

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

<p>Carrie Harkless, et al.,</p> <p style="padding-left: 40px;">Plaintiffs,</p> <p style="padding-left: 40px;">v.</p> <p>J. Kenneth Blackwell Secretary, State of Ohio, et al.,</p> <p style="padding-left: 40px;">Defendants.</p>	<p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p>	<p>Case No. 1:06-cv-2284</p> <p>Judge Gaughan</p> <p>Magistrate Vecchiarelli</p>
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MOTION TO DISMISS OF DEFENDANT
J. KENNETH BLACKWELL, SECRETARY OF STATE

Defendant J. Kenneth Blackwell, Ohio Secretary of State (“Defendant” or the “Secretary”) moves this Court to dismiss this Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6) because Plaintiffs do not have standing and the individual Plaintiffs have not complied with NVRA’s requirement that they provide written notice of their claims prior to filing suit. Additionally, and in the alternative, Defendant moves that he be dismissed as a party because the Complaint fails to state a claim against him. A memorandum in support is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

This case, filed by two individuals and the Association of Community Organizations for Reform Now (“ACORN”), alleges violations of the National Voter Registration Act (“NVRA”)., Specifically Plaintiffs allege that the county offices of the Department of Jobs and Family Services (DJFS) are not complying with their obligations to distribute mail voter registration forms, to assist recipients in completing these forms, and accepting completed voter registration forms and transmitting them to elections officials. Plaintiffs’ claims are flawed, however, in several respects.

First, Plaintiffs simply do not state a claim against Secretary of State Blackwell. The responsibility for carrying out the duties that form the basis for this Complaint rests upon the local county DJFS offices. *See* R.C. 329.051. That office is a county office, whose director is appointed by the board of county commissioners. R.C. 329.01. The mere fact that Plaintiffs allege that these offices may not be complying with their duties does not state a claim against the Secretary.

Second, the individual Plaintiffs have not provided written notice to the Defendants as required by NVRA, prior to filing this suit. The Complaint alleges that ACORN sent a letter to the Secretary of State, but this letter is not sufficient to comply with the terms of the NVRA regarding the individual’s claims because it does not give Defendants sufficient notice to cure any deficiencies experienced by these individual plaintiffs. Accordingly, the individual plaintiffs do not have standing.

Finally, ACORN does not have standing to bring this claim, either in its own capacity, or on behalf of its members. For all of these reasons, the case should be dismissed, and/or the Secretary should be dismissed as a party.

II. STATEMENT OF FACTS

A. This Case.

In this Complaint, filed on September 21, 2006, two individual Plaintiffs, Carrie Harkless and Tameca Mardis, and ACORN, allege that various county welfare agencies have failed to comply with NVRA's requirements that all offices that provide public assistance be designated as voter registration agencies and fulfill certain duties in that capacity. More specifically, Carrie Harkless alleges that the Lorain County DJFS office has never offered her the opportunity to register to vote or to change her voter registration address, despite numerous visits since 2004. Complaint, at ¶¶41-45. Likewise, Tameca Mardis, alleges that the Cuyahoga County DJFS office has never offered her the opportunity to register to vote. Complaint, at ¶¶46-52. In addition, Plaintiffs cite evidence allegedly gained during spot-checks of the DJFS offices in Cuyahoga County, Lorain County, Franklin County, Delaware County and Lake County. Complaint, at ¶ 27.

On May 12, 2006, counsel for ACORN sent a letter to the Secretary (carbon copied to Barbara Riley, Director of the Ohio Department of Jobs and Family Service ("ODJFS") and others), notifying the Secretary that the State of Ohio is not in compliance with NVRA and demanding that immediate steps be taken to bring the State into compliance. Complaint, Exhibit B. The Secretary responded on May 26, 2006, directing ACORN to R.C. 3501.05, which implemented NVRA, and pointing out that he had implemented rules, Ohio Admin. Code 111-10-01, *et seq.*, and a training program to instruct state agencies regarding their duties under the

law. Complaint, Exhibit C. Plaintiffs Harkless and Mardis never sent any type of pre-suit notice to either the Secretary of State or the Director of ODJFS.

