

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

TONY FOX,

Plaintiff

v.

CIVIL ACTION NO. 1:10cv399 TSE/TCB

PORTICO REALTY SERVICES,

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT  
PORTICO'S MOTION FOR SUMMARY JUDGMENT**

In his Complaint, Plaintiff, Tony Fox (“Plaintiff”), asserts claims for race discrimination and/or harassment under Title VII of the Civil Rights Act of 1964 against Defendant, Portico Realty Services, LLC (“Portico”); Portico, however, is not an “employer” subject to suit under Title VII. Portico is not an “employer” because it is a wholly owned subsidiary of a “Native Corporation” formed under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §1601 et seq. Entities owned by Native Corporations (such as Portico), are expressly exempted from Title VII. See 43 U.S.C. § 1626(g). Thus, Plaintiff cannot state a viable claim against Portico under Title VII and summary judgment in Portico’s favor is warranted.

**I. LIST OF UNDISPUTED FACTS**

1. Plaintiff asserts that Portico violated Title VII by discriminating against him because of his race (Black) in violation of the Title VII of the Civil Rights Act of 1964, as amended.” Compl., p. 1.

2. Following Plaintiff’s termination of employment on October 14, 2009, he filed a Charge of Discrimination with EEOC. See 1/21/10 EEOC Letter, Ex. 1.

3. On January 21, 2009, EEOC mailed a letter to Plaintiff telling him that Portico is not an “employer” under Title VII and advising him of his suit rights. Id.

4. Plaintiff filed the instant action in this Court on April 21, 2010. See U.S.D.C. Docket Report for Civil Action No. 1:10cv399.

5. Portico is an Alaska limited liability company with one member – Qivliq, LLC. See Aff. of Douglas Krause, Ex. 2.

6. Qivliq is a wholly owned subsidiary of the NANA Development Corporation. Id.

7. NANA Development Corporation in turn, is a wholly owned subsidiary of the NANA Regional Corporation. Id.

8. The NANA Regional Corporation is an Alaska Native “Regional Corporation” formed pursuant to the ANCSA. Id.

9. At all times since Portico’s inception and during Plaintiff’s employment, Portico has been 100% owned by an Alaska Native Corporation. Id.

## II. ARGUMENT

### A. Summary Judgment is Appropriate.

Summary judgment is appropriate where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The Supreme Court’s trilogy of summary judgment cases recognizes summary judgment as the proper and efficient way of eliminating non-meritorious claims without the time and expense that a trial requires. On motion for summary judgment, the burden of the moving party is discharged by showing the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Upon such a showing, the burden shifts to the non-movant to come

forward with specific and material facts to show that there is a genuine issue for trial. Id. at 324. In no case can the non-moving party simply remain silent. Id. at 325.

The mere existence of some alleged factual dispute will not defeat a motion for summary judgment, and factual disputes that are irrelevant or unnecessary are to be ignored. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). To defeat the motion, it must be a genuine dispute as to a material fact, the materiality of which will be determined by substantive law, and the trial judge must determine “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Id. at 251-52.

**B. Plaintiff Cannot Succeed on His Claim Because Defendant is A Wholly Owned Subsidiary of an Alaska “Native Corporation” that is Exempt from Title VII.**

Plaintiff asserts his race discrimination claim under Title VII of the Civil Rights Act of 1964, which prohibits employers of more than fifteen employees from discriminating in hiring and other terms and conditions of employment because of an individual's race, color, religion, sex, or national origin. See 42 U.S.C. § 2000e et seq. This claim, however, necessarily fails because Portico, as a limited liability company owned entirely by Alaska “Native Corporations” is not an “employer” under Title VII.

