

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

EILEEN JANIS and KIM COLHOFF,)	Civ. 09-5019
)	
Plaintiffs,)	
)	
v.)	
)	ANSWER
CHRIS NELSON, In his official)	
capacity as Secretary of State of)	
South Dakota, and as a Member of)	
the State Board of Elections;)	
MATT McCAULLEY, CINDY)	
SCHULTZ, CHRISTOPHER W.)	
MADSEN, RICHARD CASEY,)	
KAREN M. LAYHER, and LINDA LEA)	
M. VIKEN, in their official capacities)	
as Members of the State Board of)	
Elections; and SUE GANJE, in her)	
official capacity as Auditor for)	
Shannon County,)	
)	
Defendants.*)	

Defendant Secretary of State, Chris Nelson and Election Board Members Matt McCaulley, Cindy Schultz, Christopher W. Madsen, Richard Casey, Karen M. Layher, and Linda Lea M. Viken, named as Defendants in the above-entitled action, and in their official capacities (hereinafter referred to as "State Defendants"), hereby answer the Plaintiffs' Complaint as follows:

* Named Defendants Gail Brock and Paula Jones' terms on the South Dakota Board of Elections expired and they have been replaced by Matt McCaulley and Cindy Schultz. Pursuant to Federal Rules of Civil Procedure 25(d), the State has substituted the names of Mr. McCaulley and Ms. Schultz for the Board Members they replaced.

1. The State Defendants are entitled to dismissal of Plaintiffs' Complaint as this Court does not have subject matter or personal jurisdiction over the claims that request monetary or nonprospective relief. Plaintiffs' claim for monetary or nonprospective relief against State Defendants is barred by the Eleventh Amendment to the United States Constitution and the doctrine of sovereign immunity.

2. The Court lacks both personal and subject matter jurisdiction against State Defendants.

3. The State Defendants are entitled to dismissal of the Plaintiffs' Complaint as the State Defendants acted within the course and scope of their official duties at all times and did not violate any clearly established constitutional or federal law rights of Plaintiffs of which a reasonable official in their position would have known; therefore, the State Defendants are immune from any claim by Plaintiffs under 42 U.S.C. § 1983 and from liability thereunder, under the doctrine of qualified official immunity.

4. The Plaintiffs' Complaint fails to state a cause of action upon which relief may be granted against State Defendants.

5. The State Defendants hereby deny each and every thing, matter, and allegation contained within the Plaintiffs' Complaint except that which is hereinafter specifically admitted.

6. Paragraph 1 is admitted in part and denied in part. State Defendants admit that under state law a person convicted of a felony who is sentenced to imprisonment in the state penitentiary loses the right to vote until

that person is discharged from his or her sentence. See SDCL §§ 23A-27-35, 12-4-18. State Defendants deny that they unlawfully removed Plaintiffs from the state and county voter registration lists or denied Plaintiffs the right to vote on November 4, 2008. State Defendants are without sufficient knowledge to admit or deny the remaining portion of paragraph 1.

7. State Defendants admit this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) and (4), and 42 U.S.C. § 1973j(f). State Defendants deny that this suit is authorized by 42 U.S.C. § 1983. Under the Eleventh Amendment and based on the doctrine of sovereign immunity, State Defendants are immune from suit under 42 U.S.C. § 1983.

8. Paragraph 3 is denied. The Complaint alleges violations of valid state laws, all of which were precleared by the Department of Justice. A three judge district court panel is unwarranted based on the facts of this case. The 42 U.S.C. § 1973c claim should be severed from the remaining claims.

9. Paragraph 4 is admitted.

10. State Defendants are without sufficient knowledge to admit or deny paragraph 5.

11. State Defendants are without sufficient knowledge to admit or deny paragraph 6.

12. State Defendant Nelson admits in part and denies in part paragraph 7. Secretary of State Nelson admits that the Secretary of State maintains a statewide voter registration file. Secretary of State Nelson admits

that he is responsible for specific statutory, designated responsibilities regarding voter registration and elections. The Secretary denies that he has direct control of election and voter registration responsibilities statutorily designated to local election officials, or that SDCL 12-4-18 provides such authority to the Secretary. Defendant Nelson denies that it is his duty under federal or state law to inform county auditors of who is ineligible to vote based on a federal felony conviction. See SDCL 12-4-18; 42 U.S.C. § 1973gg-6(g)(5) .

13. State Defendants admit paragraph 8, except to the extent Paula Jones and Gail Brock have been replaced by Matt McCaulley and Cindy Schultz. Paula Jones and Gail Brock are no longer members of the South Dakota Board of Elections.

14. State Defendants admit paragraph 9 to the extent that Fall River County Auditor Sue Ganje is on contract with the Shannon County Commission to maintain and safeguard voter registration records for Shannon County.