B. Ohio's Implementation of Section 7 of the NVRA.

The NVRA was enacted in 1993. Its purposes were to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office; to make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office; to protect the integrity of the electoral process; and to ensure that accurate and current voter registration rolls are maintained. 42 U.S.C. § 1973gg. Towards that end, Section 7 of the Act requires all offices in a state that provide public assistance to distribute voter registration application forms, assist applicants in completing the forms, and accept completed forms. 42 U.S.C. § 1973gg-5.

In Ohio, NVRA was implemented via the enactment of Am. Sub. S.B. 300, which became effective on January 1, 1995, and which incorporated the provisions of NVRA into state law. The portions of the bill relevant here are R.C. 3501.05, which outlines the duties of the Secretary of State, and R.C. 329.051, which outlines the responsibilities of the county DJFS offices.

R.C. 3501.05 places the following specific responsibilities on the Secretary relative to the subject of this suit: that he prescribe a general program for registering voters and prescribe a program of distribution of voter registration forms through such agencies; that he designate an employee to be responsible for voter registration and training; and that he adopt rules to implement the program for registering voters at designated agencies. R.C. 3501.05(R), (S), and (T). In accordance with his duties under these statutes, the Secretary adopted administrative rules detailing agencies' duties under NVRA. *See* Ohio Admin. Code 111-10-01, *et seq.* The

Secretary also implemented a training program to train agencies how to comply with their responsibilities under the law. *See* Complaint, Ex. C.

In addition to the duties placed on the Secretary, R.C. 3503.10 places a number of specific duties on designated agencies that are designed to ensure that NVRA is fully implemented. At the same time, R.C. 329.051 affirmatively places the duty to provide voter registration forms to those receiving public assistance on the county DJFS offices. And, the Ohio Administrative Code, in accordance with NVRA, provides generally that the designated agency, such as the county DJFS office, must implement a plan for registering voters in accordance with NVRA. Ohio Admin. Code 111-10-01. More specifically, Ohio Admin. Code 5101:1-2-15 provides that the county DJFS offices have a duty to implement procedures designed to comply with NVRA, and specifies exactly what those offices' obligations are under Ohio law.

III. LAW AND ARGUMENT

A. Standard of Review

Federal Rule of Civil Procedure 12(b)(6) allows a district court to dismiss any complaint that fails "to state a claim upon which relief can be granted." In applying this standard, a court must presume that all factual allegations in the complaint are true, and draw all reasonable inferences in favor of the non-moving party. *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993). The court need not, however, accord the presumption of truthfulness to any legal conclusion, opinion or deduction, even if it is couched as a factual allegation. *Sexton v. Barry*, 233 F.2d 220, 223 (6th Cir. 1956), *cert. denied*, 352 U.S. 870 (1956). Applying these well-settled standards to this case, the Court should dismiss Plaintiffs' Complaint because it fails to state a claim against

the Secretary of State, and because Plaintiffs have failed to fulfill the requirements placed on them by the NVRA prior to filing suit and because ACORN lacks standing.

B. The Ohio Secretary of State is not a proper party defendant in this litigation.

As demonstrated above, Ohio has fully implemented the provisions of NVRA, including Section 7. Under Ohio law, the responsibility for implementing those provisions regarding voter registration of those receiving public assistance falls squarely upon the local DJFS offices. R.C. 329.051; Ohio Admin. Code 5101:1-2-15. Under these circumstances, the fact that Plaintiffs allege that counties are not complying with their duties under state and federal law is not sufficient to state a claim against the Secretary.