The Alaska Native Claims Settlement Act (“ANCSA”) was initially passed by Congress in 1972 “as a comprehensive statute designed to settle all land claims by Alaska Natives.” Alaska v. Native Village of Venetie Tribal Gov’t, 522 U.S. 520, 523 (1998). As part of the settlement, state-chartered private business corporations were formed and Alaska Natives were made shareholders in these corporations. Id. at 534. On behalf of the Alaska Native population, these corporations received title to the land and funds in exchange for extinguishment of

aboriginal title to land in Alaska. Id.; see also 43 U.S.C. §§1602 (defining Native Corporations to mean any “Regional Corporation”) and 1606 (permitting Alaska Natives to establish Regional Corporations such the NANA Regional Corporation).

Congress also has provided that ANCSA “Native Corporations” are exempt from Title VII. 43 U.S.C. § 1626(g). This provision exempts Alaska “Native Corporations” from Title VII’s definition of a covered “employer.” The exemption also extends to corporations in which the ANCSA corporation has at least a twenty-five percent (25%) ownership interest:

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

43 U.S.C. §1626(g); see also 42 U.S.C. § 2000e(b) (setting out the definition of an employer for purposes of Title VII); see Malabed v. North Slope Borough, 42 F. Supp. 2d 927, 934 (D. Alaska 1999), affd, 335 F.3d 864 (9th Cir. 2003) (footnote omitted) (“ANCSA corporations are themselves exempted from Title VII.”); see also Pratt v. Chenega Integrated Sys., No. 07-01573, 2007 U.S. Dist. LEXIS 56816, \*6 (N.D. Cal. 2007) (“Because Chenega is owned by an Alaska Native Corporation . . . and [Alaskan Native Corporations] are exempt from Title VII’s definition of “employer,” Chenega cannot be sued under Title VII.”) (copy attached as Ex. 3).

As set forth above, it is undisputed that Portico is wholly owned by an Alaska Native Corporation. Because ANCSA contains an express exemption for ANCSA corporations and their progeny, such as Portico, from Title VII liability, Plaintiff’s race discrimination claim fails as a matter of law. There is – and can be – no factual dispute relevant to this exemption; accordingly, this Court should grant summary judgment in favor of Portico on Mr. Fox’s Title VII claims.

### III. CONCLUSION

Because Portico is not a covered “employer” under Title VII this Court should enter judgment in favor of Portico on the Complaint as a matter of law.

PORTICO REALTY SERVICES

By \_\_\_\_\_ /s/  
Of Counsel

Scott W. Kezman, (VSB No. 36831)  
Kaufman & Canoles, P.C.  
150 West Main Street, Suite 2100  
Norfolk, Virginia 23510  
Telephone: (757) 624-3000  
Facsimile: (757) 6243169  
[swkezman@kaufcan.com](mailto:swkezman@kaufcan.com)

Counsel for Defendant

#### Certificate of Service

I hereby certify that on this 14th day of May, 2010, I mailed the foregoing pleading, first-class, postage prepaid to Plaintiff:

Tony Fox  
4118 Southway Lane, Apt. 28  
Triangle, VA 22172.

Further, I hereby certify that, on the 14th day of May, 2010, a true copy of the Defendant’s MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT PORTICO’S MOTION FOR SUMMARY JUDGMENT was filed electronically in this Court.

\_\_\_\_\_/s/

::ODMA\PCDOCS\DOCSNFK\1611434\1



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Washington Field Office**

131 M Street, N.E., Suite 4NW02F  
Washington, D. C. 20507  
(202) 419-0713  
TTY (202) 419-0702  
FAX (202) 419-0740  
Toll Free (866) 408-8075  
General Information (800) 669-4000

January 21, 2010

Tony Fox

*Redacted*

RE: Fox vs. Portico Realty Services  
EEOC Charge Number 846-2010-05638

Dear Mr. Fox:

Pursuant to your request, this letter is sent as a follow-up to our telephone conversation this morning regarding Entities that Are Exempt from Coverage for Any Employment Decision under Title VII and the ADA.

