

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

EILEEN JANIS AND KIM COLHOFF,)
)
Plaintiff(s),)
)
v.)
)
CHRIS NELSON, IN HIS INDIVIDUAL AND)
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. MADEN,)
RICHARD CASEY, KAREN M. LAYHER,)
AND LINDA LEA M. VIKEN, IN THEIR)
INDIVIDUAL AND OFFICIAL CAPACITIES)
AS MEMBERS OF THE STATE BOARD OF)
ELECTIONS; AND SUE GANJE, IN HER)
OFFICIAL AND INDIVIDUAL CAPACITY AS)
AUDITOR FOR SHANNON COUNTY; AND)
LA FAWN CONROY, IN HER INDIVIDUAL)
AND OFFICIAL CAPACITY AS A POLL)
WORKER FOR SHANNON COUNTY,)
)
Defendant(s).)

Case No.: 09-5019

**MEMORANDUM IN SUPPORT OF
DEFENDANTS GANJE AND
CONROY'S MOTION TO DISMISS
PLAINTIFFS' FOURTEENTH
AMENDMENT CLAIMS**

Defendants, Sue Ganje and LaFawn Conroy, by and through their counsel of record Sara Frankenstein of Gunderson, Palmer, Nelson & Ashmore, pursuant to Fed. R. Civ. P. 12(c), hereby submit their Memorandum in Support of Motion to Dismiss Plaintiffs' Fourteenth Amendment Claims.

Plaintiffs' Count 1 of their Amended Complaint alleges a violation of Equal Protection of § 1 of the Fourteenth Amendment to the United States Constitution. Plaintiffs' Count 2 alleges a violation of Due Process under § 1 of the Fourteenth Amendment. Plaintiffs do not allege in their Amended Complaint that any Defendants acted purposefully or intentionally to discriminate. Therefore, Plaintiffs' Counts 1 and 2 must be dismissed.

STANDARD

A motion to dismiss is properly granted if, "...it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." Carter v. Arkansas et al., 392 F.3d 965, 967 (8th Cir. 2004)(quoting Knapp v. Hanson, 183 F.3d 786, 788 (8th Cir. 1999)). Under Fed. R. Civ. P. 12(b)(6), the Court must take all the facts alleged in the complaint to be true and all inferences in favor of the non-moving party. Strand v. Diversified Collection Service, Inc., 380 F.3d 316, 317 (8th Cir. 2004)(citing Stone Motor Co. v. Gen. Motors Corp., 293 F.3d 456, 465 (8th Cir. 2002); Fed. R. Civ. P. 12(b)(6)). However, "[a]lthough the pleading standard is liberal, the plaintiff must allege facts--not mere legal conclusions--that, if true, would support the existence of the claimed torts." Moses.com Securities, Inc. v. Comprehensive Software Systems, Inc., 406 F.3d 1052, 1062 (8th Cir. 2005)(citing Schaller Tel. Co. v. Golden Sky Sys., 298 F.3d 736, 740 (8th Cir. 2002)).

A failure to set forth facts sufficient to satisfy the requisite elements of a viable claim provides grounds to dismiss under Fed. R. Civ. P. 12(b)(6). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Benton v. Merrill Lynch & Co., Inc., 524 F.3d 866, 870 (8th Cir. 2008)(quoting Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1964-65 (2007)(internal citations omitted)). "The complaint must allege facts, which, when taken as true, raise more than a speculative right to relief." Id. (citing Bell Atlantic Corp., 127 S.Ct. at 1965). "Where the allegations show on the face of the complaint there is some insuperable bar to relief, dismissal under Rule 12(b)(6) is appropriate." Id. (citing Parnes v. Gateway 2000, Inc., 122 F.3d 539, 546 (8th Cir. 1997)).