Plaintiffs allege that the Secretary has not fulfilled his responsibilities as “chief elections officer” for implementing and enforcing the relevant provisions of NVRA. Complaint, at ¶ 3. More specifically, Plaintiffs’ allegations against the Secretary all amount to an allegation that he is not enforcing these provisions. Complaint, at ¶ 25. Plaintiffs are incorrect, however, that the Secretary has a duty to enforce these statutes, such that he becomes legally responsible for every alleged failure of a county employee to abide by the provisions of state and federal law.

The NVRA requires each State to designate “a state officer or employee as the chief state election official to be responsible for coordination of state responsibilities under [the NVRA].” 42 U.S.C. § 1973gg-8. Ohio, in compliance with the NVRA, has designated the Secretary of State as its chief election official. R.C. 3501.04. The responsibility to coordinate, however, does not equate to a duty to enforce each and every provision. *See United States of America v. Missouri*, 2006 US Dist. LEXIS 32499 (W.D. Mo. 2006), attached.

In *United States of America v. Missouri*, 2006 US Dist. LEXIS 32499 (W.D. Mo. 2006), the federal government filed suit against the State of Missouri and its Secretary of State alleging

that the State had failed to comply with the NVRA's requirements concerning voter registration rolls. The District Court granted Missouri's summary judgment motion to the extent that the federal government was attempting to hold Missouri legally responsible for the failings of local government officials. *Id.* at * 28.

The District Court observed that the NVRA requires the designated chief election official is "responsible for coordination of state responsibilities..." under the act. *Id.* at *19, quoting 42 U.S.C. § 1973gg-8. "Coordination means 'harmonious adjustment or interaction.'" *Id.*, citing The American Heritage Dictionary of the English Language (4th ed. 2000). Enforcement, on the other hand, means to "compel observance or obedience to." *Id.* As a result, the district court found that a responsibility for coordination did not equate to the responsibility to enforce because these roles are not equivalent. *Id.*¹

Just as the *U.S. v. Missouri* court refused to hold the State responsible for the alleged failings of local entities, this Court too should reject Plaintiffs' invitation to hold the Secretary of State responsible for the failings of local DJFS offices. Ohio has passed laws that make it clear that the duties that are the issue of this suit fall upon the county DJFS offices. The Secretary of State has fulfilled his legal responsibility under the NVRA as well as under Ohio law, and Plaintiffs have failed to state a claim against him when they allege that county DJFS offices have failed to comply with their obligations under federal and state law.

¹ At the same time, this case is readily distinguishable from *United States v. State of New York*, 255 F. Supp.2d 73 (E.D. N.Y. 2003), in which the Court held the State responsible for the failure of county welfare offices to properly offer voter registration services. The difference is that New York law granted the State control over those local offices. *Id.* at 80, citing *Thomasel v. Perales*, 78 N.Y.2d 561, 570 (1991). Ohio law is clear, however, that county DJFS offices are local governmental offices. The director of each county DJFS office is appointed by the board of county commissioners, serves at the pleasure of the commissioners, and oversees a budget approved by the commissioners. R.C. 329.01; R.C. 329.02.

C. The individual Plaintiffs have failed to follow the necessary prerequisites prior to filing a lawsuit under the National Voter Registration Act and their claims should be dismissed.

NVRA creates only a limited private right of action. 42 U.S.C. § 1973gg-9(b). Under NVRA, an aggrieved person cannot file suit until that person sends written notice of the alleged violation to the State's chief elections official and the violation is not corrected within 90 days after receipt of the notice or within 20 days after receipt if the alleged violation occurs within 120 days of the election. 42 U.S.C. § 1973gg-9(b)(2). In this case, Plaintiffs Harkless and Mardis have failed to allege that they have sent the Secretary notice of their specific allegations. On this basis, the Court should dismiss their claims.

The only letter sent in this instance was a blanket letter sent by ACORN that generally outlined its allegations against the county DJFS offices. Nowhere in that letter does ACORN mention Harkless or Mardis. Accordingly, Harkless and Mardis have failed to provide the Secretary or anyone else with an opportunity to address their specific concerns. Under these circumstances, this Court should find that ACORN's letter is not sufficient to obviate the need for these individuals to send a letter prior to filing suit.