15. State Defendants are without sufficient knowledge to admit or deny paragraph 10, but admit that the U.S. Attorney's Office sent a Notice of Judgment of Conviction, which was received by the Secretary of State's Office on January 30, 2008.

16. State Defendants are without sufficient knowledge to admit or deny paragraph 11.

17. State Defendants are without sufficient knowledge to admit or deny paragraph 12.

18. State Defendants are without sufficient knowledge to admit or deny paragraph 13.

19. State Defendants are without sufficient knowledge to admit or deny paragraph 14.

20. State Defendants are without sufficient knowledge to admit or deny paragraph 15.

21. State Defendants are without sufficient knowledge to admit or deny paragraph 16.

22. State Defendants are without sufficient knowledge to admit or deny paragraph 17.

23. State Defendants are without sufficient knowledge to admit or deny paragraph 18, but admit that the U.S. Attorney's Office sent a Notice of Judgment of Conviction, which was received in the Secretary of State's Office on January 30, 2008.

24. State Defendants are without sufficient knowledge to admit or deny paragraph 19.

25. State Defendants are without sufficient knowledge to admit or deny paragraph 20.

26. State Defendants are without sufficient knowledge to admit or deny paragraph 21.

27. State Defendants are without sufficient knowledge to admit or deny paragraph 22.

28. State Defendants are without sufficient knowledge to admit or deny paragraph 23.

29. State Defendants are without sufficient knowledge to admit or deny paragraph 24.

30. State Defendants are without sufficient knowledge to admit or deny paragraph 25.

31. State Defendants admit that Native Americans are represented in South Dakota's criminal justice system to the extent they are charged, convicted, and sentenced to probation for crimes committed within the jurisdiction of the state.

32. State Defendants deny paragraph 27.

33. State Defendants admit paragraph 28.

34. State Defendants deny that it has implemented a policy and practice of denying voting rights to people with felony convictions who are on probation. Therefore, no effort to seek preclearance for such a change is legally required or been sought by State Defendants.

35. State Defendants deny paragraph 30.

36. State Defendants deny paragraph 31.

37. State Defendants reassert and reallege their responses to all preceding paragraphs as if fully set forth herein. No additional answer is required to paragraph 32.

38. State Defendants admit that Section 1 of the Fourteenth Amendment of the United States Constitution contains the quoted language.

39. State Defendants admit that South Dakota Constitution Article VII, Section 1 and South Dakota Constitution Article VI, Section 19 contain the quoted language.

40. State Defendants deny paragraph 35.

41. State Defendants reassert and reallege their responses to all preceding paragraphs as if fully set forth herein. No additional answer is required for paragraph 36.

42. State Defendants admit that Section 1 of the Fourteenth Amendment of the United States Constitution contains the quoted language.

43. State Defendants admit that the South Dakota Constitution contains the quoted language.

44. State Defendants are without sufficient knowledge to admit or deny paragraph 39.

45. State Defendants deny paragraph 40. State Defendants further deny that they removed Plaintiffs from the state and county voter registration lists.

46. State Defendants reassert and reallege their responses to all preceding paragraphs as if fully set forth herein. No additional answer is required to paragraph 41.

47. State Defendants admit in part and deny in part paragraph 42. Defendant Chris Nelson admits that HAVA requires the Secretary of State to maintain a statewide voter registration list. State Defendant Board of Election Members Matthew McCaulley, Cindy Schultz, Christopher W. Madsen, Richard

Casey, Karen M. Layher, and Linda Lea M. Viken deny that HAVA requires the State Board of Elections to maintain a statewide voter registration list. State Defendants admit that only voters who are not eligible to vote may be removed from the voter registration list by the county auditor. State Defendants deny that they can add, delete or modify the information contained in the statewide voter registration list.

48. State Defendants deny paragraph 43.

49. State Defendants deny paragraph 44. State Defendants further deny that they removed Plaintiffs from the state and county voter registration lists.

50. State Defendants reassert and reallege their responses to all preceding paragraphs as if fully set forth herein. No additional answer is required for paragraph 45.

51. State Defendants admit in part and deny in part paragraph 46. State Defendants admit that the precinct election board is required to provide a provisional ballot to any person who signs an affirmation that he or she is eligible to vote in the precinct in which the person is claiming to be registered to vote. State Defendants admit that a member of the precinct election board shall notify any person who is denied the ability to vote that the person may cast a provisional ballot. 43 U.S.C. § 15482.

52. State Defendants admit in part and deny in part paragraph 47. State Defendants admit that the precinct election board is required to provide a provisional ballot to any person who signs an affirmation that he or she is

eligible to vote in the precinct in which the person is claiming to be registered to vote. State Defendants admit that a member of the precinct election board shall notify any person who is denied the ability to vote that the person may cast a provisional ballot. SDCL §§ 12-18-39 and 12-18-40.