*Exemption of American Indian Tribes*

*For the purposes of implementation of the Civil Rights Act of 1964 [42 U.S.C. 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. 2000e (b)(1)], or successor statutes.*

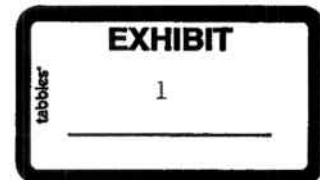
Portico Realty Services is a wholly owned subsidiary of Qivliq LLC. Qivliq is a limited liability company, in which the Natives of Northwest Artic (NANA) Development Corporation has a 100% ownership interest. NANA Development Corporation is a wholly-owned subsidiary of NANA Regional Corporation, Inc. NANA was one of the twelve regional corporations formed by the Alaska Native Claims Settlement Act (ANCSA). Therefore, Qivliq and Portico Realty Services are exempt from coverage of Title VII of the Civil Rights Act of 1964 and not considered "employers" for Title VII purposes.

As a result, the Equal Employment Opportunity Commission (EEOC) does not have jurisdiction to investigate your claim filed under Title VII of the Civil Rights Act of 1964, as amended. However, you may pursue the matter on your own in federal district court, if you choose to do so. Please be advised, a lawsuit must be filed within 90 days of your receipt of the Right to Sue Notice (EEOC Form 161) from our agency.

Respectfully,

A handwritten signature in black ink, appearing to read "Erika Mocha Suell".

Investigator Mocha Suell  
202-419-0706, 202-419-0740 / Fax  
[Erika.Mocha.Suell@eeoc.gov](mailto:Erika.Mocha.Suell@eeoc.gov)



EEOC Form 161 (11/09)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

To: Tony C. Fox  
*Redacted*

From: Washington Field Office  
131 M Street, N.E.  
Suite 4NW02F  
Washington, DC 20507

On behalf of person(s) aggrieved whose identity is  
CONFIDENTIAL (29 CFR §1601.7(a))

EEOC Charge No.	EEOC Representative	Telephone No.
846-2010-05638	Janet Stump, Enforcement Supervisor	(202) 419-0736

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

- The facts alleged in the charge fail to state a claim under any of the statutes enforced by the EEOC.
- Your allegations did not involve a disability as defined by the Americans With Disabilities Act.
- The Respondent employs less than the required number of employees or is not otherwise covered by the statutes.
- Your charge was not timely filed with EEOC; in other words, you waited too long after the date(s) of the alleged discrimination to file your charge
- The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.
- The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.
- Other (briefly state) **The Respondent is excluded from the definition of "employer" under Title VII.**

- NOTICE OF SUIT RIGHTS -  
(See the additional information attached to this form.)

**Title VII, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, or the Age Discrimination in Employment Act:** This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit **must be filed WITHIN 90 DAYS of your receipt of this notice**; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a claim under state law may be different.)

**Equal Pay Act (EPA):** EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that **backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.**

On behalf of the Commission

*Janet A. Stump for*  
Mindy E. Weinstein  
Acting Director

JAN 29 2010

(Date Mailed)

Enclosures(s)

cc: Helena Hall  
Senior Corporate Counsel  
PORTICO REALITY SERVICES, LLC  
(A Qivliq Company)  
10126 Residency Road  
Manassas, VA 20110

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

TONY FOX,

Plaintiff

v.

CIVIL ACTION NO. 1:10cv399 TSE/TCB

PORTICO REALTY SERVICES,

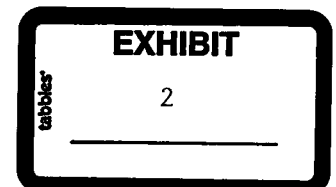
Defendants.

AFFIDAVIT OF DOUGLAS KRAUSE

COMMONWEALTH OF VIRGINIA )


COUNTY OF Prince William )

1. My name is Douglas Krause. I am over the age of 21 years, and I am competent to make this Affidavit. All information herein is true and correct and is based on my personal knowledge.
2. I am the Vice President and General Manager of Portico Realty Services, LLC (“Portico”). I have held this position since February 10, 2006.
3. Portico is an Alaska limited liability company with one member – Qivliq LLC.
4. Qivliq LLC is a wholly owned subsidiary of NANA Development Corporation.
5. NANA Development Corporation in turn, is a wholly owned subsidiary of NANA Regional Corporation.
6. NANA Regional Corporation is an Alaska Native “Regional Corporation” formed pursuant to the Alaska Native Claims Settlement Act.