Although blanket letters have been held sufficient, those cases are distinguishable. For example, in *ACORN v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997), the Sixth Circuit refused to dismiss claims brought by individual Michigan citizens. The difference, however, is that in that case Michigan had made a blanket refusal to comply with NVRA until the federal government provided funds to pay for the program. Thus, under those facts, providing individual notice would have been a futile act. There is no evidence that the same would be true here. In fact, the contrary is true. If Plaintiffs Harkless and Mardis sent non-compliance letters to the Ohio

Secretary of State, their individual claims could have been investigated and steps taken to be sure that they were registered to vote.

D. ACORN lacks standing to bring its complaint against the Secretary of State.

In order to show standing, a plaintiff must satisfy the requirements of Article III of the Constitution. It must show an injury in fact that is concrete and particularized and actual or imminent, not merely hypothetical; that the injury is fairly traced to the challenged action of the defendant; and that the injury will be redressed by a favorable decision of the court. *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 573 (6th Cir. 2004). An association has standing to bring suit on behalf of its members only when its members would otherwise have standing to sue in their own right. *Id.*; see *Indiana Democratic Party v. Rokita*, 2006 U.S. LEXIS 20321, *99-*114 (case dismissing organizational plaintiffs in an election case for failure to establish they had standing in their own right; standing based on the rights of their members; or standing based upon the individuals the organizations served).

In this case, ACORN alleges that it is a community organization whose members work on “public policy campaigns, and elect their own leaders from their neighborhoods.” (Complaint at ¶ 7). It also alleges that it “has been a strong advocate for voter participation,” and that it conducts voter registration drives in various Ohio urban counties. (Complaint at ¶¶ 38-39). These allegations are insufficient to accord organizational standing to ACORN to challenge the provisions at issue here.

In *Greater Cincinnati Coalition for the Homeless v. City of Cincinnati*, 56 F.3d 710 (6th Cir. 1995), the Sixth Circuit found that an organization which attempted to challenge a city anti-begging statute lacked standing. The Court recognized that a mere interest in any particular

problem is insufficient to confer standing upon an organization. *Id.* at 716, citing *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). Rather, the organization must show that “its ability to further its goals have been ‘perceptively impaired’ so as to ‘constitute[] far more than simply a setback to the organization’s abstract social interests.’” *Id.* at 717, quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

In this case, ACORN has failed to allege anything except a setback to its abstract social interests. It has alleged that ACORN is an advocate for voter participation, that if more people were registered to vote ACORN could encourage more people to vote on election day, and that ACORN’s members who receive public assistance should be allowed to change their voter registration when they arrive at the county DJFS office. (Complaint at ¶ 38). These allegations do not amount to anything more than a perceived setback to an organization’s general abstract social interests and are not sufficient to allege that ACORN has standing to bring this litigation.

Likewise, ACORN has failed to allege sufficient facts to demonstrate that it has associational standing to raise the claims of its members. As the Sixth Circuit has recognized, an organization has standing to raise a claim on behalf of its members if its members would have standing to sue in their own right; the interests it seeks to protect are germane to the organization’s purpose; and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Id.* at 717, citing *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). In this case, ACORN has failed to allege any facts that show it is seeking to protect interests germane to its own purpose.

According to its complaint, the purpose of ACORN is to work “for social justice and stronger communities.” Complaint at ¶ 7. This does not show that the allegations in this Complaint affect interests that are germane to ACORN’s purpose. Thus, ACORN lacks associational

standing to pursue these claims, on its own behalf, on behalf of its members or on behalf of individuals such as Harkless and Mardis.

IV. CONCLUSION

For the foregoing reasons, this Court should dismiss the Secretary of State as a party to this litigation, or alternatively dismiss the case or the claims of the Plaintiffs.

Respectfully submitted,

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Certificate of Service

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 16th day of October, 2006.

/s Damian W. Sikora