ARGUMENT AND AUTHORITIES

In order to prove a due process and/or equal protection claim, plaintiffs must allege and prove that a state actor intentionally deprived them of a constitutional right. Ramratan v. New York City Board of Elections, 2006 WL 2583742 (E.D.N.Y. 2006), citing Shannon v. Jacobowitz, 394 F.3d 90, 95-96 (2d Cir. 2005). Federal courts must allow state courts to determine state election law absent a showing that state actors “intentionally acted to deprive plaintiffs of their constitutional rights.” Ramratan at ¶ 4. Plaintiffs must allege a specific instance of willful conduct that might amount to a violation of Plaintiffs’ due process rights. Id. at ¶ 5. Only then may a court potentially grant Plaintiffs their proposed injunctive relief. Id. A plaintiff’s Fourteenth Amendment claim must be dismissed if Plaintiffs do not prove intended discrimination on the basis of race. Welch v. McKenzie, 765 F.2d 1311, 1315 (5th Cir. 1985).

“As in any suit under § 1983 the first inquiry is whether the plaintiff has been deprived of a right secured by the Constitution and laws.” Hutchinson v. Miller, 797 F.2d 1279, 1282 (4th Cir. 1986); citing Baker v. McCollan, 443 U.S. 137, 140 (1979).

The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination....But a discriminatory purpose is not presumed...there must be a showing of clear and intentional discrimination....

Snowden v. Hughes, 321 U.S. 1, 8 (1944) (internal quotation and citations omitted).

Mere violation of a state statute does not infringe the federal Constitution...[because] [a] construction of the Equal Protection Clause which would find a violation of federal right in every departure by state officers from state law is not to be favored.

Id. at 11-12 (internal citation omitted).

Furthermore, in light of the history of the Due Process Clause and its policy of protecting citizens from the arbitrary exercise of government power and of

preventing governmental oppression, the Due Process Clause is similarly not implemented by a *negligent* act of an official causing unintended loss of or injury to life, liberty or property.

Daniels v. Williams, 474 U.S. 327, 328 (1986); see also Lunde v. Oldi, 808 F.2d 219, 220-21 (2d Cir. 1986) (citation and footnote omitted) (negligent actions of election officials which deprived plaintiff of his right to vote did not violate plaintiff's rights to due process or equal protection and his complaint pursuant to U.S.C. § 1983 was properly dismissed). "The guarantee of due process has never been understood to mean that the State must guarantee due care on the part of its officials." Davidson v. Cannon, 474 U.S. 344, 348 (1986).

Moreover, uneven or erroneous application of an otherwise valid statute constitutes a denial of equal protection only if it represents intentional or purposeful discrimination....Similarly, the Due Process Clause and Article I, Section 2 [of the United States Constitution] offer no guarantee against errors in the administration of an election....[W]e cannot believe that the framers of our Constitution were so hypersensitive to ordinary human frailties as to lay down an unrealistic requirement that elections be free of any error.

Dill v. Lake Pleasant Central School District, 2004 WL 2381528 (N.D.N.Y. 2004) (internal quotation and citations omitted); citing Powell v. Power, 436 F.2d 84, 88 (2d Cir. 1970).¹

As in Dill, where Plaintiffs do not allege discriminatory conduct, merely alleging negligence will not suffice to make out a § 1983 (and therefore a Fourteenth Amendment) claim.

Dill at ¶ 4. Plaintiffs showing of discrimination must be "clear and intentional." Id.

Plaintiffs must demonstrate more than a misunderstanding or a misapplication of the law on the part of the defendants, and mere speculation regarding defendants' alleged discriminatory intent will not suffice."

Id.

The Eighth Circuit has held that Plaintiffs must plead discrimination because of race in order to make out a VRA or § 1983 claim. Pettengill v. Putnam County R-1 School District, 472 F.2d 121, 122 (8th Cir. 1973). The Eighth Circuit explicitly adopted the rationale in Powell v.

¹ The Second Circuit has since reaffirmed its decision in Powell. Gold v. Feinberg, 107 F.3d 796 (2d Cir. 1996).

Power, 436 F.2d 84 (2d Cir. 1970), finding “no Constitutional basis” for overseeing “the administrative details of a local election” unless the denial of voting was for reasons of race. Pettengill at 122. The Powell court held that 42 U.S.C. § 1983 requires a plaintiff to allege racial discrimination, or in other words, purposeful or intentional discrimination. Pettengill at 86.