7. At all times since Portico's inception and during Plaintiff's employment, Portico has been an affiliate, 100% owned by a Native Corporation.

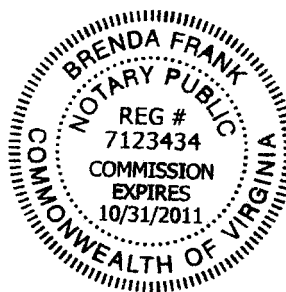
Further, affiant sayeth not.

  
Douglas Krause

SUBSCRIBED AND SWORN TO BEFORE ME, on this 13<sup>th</sup> day of May, 2010.

Brenda Frank  
Notary Public in and for the  
Commonwealth of Virginia

My commission expires: Oct. 31, 2011





LEXSEE 2007 US DIST LEXIS 56816

**MICHAEL A. PRATT, Plaintiff, v. CHENEGA INTEGRATED SYSTEMS, Defendant.**

**No. C 07-01573 JSW**

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**2007 U.S. Dist. LEXIS 56816**

**July 27, 2007, Decided  
July 27, 2007, Filed**

**COUNSEL:** [\*1] Michael Anthony Pratt, Plaintiff, Prose, Susanville, CA.

For Chenega Integrated Systems, LLC, Defendant: Nathan Wade Austin, LEAD ATTORNEY, Jackson Lewis, Sacramento, CA.

**JUDGES:** JEFFREY S. WHITE, UNITED STATES DISTRICT JUDGE.

**OPINION BY:** JEFFREY S. WHITE

**OPINION**

**ORDER GRANTING MOTION TO DISMISS COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION**

Now before the Court is the motion to dismiss filed by defendant Chenega Integrated Systems, LLC ("Chenega"). The Court finds that this matter is appropriate for disposition without oral argument and it is hereby deemed submitted. *See* Civ. L.R. 7-1(b). Accordingly, the hearing on the motion and the case management conference set for August 17, 2007 are HEREBY VACATED. Having carefully considered the parties' arguments and relevant legal authority, the Court GRANTS Chenega's motion.

**BACKGROUND**

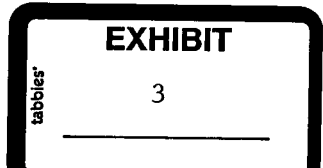
Beginning in October 2005, plaintiff Michael Pratt ("Pratt") worked for Chenega as a security officer at the Sierra Army Depot in Herlong, California, where defendant provided security services. Fifty-one percent of

Chenega is owned by Chenega Corporation ("Chenega Corp."). (Supplemental Declaration of Nathan W. Austin in Support of Motion to Dismiss ("Suppl. Austin Decl."), Ex. 4 at 4.) [\*2] Chenega Corp. is a Native Village Corporation, incorporated in Alaska pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C.A. § 1601 *et seq.* (*Id.*, Ex. 3 at 4.)

Citing insubordination and failure to report the intoxication of a superior, Chenega terminated Pratt's employment on May 11, 2006. (Compl. at 6.) Pratt subsequently filed two Charges of Discrimination with the Equal Employment Opportunity Commission ("EEOC"). (*Id.* at 8, 10.) The EEOC dismissed the complaints, issuing Pratt a right-to-sue letter on December 27, 2006. (*Id.* at 11.) The EEOC additionally referred the complaint to the California Department of Fair Employment and Housing, which also declined to pursue the matter and issued state right-to-sue letters on June 6 and June 23, 2006. (*Id.* at 7, 9.)

