

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

CARRIE HARKLESS, <i>et al.</i> ,	:	
	:	CASE NO. 1:06CV2284
Plaintiffs,	:	
	:	JUDGE PATRICIA GAUGHAN
v.	:	
	:	MAGISTRATE JUDGE
J. KENNETH BLACKWELL, <i>et al.</i> ,	:	VECCHIARELLI
	:	
Defendants.	:	

**ODJFS DIRECTOR JONES-KELLEY’S¹ RESPONSE TO
PLAINTIFFS’ MOTION FOR RECONSIDERATION**

I. INTRODUCTION

On December 28, 2006, this Court issued a Memorandum Opinion and a Judgment Entry, granting Defendants’ motions to dismiss this action. On January 12, 2007, Plaintiffs filed a Motion for Reconsideration, asking this Court to reverse itself. Defendants responded on February 23, 2007. The case was later stayed, and the reconsideration-related filings were deemed moot subject to re-filing. On June 6, 2007, Plaintiffs re-filed their Motion for Reconsideration, and Director Kelley now (re-)files her response to the re-filed Motion.

The Motion for Reconsideration should be denied. The Motion rehashes arguments that this Court rejected in its well-reasoned Memorandum Opinion and Order, and adds other

¹ As mentioned in the proposed Stipulated Extension of time for filing this response, former ODJFS Director Barbara Riley has been succeeded by the current ODJFS Director Helen E. Jones-Kelley. Also, Jennifer Brunner has succeeded J. Kenneth Blackwell as the Secretary of State. To acknowledge the current officeholders while taking into account the actions taken by their predecessors, this Response will use the terms “Director” and “Secretary” (or “Secretary of State”) instead of personal names to refer to the Defendants.

arguments that likewise fail to support reconsideration. First, Plaintiffs' argument that Defendant Director is, in fact, a proper party to this action is as wrong now as it was when the Court first considered this argument. Second, the Court correctly held that ACORN lacks both representational and associational standing to sue in this case. Finally, in light of these conclusions, Plaintiffs' Motion does not meet the reconsideration criteria set forth by Plaintiffs themselves on the first page of their Motion. This Court did not commit a clear error of law, nor was there any new evidence that (1) was not in Plaintiffs' possession prior to judgment and (2) could have any effect on the outcome of this case. It follows that this Court should likewise deny Plaintiffs' "alternative" request to amend the complaint. Such a request cannot be an alternative, but can be granted only if the motion for reconsideration is successful.

II. THE COURT CORRECTLY CONCLUDED THAT THE DIRECTOR CANNOT ENFORCE THE NVRA AGAINST COUNTY DEPARTMENTS, AND HER ENFORCEMENT POWERS WERE NOT AFFECTED BY INFORMATIONAL LETTERS SENT TO COUNTY DEPARTMENTS.

This Court held—as Defendant Director had argued—that the Director was not a proper party to this action because she does not have authority over county departments of job and family services such that she is in a position to enforce the NVRA (or Ohio's implementing statutes) against those county departments. In fact, she is statutorily prohibited from doing so. See R.C. 3503.10(L); see also 12/28/06 Mem. Op. & Order, p. 23.

Plaintiffs now argue that the Director is a proper party based on claimed new evidence. According to Plaintiffs, in mid-December 2006 they received mandatory initial disclosures from the Director that included "correspondence with county department of job and family services informing/reminding them of their voter registration obligations." See Motion for Recon., p. 6. Plaintiffs argue that this correspondence "contradict[s]" arguments that [the Director] made to

this Court in support of dismissal, because—Plaintiffs assert—the correspondence “belies her argument that she is prohibited by law from taking any action to effect NVRA compliance at the county level.” See *id.* Plaintiffs also assert that the correspondence demonstrates that the Director “understood that she had a responsibility to take steps to ensure NVRA compliance at the county-level DJFS.” See *id.*

First, a motion to dismiss is based on the Complaint, not on evidence. Therefore, the mandatory disclosures could not properly have affected the decision whether to grant a motion to dismiss. Second, even if the disclosures could have made a difference, Plaintiffs have not explained why—after receiving the mandatory disclosures—they failed to file anything with the Court (such as an amended complaint or a motion for leave to file a surreply regarding the motion to dismiss) to bring this allegedly damning evidence to the Court’s attention prior to judgment.² They chose to await this Court’s judgment, and only after a result in Defendants’ favor did Plaintiffs raise this new-evidence argument.

