local Civil Rule 7(K). Plaintiff did not file an opposition brief. The parties appeared—plaintiff without counsel and Portico by counsel—at a June 25, 2010 hearing, following which the matter was taken under advisement.

The following undisputed facts are pertinent to Portico's motion for summary judgment: [4]

1. Plaintiff, an African-American male, is a resident of Virginia.

2. Portico—an Alaska limited liability company with its principal place of business in Manassas, Virginia—has one sole member, Qivliq LLC.[5] Qivliq LLC, in turn, is a wholly-owned subsidiary of NANA Development Corporation, which is a wholly-owned subsidiary of NANA Regional Corporation. NANA Regional Corporation is an Alaska Native Regional Corporation formed pursuant to the Alaska Native Claims Settlement Act. In sum, therefore, Portico is an indirect subsidiary of NANA Regional Corporation.

3. Plaintiff alleges in his complaint that he was hired to serve as a foreman at Portico's Manassas, Virginia office on September 19, 2007. While employed by Portico, plaintiff was allegedly treated differently from other non-African-American employees in that, *inter alia*, he (i) was not given a company vehicle, (ii) was not reimbursed for travel expenses, (iii) was not given an opportunity to work as a foreman, despite being hired for that position, (iv) was forced to work through his lunch breaks, (v) was the subject of numerous offensive racial remarks, and (vi) was not given a regularly-scheduled pay raise. Plaintiff alleges that he was wrongfully and discriminatorily discharged on October 12, 2009.

4. Following the denial of his administrative claim by the Equal Employment Opportunity Commission and the issuance of a right to sue letter, plaintiff on April 21, 2010, filed a complaint alleging discrimination on the basis of race, in violation of Title VII of the Civil Rights Act of 1964.

Title VII of the Civil Rights Act of 1964 makes it unlawful for any "employer," as defined by Title VII,

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[4] The facts stated herein are derived from the exhibits filed in support of Portico's motion for summary judgment, namely (i) the Equal Employment Opportunity Commission letter determination of plaintiff's administrative claim, and (ii) an affidavit by Douglas Krause, Portico's Vice President and General Manager. These facts are undisputed, as plaintiff filed neither an opposition brief nor other evidence controverting Portico's evidence.

[5] According to the Alaska Corporations, Business and Professional Licensing Division, Qivliq LLC is headquartered in Herndon, Virginia.

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). Title VII generally defines the term "employer" to be "a person engaged in an industry affecting commerce who has fifteen or more employees." *Id.* § 2000e(b)(1). Notably, however, certain groups and entities—namely wholly-owned government corporations, Indian tribes, and bona fide private membership clubs—are statutorily excepted from the scope of Title VII because they are not considered to be "employers" under 42 U.S.C. § 2000e(b)(1)-(2).

Pertinent here is the statutory exception for Alaska Native Corporations created under the Alaska Native Claims Settlement Act ("ANCSA"),[6] which exception states, as follows:

> For the purposes of implementation of the Civil Rights Act of 1964, 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 [42 USCS § 2000e(b)(1)], as amended, or successor statutes.

43 U.S.C. § 1626(g). Notably, the Supreme Court has held that the analogous Title VII exception for Native American tribes must be construed narrowly and consistently with the "clear congressional sentiment that an Indian preference in the narrow context of tribal or reservation-related employment d[oes] not constitute racial discrimination of the type otherwise proscribed." *Morton v. Mancari*, 417 U.S. 535, 547-48 (1974). Likewise, courts have

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[6] Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629a (2006)).

recognized that the purpose of the Native Corporations exception was to permit hiring favoritism toward Alaska Natives without violating Title VII. *See, e.g., Malabed v. N. Slope Borough*, 42 F. Supp. 2d 927, 934 (D. Alaska 1999). Accordingly, as Alaska Natives and Native Americans are treated comparably under federal law,[7] and the Title VII exceptions for Native American tribes and Alaska Native Corporations share a common purpose, it is appropriate to construe the Native Corporations exception narrowly as well. *See Pearson v. Chugach Gov't Servs.*, 669 F. Supp. 2d 467, 470-73 (D. Del. 2009) (concluding that Native Corporations Title VII exception is analogous to Native American tribes Title VII exception).