Pratt subsequently filed suit in federal court, claiming Chenega discriminated against him on the basis of sex under Title VII of the Civil Rights Act of 1964 ("Title VII"), in that he was subjected to sexual harassment and a hostile work environment. (*Id.* at 2.) He further alleges his employer retaliated against him for filing complaints with his superiors and with the corporate office. (*Id.* at 10.) The alleged retaliation [\*3] consisted of suspending Pratt and assigning him undesirable work hours, despite his seniority. (*Id.* at 2.)

In response to the complaint, Chenega filed a motion to dismiss under *Federal Rule of Civil Procedure 12(b)(1)* for lack of subject matter jurisdiction and *Rule*



12(b)(6) for failure to state a claim upon which relief can be granted, or in the alternative, for change of venue under 28 U.S.C. § 1404(a).

## ANALYSIS

### A. Legal Standards Applicable to a Motion to Dismiss.

When a defendant moves to dismiss a complaint or claim for lack of subject matter jurisdiction, the plaintiff bears the burden of proving that the court has jurisdiction to decide the claim. *Thornhill Publ'n Co. v. General Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). Federal courts can only adjudicate cases which the Constitution or Congress authorize them to adjudicate: those cases involving diversity of citizenship (where the parties are from diverse states), or a federal question, or those cases to which the United States is a party. *See e.g., Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994).

A motion to dismiss for lack of subject matter jurisdiction under *Rule 12(b)(1)* may be "facial or [\*4] factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Where the jurisdictional attack is "factual," a defendant may rely on affidavits or other evidence that would be properly before the Court, and the non-moving party is not entitled to any presumptions of truthfulness with respect to the allegations in the complaint. Rather, the non-moving party must come forward with evidence establishing jurisdiction. *Thornhill*, 594 F.2d at 733. If an attack on jurisdiction is a "facial" attack on the allegations of the complaint, the factual allegations of the complaint are taken as true and the non-moving party is entitled to have those facts construed in the light most favorable to him or her. *Federation of African Amer. Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir. 1996).

### B. Chenega's Motion to Dismiss.

Plaintiff asserts causes of action under Title VII, a federal anti-discrimination statute. Defendant contends that it is exempt from Title VII lawsuits, and that therefore this Court lacks federal subject matter jurisdiction.

#### 1. Chenega is exempt from the definition of "employer" under Title VII.

Title VII states in relevant part that "it shall be an unlawful [\*5] employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C.A. § 2000e-2(a)(1). Although Title VII applies to most businesses of "fifteen or more employees," it exempts certain groups, including Indian tribes,

from its definition of the term "employer." 42 U.S.C.A. § 2000e(b). In addition to excluding specific Indian tribes from Title VII liability, the Ninth Circuit has held that Congress also intended to exempt certain tribal-owned organizations. *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1988) (noting that "the purpose of the tribal exemption . . . was to promote the ability of Indian tribes to control their own enterprises.").

The Alaska Native Claim Settlement Act ("ANCSA") addresses the tribal claims of Alaska Natives. 43 U.S.C.A. §§ 1601-1629a (2000). Section 1602(j) states that a "Village Corporation" is an "Alaska Native Village Corporation organized under the laws of the state of Alaska as a business for profit or nonprofit corporation to hold, invest, manage, and/or distribute lands, property, funds, and other rights and assets for [\*6] and on behalf of a Native village." Chenega's majority owner, Chenega Corp., is incorporated as a Native Village Corporation. (Supplemental Declaration of Nathan W. Austin in Support of Motion ("Suppl. Austin Decl."), Ex. 3 at 4.).

Section 1626 of ANCSA, entitled "Relation to other programs" places the act in the context of other federal legislation. 43 U.S.C.A. § 1626. Section 1626(g) states in relevant part:

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 [Title VII, 42 U.S.C.A. § 2000e(b)(1)] or successor statutes.

43 U.S.C.A. § 1626(g).

Here, Chenega provided documentation that demonstrates it is at least 25% owned by a Native Corporation, Chenega Corp, and Pratt does not contest this status. (Suppl. Austin Decl., Ex. 4 at 4.) Because Chenega is owned by an Alaska Native Corporation ("ANC"), and ANCs are exempt from Title VII's definition of "employer," Chenega cannot be sued under Title [\*7] VII.