Finally, the Court’s decision to dismiss is based on what the law requires, not on what Defendant Director may have done or what she may have subjectively believed. The correspondence at issue was merely a gesture on the Director’s part to remind the counties of NVRA requirements. It was not any kind of official enforcement, nor could it have been. The Director’s willingness to go above and beyond the call of duty by sending informational letters did nothing to alter her legal obligations or her enforcement authority, which are defined by lawmakers. Agency officials cannot unilaterally grant themselves enforcement power by writing

² A party may raise newly-discovered evidence as a basis for reconsideration only if that evidence was unavailable prior to judgment. See *Niedermeier v. Office of Max S. Baucus*, 157 F.Supp.2d 23, 29-30 (D.D.C. 2001) (“Courts routinely deny Rule 59(e) motions where all relevant facts were known by the party prior to the entry of judgment and the party failed to present those facts.”) (citations omitted). By Plaintiffs’ own concession, they had this “new” evidence prior to judgment. They could have filed a motion to amend the complaint or asked for leave to file a surreply opposing dismissal. They did not.

letters. Nor did the correspondence indicate that the Director’s arguments in support of dismissal were made in bad faith, as intimated by Plaintiffs. There is nothing surprising about an official’s simultaneously believing that: (1) she may not enforce NVRA requirements against county departments, and (2) sending reminder letters might be a good idea.

Plaintiffs also argue that ODJFS “cannot avoid its responsibilities by delegating those responsibilities to county offices.” See *Mtn. For Recon.*, p. 7. But ODJFS has not “delegated” the responsibilities at issue here. The Complaint purports to allege—at most—violations by the *county departments in their own capacities* as providers of public assistance. County departments have their own independent NVRA obligations, and ODJFS—for reasons explained by the Court in its Opinion & Order—cannot enforce those county departments’ obligations. Thus, to the extent that the Complaint contains any valid allegations of NVRA violations, the violations cannot have been committed by Defendant Director (or anyone else at ODJFS), nor did the Director have the authority to correct or prevent those alleged violations. This Court was correct to hold that the Director is not a proper party here.

III. THE COURT CORRECTLY HELD THAT ACORN LACKS STANDING TO BRING THE CLAIMS RAISED IN THE COMPLAINT.

Plaintiffs re-argue their position that ACORN had both organizational and associational standing to sue. But it is still true that Plaintiffs failed to allege more than a perceived setback to ACORN’s abstract interests; failed to allege that ACORN expended resources that it would not have spent absent the alleged NVRA violations; failed to allege that the interests at stake here are germane to ACORN’s purposes; and failed to allege actual (or impending) injury to any member as a result of alleged NVRA violations. The Court’s conclusion that ACORN lacks standing should not be disturbed.

A. ACORN's Lack of Organizational Standing.

Plaintiffs assert that the Court wrongly accepted the Director's factual assertions instead of accepting Plaintiffs factual assertions in the Complaint. But Plaintiffs have confused two concepts: (1) a court's improper acceptance of factual assertions by a defendant, and (2) a court's observation that the factual assertions in the Complaint do not suffice to establish standing. What happened in this case was the latter, not the former. As the Court noted, Plaintiffs failed to allege facts that would show organizational standing. See Mem. Op. & Order, pp. 7-8.