The Second Circuit has also more recently found that the determinative threshold question for Fourteenth Amendment claims is “whether the state actors’ conduct was intentional.” Shannon v. Jacobowitz, 391 F.3d 90, 93 (2d Cir. 2005). “Because Supreme Court jurisprudence plainly requires intentional conduct by state actors as a prerequisite for a due process violation” claims devoid of such discrimination must be dismissed. Id. In Shannon, a voting machine malfunctioned in a local New York election, allowing the candidate who received the fewer number of votes to win the election. Plaintiffs filed a complaint in federal court pursuant to 42 U.S.C. § 1983 alleging a due process violation. Id. at 91. Plaintiffs did not allege that Defendants intentionally deprived them of their rights. Id.

The Second Circuit found that “[p]rinciples of federalism limit the power of federal courts to intervene in state elections.” Id. at 94, citing Burton v. Georgia, 953 F.2d 1266, 1268 (11th Cir. 1992).

The Constitution leaves the conduct of state elections to the states, and the Supreme Court has recognized that the States’ have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised. Because the states traditionally have authority over their own elections and because the Constitution contemplates that authority, courts have long recognized that not every state election dispute implicates federal constitutional rights. Only in extraordinary circumstances will a challenge to a state or local election rise to the level of a constitutional deprivation.

Id. at 94 (internal citations and quotations omitted).

The Supreme Court has concluded that the Due Process Clause is not simply implicated by a negligent act of a state official. Id. citing Daniels v. Williams, 474 U.S. 327, 328 (1986).

The Supreme Court held that “[t]o hold that injury caused by such [negligent] conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the century’s-old principle of due process of law.” Daniels at 332. The 2005 Shannon decision found that while courts have found due process violations in voting cases before, each case involved an intentional act on the part of governmental officials. Every recognized voting rights case has required intentional state conduct directed at impairing a citizen’s right to vote. Shannon at 96. “Garden variety election irregularities” do not violate the Due Process Clause. Id. Examples of such “garden variety irregularities” as identified by the federal courts include malfunctioning of voting machines, human error resulting in miscounting of votes and delay in arrival of voting machines, allegedly inadequate state response to illegal cross-over voting, mechanical and human error in counting votes, technical deficiencies in printing ballots, mistakenly allowing non-party members to vote in a congressional primary, and arbitrary rejection of ballots. Id. at 96. Rather, cognizable Fourteenth Amendment claims must allege “purposeful state conduct directed at disenfranchising a class or group of citizens.” Id.

Plaintiffs have not alleged that available state remedies would be inadequate or unfair. Even if Plaintiffs alleged that state courts would not provide a fair or adequate response to their claims, such is not a basis for a federal court retaining jurisdiction of the Fourteenth Amendment claims. “Courts may consider the adequacy and fairness of the state remedy *only after* they first conclude that the Due Process Clause is implicated by intentional state action.” Shannon at 97. Moreover, where Plaintiffs have not alleged intentional conduct by the Defendants, courts need not reach the “fair and adequate” question. Id.

In addition to their Amended Complaint not alleging discriminatory intent, Plaintiffs concede that they have not made such allegations. See Plaintiffs’ Response in Opposition to

Defendant Sue Ganje's Motion to Dismiss Counts 6 and 7 of Plaintiffs' Complaint, Docket No. 79, filed October 1, 2009, p. 7-8. In Docket No. 79, Plaintiffs argue that they need not allege racial discrimination in order to make out a Voting Rights Act, § 2 claim. Rather, Plaintiffs rely upon their allegation that the Defendants' conduct "results" in the denial or abridgment of Native American voting rights. Plaintiffs' briefing corroborates the Amended Complaint's lack of discriminatory intent allegations.

CONCLUSION

Plaintiffs have not alleged intentional or purposeful discrimination. Therefore, Plaintiffs' Fourteenth Amendment claims must be dismissed.

Dated: January 7, 2010.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

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CERTIFICATE OF SERVICE

I hereby certify on January 7, 2010, a true and correct copy of **MEMORANDUM IN SUPPORT OF DEFENDANTS GANJE AND CONROY'S MOTION TO DISMISS PLAINTIFFS' FOURTEENTH AMENDMENT CLAIMS** was served electronically through the CM/ECF system upon the following individuals:

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