By its plain terms, § 1626(g) excepts from the Title VII definition of "employer" only (i) "Native Corporations," and (ii) "corporations, partnerships, joint ventures, trusts, or affiliates in which *the Native Corporation owns* not less than 25 per centum of the equity." 43 U.S.C. § 1626(g) (emphasis added). With respect to the latter category, a Native Corporation's indirect ownership interest in a subsidiary is insufficient to trigger the statutory exception for three reasons. First, it is notable that § 1626(e) specifically references both direct and indirect subsidiary corporations in setting forth the requirements for "minority and economically disadvantaged business enterprise" status, yet § 1626(g) does not. The express inclusion of indirect subsidiaries in § 1626(e) and the absence of comparable language in § 1626(g) is significant, as "it is generally presumed that Congress acts intentionally and purposefully in the

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[7] *See, e.g.*, 43 U.S.C. § 1626(d) ("Notwithstanding any other provision of law, Alaska Natives shall remain eligible for all Federal Indian programs on the same basis as other Native Americans."); *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827, 851-52 (9th Cir. 2006) (citing statutes in which Congress has defined terms "Indian," "native," "Native American," and "tribal organization" to include people who are not members of federally-recognized tribes, such as Alaska Natives).

disparate inclusion or exclusion." *Soliman v. Gonzales*, 419 F.3d 276, 283 (4th Cir. 2005). Second, NANA Regional Corporation does not legally own any part of Portico through intermediary subsidiaries. As the Supreme Court has held in another context, "[a] corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary; and, it follows with even greater force, the parent does not own or have legal title to the subsidiaries of the subsidiary." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003).[8] Third, practical and public policy considerations further support a direct ownership requirement. Specifically, if an indirect ownership relationship were sufficient, downstream subsidiaries might exploit the statutory exception and evade Title VII's requirements by ceding twenty-percent ownership to a Native Corporation holding company.[9] Furthermore, if a Native Corporation owns fifty percent of Subsidiary A, which in turn owns fifty percent of Subsidiary B, it would make little sense to hold that the Native Corporation owns twenty-five percent of Subsidiary B, notwithstanding that such an argument is foreclosed by the Supreme Court's holding in *Dole Food Co.* Accordingly, it is clear that the Native Corporation exception applies to subsidiaries only where the Native Corporation directly owns the subsidiary.

These principles, applied here, compel the conclusion that Portico is neither a Native Corporation nor a subsidiary owned by a Native Corporation, and thus is not excepted from the

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[8] It is worth noting that the Supreme Court relies on 1 Fletcher Cyclopedia of the Law of Private Corporations § 31, at 514 (rev. ed. 1999), for the proposition that "[t]he properties of two corporations are distinct, though the same shareholders own or control both. A holding corporation does not own the subsidiary's property."

[9] *See Pearson*, 669 F. Supp. 2d at 472 ("With the growth of the ANCs, the effect of ANCs exemption has reached far beyond a Native American employment preference. . . . This evolution of ANCs into open-market interstate commercial organizations, including employment of non-Native Americans, raises new questions about the scope of the ANC exemption.").

scope of Title VII under § 1626(g). To begin with, although Portico is an Alaska limited liability company, Portico presents no evidence—and indeed does not contend—that it is itself a Native Corporation, as defined by the ANCSA. *See* 43 U.S.C. § 1602. Moreover, the summary judgment record makes clear that NANA Regional Corporation—the only corporate entity said to be a Native Corporation in this case—does not hold a *direct* ownership stake in Portico. Instead, NANA Regional Corporation can only be said to own Portico *indirectly*. In other words, NANA Regional Corporation owns NANA Development Corporation, which in turn owns Qivliq LLC, which in turn owns Portico. *See Fairchild Dornier GmbH v. Official Comm. of Unsecured Creditors (In re Dornier Aviation (N. Am.), Inc.)*, 453 F.3d 225, 229 & n.1 (4th Cir. 2006) (explaining indirect subsidiary relationship). This indirect, twice-removed corporate relationship between NANA Regional Corporation and Portico does not satisfy § 1626(g) on the ground that "[a] corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary; and, it follows with even greater force, the parent does not own or have legal title to the subsidiaries of the subsidiary." *Dole Food Co.*, 538 U.S. at 475. Moreover, to hold otherwise would permit subsidiaries of subsidiaries of subsidiaries—which are only tenuously related to a Native Corporation and indeed may not even operate in Alaska—to evade Title VII's prohibition on employment discrimination, thereby contravening the purposes of both the ANCSA and Title VII. In this regard, it is worth emphasizing that Portico and its sole member, Qivliq LLC, are corporate entities with their principal places of business in Virginia. Thus, because Portico is neither an Alaska Native Corporation nor a direct subsidiary corporation of an Alaska Native Corporation, the Native Corporations exception does not apply.

Accordingly, for the reasons stated herein, and for good cause,

It is hereby **ORDERED** that Portico's motion for summary judgment (Doc. 4) is **DENIED.**[10]

The Clerk is directed to send a copy of this Order to counsel of record and to the *pro se* plaintiff.

Alexandria, Virginia
June 28, 2010

T. S. Ellis, III
United States District Judge

[10] Inasmuch as Portico's motion for summary judgment is denied, this matter will now proceed under the scheduling orders already issued in this case. Also, counsel for plaintiff may be appointed pursuant to 42 U.S.C. § 2000e-5(f)(1)(B).