Plaintiffs remind the Court that they alleged in the Complaint that certain voter-registration efforts by ACORN would have been unnecessary if Defendants had not allegedly violated the NVRA, and also alleged that ACORN collected voter-registration applications from individuals outside of County DJFS offices who had (allegedly) not been offered registration materials during their visits to those offices. See Mtn. for Recon., pp. 7-8. But these allegations, especially when read in light of other allegations in the Complaint about ACORN's purposes and activities, fail to add up to an allegation that ACORN would not otherwise have committed the same time and resources to activities near County DJFS offices. See Mem. Op. & Order, p. 8. See also *ACORN v. Fowler*, 178 F.3d 350, 360 (5th Cir. 1999).

Thus, the Court did not accept facts alleged by Defendants, but rather the Court agreed with Defendants that the alleged facts were inadequate to support standing. The burden of establishing organizational standing is on the organization claiming to have standing, and a defendant is free to point out that the burden has not been carried. The Court correctly concluded that ACORN lacks standing to sue on its own behalf.

B. ACORN's Lack of Associational Standing.

According to Plaintiffs, the Court incorrectly concluded that ACORN failed to allege harm to its members, because—Plaintiffs insist—the Court improperly accepted assertions by Defendants rather than drawing inferences in favor of Plaintiffs. But, again, this is a case of Plaintiffs' failing to carry their burden of showing standing, which failure Defendants merely pointed out and the Court recognized. Plaintiffs failed to identify a single ACORN member who was actually denied voter-registration materials by a county DJFS. Moreover, alleging that some of ACORN's members who receive public assistance are not registered voters—when those members were almost certainly offered the chance (and maybe actively encouraged) to register when they joined ACORN—virtually compels the conclusion that they must have deliberately declined to register. As the Court recognized, Plaintiffs did not allege that any member had suffered or would suffer a concrete, actual injury traceable to alleged NVRA violations. See Mem. Op. & Order, pp. 9-10 (citing *Northeast Coalition for the Homeless and Service Employees Intern. Union, Local 1199 v. Blackwell*, 467 F.3d 999 (6th Cir. 2006)).

Nor did Plaintiffs make a sufficient showing that the interests at stake here are “germane” to ACORN's purposes, which—to the extent that they were articulated—are apparently to organize low- and moderate-income families to work toward social justice and stronger communities. See Complaint, ¶ 38. The fact that ACORN is involved in some voter-registration efforts as part of its overall activities is not sufficient. See *Northeast Coalition for the Homeless* at *28 (finding—in two organizations' challenge to voter-registration requirements—that the interests were not germane to either organization's purposes, although the organizations may have conducted voter-registration activities for their members and/or target populations).

Given the above failures, Plaintiffs failed the test for ACORN's associational standing.

IV. THE COURT SHOULD NOT ALLOW PLAINTIFFS TO FILE THEIR PROPOSED AMENDED COMPLAINT.

Plaintiffs improperly request that, as an alternative to reconsideration, they be allowed to amend their complaint. But post-judgment amendment of a complaint cannot be an *alternative* to reconsideration; rather, post-judgment amendment can occur only if a court *also* sets aside or vacates its judgment pursuant to either Fed. R. Civ. P. 59(e) or 60(b). See, e.g., *Laber v. Harvey*, 438 F.3d 404, 427-428 (4th Cir. 2006) (citing *Cooper v. Shumway*, 780 F.2d 27, 29 (10th Cir. 1985); *Scott v. Schmidt*, 773 F.2d 160, 163 (7th Cir. 1985); 6 Charles Allen Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice & Procedure* § 1489; *Morrow Furniture Galleries, Inc. v. Thomasville Furniture Indust., Inc.*, 889 F.2d 524, 526 n. 3 (4th Cir. 1989); and *De Buit v. Harwell Enters., Inc.*, 540 F.2d 690, 692 (4th Cir. 1976). Thus, unless Plaintiffs succeed on their motion to reconsider, they may not be permitted to amend their Complaint. Because—for reasons articulated above and in Defendants’ filings supporting dismissal—Plaintiffs’ motion for reconsideration should be denied, it follows that their request for leave to amend should likewise be denied.