53. State Defendants deny paragraph 48 to the extent it claims they violated HAVA. State Defendants are without sufficient knowledge to admit or deny the rest of paragraph 48.

54. State Defendants reassert and reallege their responses to all preceding paragraphs as if fully set forth herein. No additional answer is required to paragraph 49.

55. State Defendants admit in part and deny in part paragraph 50. State Defendants admit that any state program or activity to protect the integrity of the election process by ensuring the maintenance of an accurate and current voter registration roll for federal office shall be uniform, nondiscriminatory, and in compliance with the NVRA. State Defendants admit that under state law each county auditor is responsible for maintaining an accurate and current voter registration roll for federal office. SDCL 12-4-2.

56. State Defendants admit that the Act cited in paragraph 51 contains the quoted language.

57. State Defendants are without sufficient knowledge to admit or deny paragraph 52.

58. State Defendants reassert and reallege their responses to all preceding paragraphs as if fully set forth herein. No additional answer is required to paragraph 53.

59. State Defendants admit that the Act cited in paragraph 54 contains the quoted language.

60. State Defendants deny paragraph 55.

61. State Defendants reassert and reallege their responses to all preceding paragraphs as if fully set forth herein. No additional answer is required to paragraph 56.

62. State Defendants deny paragraph 57.

63. State Defendants reassert and reallege their responses to all preceding paragraphs as if fully set forth herein. No additional answer is required to paragraph 58.

64. State Defendants admit that the Act cited in paragraph 59 contains the quoted language.

65. State Defendants admit that the South Dakota Constitution contains the quoted language.

66. State Defendants deny paragraph 61. State Defendants further deny that they made any determination that Plaintiffs were not qualified to vote.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which relief can be granted.

2. State Defendants are immune from suit under Amendment XI of the United States Constitution.

3. State Defendants are immune from suit based on qualified immunity.

4. State Defendants are immune from suit based on sovereign and government immunity to the extent of any state law claims. State Defendant's allege that any recovery against them is limited by statute to the amount of coverage under the public entity pool for liability established by SDCL ch. 3-22 and that the payment of any judgment that may be obtained would be governed by the provisions thereof.

5. Plaintiffs have improperly joined a cause of action which can only be determined by a three judge court and a cause of action by which the claim can be determined only by a one judge court. The Section 5 claim should be severed from this action.

6. State Defendants had no intent, purpose, or deliberate indifference on their part to deny Plaintiffs their constitutional or statutory rights, or any rights allegedly to have been deprived of them by the complaint, and Plaintiffs are barred from any relief herein.

7. Waiver and laches.

8. Plaintiffs failed to exhaust their administrative remedies, barring suit.

WHEREFORE, State Defendants respectfully pray that the Court enter relief in the matter as follows:

1. Plaintiffs' action be dismissed.
2. Plaintiffs' claims be severed.
3. State Defendants be awarded the costs and disbursements in this action including reasonable attorney's fees.
4. Plaintiffs' request for a preliminary and permanent injunction be denied.
5. State Defendants be awarded such other and further relief as the Court may deem just and equitable on the premises.
6. Plaintiffs' request for compensatory and nominal damages be denied.

Dated this 25th day of March, 2009.

Respectfully submitted,

LAWRENCE E. LONG
ATTORNEY GENERAL

/s/ Sherri Sundem Wald
Sherri Sundem Wald
Deputy Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
sherri.wald@state.sd.us

CERTIFICATE OF SERVICE

I hereby certify on March 25, 2009, a true and correct copy of the Answer was served electronically through the CM/ECF system upon the following individuals:

Bryan L. Sells
Laughlin McDonald
Nancy Abudu
American Civil Liberties Union Foundation
230 Peachtree Street, N.W., Suite 1440
Atlanta, GA 30303-1513
E-mail: bsells@aclu.org
*Attorneys for Plaintiffs,
Eileen Janis and Kim Colhoff*

Patrick K. Duffy
Patrick K. Duffy, LLC
629 Quincy Street, Suite 105
Rapid City, SD 57701
E-mail: pduffy@rushmore.com
*Attorney for Plaintiffs,
Eileen Janis and Kim Colhoff*

Robert Doody
American Civil Liberties Union,
South Dakota Chapter
401 East 8th Street, Suite 200P
Sioux Falls, SD 57103
E-mail: rdoody@aclu.org
*Attorney for Plaintiffs,
Eileen Janis and Kim Colhoff*

Sara M. Frankenstein
Gunderson, Palmer, Goodsell & Nelson
P.O. Box 8045
Rapid City, SD 57709
E-mail: sfrankenstein@gpgnlaw.com
*Attorney for Defendant,
Sue Ganje*

/s/ Sherri Sundem Wald