The case law further bears out this interpretation. The Ninth Circuit has not addressed ANCs in the context of Title VII, but the Fourth Circuit did so recently in *Aleman v. Chugach Support Services, Inc.*, 485 F.3d 206 (4th Cir. 2007). There, plaintiffs appealed the trial court ruling that ANCs were exempt from both Title VII and 42 U.S.C. § 1981, another antidiscrimination statute. *Id.*

at 210. The *Aleman* court held that ANCs are exempt from Title VII liability, stating "the single-sentence exclusion [in *Section 1626(g)*] makes this clear twice." *Id.*

The Court is satisfied, from the clearly-worded statute, the existing case law, and the documents provided by defendant, that Chenega is owned by an ANC and is therefore exempt from Title VII liability. Thus, the Court lacks subject matter jurisdiction over this action and GRANTS defendant's motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(1)*.

## 2. Chenega cannot waive its exemption from the definition of "employer."

As a final matter, Pratt argues that even if Chenega is exempt from Title VII, Chenega waived this exemption because its employee handbook contains an "Equal Employment Opportunity Statement" pledging its [\*8] commitment to equality in the workplace and adherence to "applicable" employment anti-discrimination laws. (Opp., Ex. 1.)

The Court finds that Chenega did not waive its exemption. In *Duke v. Absentee Shawnee Tribe*, 199 F.3d 1123, 1125 (10th Cir. 1999), plaintiff employee argued that defendant had "made a sovereign choice to subject [itself] to all state and federal laws." The court held that it was "reluctant to impute such an intent" without an "express declaration." *Id.* at 1126. Furthermore, even if the tribe had intended to do so, "this intent could not unilaterally create subject matter jurisdiction." *Id.* Finally, the court noted that "parties cannot confer subject matter jurisdiction by consent, estoppel, or waiver." *Id.* (citing *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)).

Additionally, Chenega cites *Hall v. Baptist Memorial Health Care Corp.*, 215 F.3d 618, 625 (6th Cir. 2000), for the general proposition that one who is statutorily exempt from the definition of "employer" under Title VII cannot waive that exemption. There, plaintiff argued that defendant religious organization had waived its Title VII exemption when it claimed [\*9] to be an

equal opportunity employer. *Id.* However, the court held "statutory exemptions from religious discrimination claims under Title VII cannot be waived" because these exemptions "reflect a decision by Congress that religious organizations have a constitutional right to be free from government intervention. . . . Once Congress stated that '[t]his title shall not apply'. . . neither party could expand the statute's scope." *Id.* The court also cited with approval *Ward v. Hengle*, 124 Ohio App. 3d 396, 400, 706 N.E.2d 392 (1997), holding a church did not waive Title VII exemption when it pledged in an employee handbook not to discriminate based on religion. *Id.*

Here, Chenega is not a religious organization, but as an ANC it is a member of another group Congress has specially recognized with Title VII immunity. Congress clearly intended to exempt Chenega and other ANCs from the definition of "employer" under Title VII. 43 U.S.C.A. § 1626(g). As *Duke* and *Hall* demonstrate, a party thus designated cannot waive a statutory exemption or create subject matter jurisdiction.

## CONCLUSION

For the foregoing reasons, the Court GRANTS Chenega's motion to dismiss.<sup>1</sup> The clerk shall close the file.

1 Because the Court grants [\*10] Chenega's motion to dismiss for lack of subject matter jurisdiction under *Federal Rule of Civil Procedure 12(b)(1)*, the Court need not address Chenega's alternative motion to dismiss for failure to state a claim upon which relief can be granted under *Federal Rule of Civil Procedure 12(b)(6)* or motion to change venue pursuant to 28 U.S.C. § 1404(a).

## IT IS SO ORDERED.

Dated: July 27, 2007

JEFFREY S. WHITE

UNITED STATES DISTRICT JUDGE