Even if it were proper to allow Plaintiffs to amend without vacating the judgment, the Court still should not allow it here. The usual liberality in granting leave to amend disappears once judgment has been entered. See, e.g., *United States ex rel. American Textile Mfrs. Inst. v. Limited*, 179 F.R.D. 541, 551 (S.D. Ohio 1998) (citations omitted). The Sixth Circuit has held that, in the post-judgment context, a court considering a motion for leave to amend must pay special attention to the plaintiffs’ explanation for not amending prior to judgment. See *Benzon v. Morgan Stanley Distribs.*, 420 F.3d 598, 613 (6th Cir. 2005). Plaintiffs have offered no explanation as to why they failed to amend the complaint prior to judgment based either on the “new” evidence in the mandatory disclosures or based on the defective allegations in the original

complaint (which Defendants had pointed out in their filings supporting dismissal). Such failure may render a motion for leave to amend untimely. See *id.*³

Moreover, Plaintiffs' proposed amendment would appear to be futile. Even assuming that Plaintiffs' new allegations would be sufficient to survive a motion to dismiss for lack of standing (which the Director does not concede), the Court concluded that neither Defendant is a proper party to this action. Showing ACORN's standing, therefore, would have no effect on the propriety of dismissal. Defendant Director will allow the Secretary of State to speak for herself, but the Director on her own behalf points out to the Court that the only argument offered by Plaintiffs to demonstrate that the Director is a proper party are her letters to county departments "informing/reminding them of their voter-registration requirements." See Mtn. for Recon., p. 6. As explained above, the sending of those informational letters had no effect at all on the Director's authority (or lack thereof) to enforce NVRA requirements against the county departments. The Court looked to the law and properly concluded that the Director is not a proper party.

Because Plaintiffs' request to amend is untimely and would have no effect on whether the Director is a proper party, and also because it is improperly requested as an "alternative" to reconsideration, the Director opposes Plaintiffs' request to be allowed to file the proposed amended complaint.

VI. CONCLUSION

The Court committed no clear error in its dismissal of this action, nor have Plaintiffs presented any new, outcome-determinative evidence. Furthermore, the proposed amended

³ See also *Niedermeier, supra*, at 30 ("Plaintiff cannot now establish that the Court's decision granting the motion to dismiss based upon the record before it was manifestly unjust where she took no action to amend her pleadings or to introduce this new evidence until after the Court dismissed this case.") (citations omitted).

complaint would not change the fact that the Director is not a proper party. For the foregoing reasons, as well as Defendant Director's previous arguments in support of dismissal, the Court should deny Plaintiffs' Motion for Reconsideration and their "alternative" motion for leave to amend their Complaint.

Respectfully submitted,

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CERTIFICATION OF PAGE LENGTH

I hereby certify that this case is on the standard track and that the Response adheres to the page limitation established in Loc.R. 7.1(f).

s/Rebecca L. Thomas

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following: Counsel for Plaintiffs, Donna Taylor Kollis, FRIEDMAN, DOMIANO & SMITH CO., 1370 Ontario Street, Sixth Floor, Cleveland, Ohio 44113, and Richard Coglianese and Damian Sikora, Constitutional Offices Section, Ohio Attorney General's Office, 30 East Broad Street, Level 17, Columbus, Ohio 43215, Counsel for Defendant, Secretary of State Jennifer Brunner.

I hereby certify that on June 26, 2007, I mailed by U.S. Postal Service, postage prepaid, a copy of the aforementioned to the following counsels for Plaintiffs: (1) Neil Steiner, Robert Topp, Eliot Gardner, and William Gibson, DECHERT LLP, 30 Rockefeller Plaza, New York, New York 10112; (2) Lisa Danetz and Brenda Wright, NATIONAL VOTING RIGHTS INSTITUTE, 27 School Street, Boston, Massachusetts 02108; (3) Jon M. Greenbaum and Benjamin Blustein, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, 1401 New York Avenue, Suite 400, Washington, D.C. 20005, and (4) Brian Mellor, PROJECT VOTE, 1486 Dorchester Avenue, Dorchester, Massachusetts 02122.

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