

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION**

EILEEN JANIS and KIM COLHOFF,)	
)	
Plaintiffs,)	
)	
vs.)	Civil Action No. 09-5019
)	
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.)	

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT
OF THEIR MOTION TO AMEND THE COMPLAINT**

Plaintiffs, by and through counsel, pursuant to Fed. R. Civ. P. 15(a), hereby file this memorandum of law in support of their motion to amend the complaint. In support of their motion, Plaintiffs show as follows:

A. PROCEDURAL AND FACTUAL BACKGROUND

Plaintiffs filed this civil action on February 18, 2009 challenging the denial of their right to vote based on their felony convictions even though they were sentenced only to probation and South Dakota law allows probationers to vote. Compl. at ¶ 1; S.D.C.L. § 23A-27-35. Plaintiffs maintain they never received notice from Defendants that they were being removed from the state and county voter registration lists as ineligible voters. Compl. at ¶¶ 14, 22. Plaintiff Eileen Janis further contends that, once

county election officials refused to allow her to cast a regular ballot, she requested and was denied the right to vote by provisional ballot. Id. at ¶ 17. Plaintiffs' claims are based on both state and federal law, including Section 5 of the Voting Rights Act which requires Shannon County to seek preclearance from the U.S. Department of Justice or the U.S. District Court for the District of Columbia prior to implementing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." Id. at ¶¶ 33 – 61; 42 U.S.C. § 1973c.

Defendant Sue Ganje, the County Auditor for Shannon County where Plaintiffs are residents, filed her answer to the complaint on March 17, 2009, and the remaining defendants (the "state defendants") filed their joint answer on March 25, 2009. [Docket Entry "D.E." 22, 23]. On March 25, 2009, Plaintiffs filed a "Motion for a Temporary Restraining Order or Preliminary Injunction," requesting that their names be immediately restored to the voter rolls in time for the next election in Shannon County and Defendants be enjoined from removing their names from the voter rolls until this litigation is resolved.

The state defendants and Defendant Ganje filed their responses in opposition to Plaintiffs' motion for a temporary restraining order (TRO) or preliminary injunction on April 13, 2009. In their responses, they stated that Plaintiffs' names had been placed back on the voter rolls and Defendant Ganje submitted an affidavit attesting that Plaintiffs' names would not be removed from the voter registration rolls absent an order from this Court. Based on Defendant Ganje's pledge not to interfere with Plaintiffs' right to vote in upcoming elections, Plaintiffs withdrew their motion and this Court granted the motion to withdraw without prejudice. [D.E. 46, 47].

On April 13, 2009, the state defendants filed a motion to dismiss Plaintiffs' claims for monetary damages on the ground that Defendants were not sued in their individual capacity and, according to Defendants, this Court lacks the jurisdiction to award monetary damages. [D.E. 38]. Plaintiffs' response in opposition to the motion to dismiss is due on May 4, 2009.

B. ARGUMENT

Federal Rule of Civil Procedure 15(a)(2) provides that a "court should freely give leave [to amend] when justice so requires." See also Semrad v. Dooley, 2009 WL 700203 *3 (D.S.D. Mar. 17, 2009) (granting plaintiff's motion to amend the complaint to add three additional defendants); American Fed., State, County v. City of Benton, Ark., 513 F.3d 874, 882-83 (8th Cir. 2008) ("A party may move to amend the pleadings to conform them to the evidence and to raise an unpleaded issue . . ."). While a court has discretion to grant leave to amend a complaint, there must be a justifiable or compelling reason for the court to deny the motion. Sherman v. Winco Fireworks, Inc., 532 F.3d 709, 715 (8th Cir. 2008) (ruling that a court's denial of a motion to amend is warranted when there are "compelling" reasons to support the decision). Reasons for denying a motion to amend include undue delay, bad faith, dilatory motive on the plaintiff's part, and undue prejudice to the opposing party. Id.; Bailey v. Bayer Cropscience L.P., 2009 WL 938914 * (8th Cir. Apr. 9, 2009); Amrine v. Brooks, 522 F.3d 823, 833 (8th Cir. 2008). None of these factors are present in this case.

There has been no undue delay in filing the motion to amend the complaint because only three months have passed since Plaintiffs filed their original complaint. All of the claims relate back to the pleadings in the original complaint and the parties have

not exchanged any discovery documents. Except for the briefing regarding Plaintiffs' motion for a TRO or preliminary injunction, the case remains relatively at the beginning stages.

The fact that the case is still in its beginning stages also shows that Defendants will not be prejudiced by the proposed amendments to the complaint, including the addition of La Fawn Conroy as a defendant. As alleged in the proposed amended complaint, Ms. Conroy was the election official who ultimately denied Plaintiff Janis the right to vote. Therefore, Ms. Conroy also bears legal responsibility for the denial of Plaintiff Janis' voting rights, and including her as a defendant in the case at this early stage allows Ms. Conroy to participate in discovery and any future motion practice.

Defendants also cannot assert any undue prejudice or bad faith on Plaintiffs' part for seeking to sue them in their individual capacities. Plaintiffs' request for monetary damages was well pled in the heading of their original complaint and in the prayer for relief. Therefore, Defendants already were on notice that this action involved monetary damages. Plaintiffs should be allowed to amend their complaint to clarify their intentions. In sum, the amendments Plaintiffs seek to make to the complaint are warranted and there is no compelling or justifiable reason for this Court to deny their motion to amend.

C. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that their motion to amend the complaint be granted.

Respectfully submitted,

By: /s/ Patrick Duffy
PATRICK DUFFY

629 Quincy Street, Suite 105
Rapid City SD 57701
Tel: (605) 342-1963
Fax: (605) 399-9512
pduffy@rushmore.com

LAUGHLIN MCDONALD*
NANCY G. ABUDU*
BRYAN SELLS*
AMERICAN CIVIL LIBERTIES UNION,
VOTING RIGHTS PROJECT
230 Peachtree Street, Suite 1440
Atlanta, GA 30303-1227
Tel: (404) 523-2721
Fax: (404) 653-0331
lmcdonald@aclu.org
nabudu@aclu.org
bsells@aclu.org
*Admitted pro hac vice

ROBERT DOODY
AMERICAN CIVIL LIBERTIES UNION,
SOUTH DAKOTA CHAPTER
401 East 8th Street, Suite 200P
Sioux Falls, SD 57103
Tel: (605) 332-2508
rdoody@aclu.org

ATTORNEYS FOR PLAINTIFFS