

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

EILEEN JANIS AND KIM COLHOFF,)
)
 Plaintiff(s),)
)
 v.)
)
 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. MADEN, 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,)
)
 Defendant(s).)

Case No.: 09-5019

**MEMORANDUM IN SUPPORT
OF DEFENDANT SUE GANJE’S
MOTION TO DISMISS ON
MOOTNESS AND STANDING
GROUNDS**

Defendant, Sue Ganje, by and through her counsel of record Sara Frankenstein of Gunderson, Palmer, Nelson & Ashmore, pursuant to Fed. R. Civ. P. 12(b)(6) and 12(c), hereby submits her Memorandum in Support of Motion to Dismiss on Mootness and Standing Grounds. Specifically, Defendant Sue Ganje (“Ganje”) moves to dismiss all Counts of Plaintiffs’ Complaint (Docket No. 1) or proposed Amended Complaint (Docket No. 49, Exhibit 1) requesting injunctive and declaratory relief.¹

FACTS

Plaintiffs have alleged that they were wrongfully removed from the voter registration rolls based upon their felony convictions in federal court. Eileen R. Janis is currently registered to vote in Shannon County, South Dakota. See Exhibit A, Janis Voter Registry Information. Her

¹ For ease of reference, Defendant Ganje will refer to the proposed Amended Complaint throughout.

voter registration is dated November 4, 2008. Id. Kim Colhoff is currently registered to vote in Shannon County, South Dakota. See Exhibit B, Colhoff Voter Registry Information. Her voter registration is dated April 8, 2009. Id.

In addition to allegations pertaining to the two Plaintiffs, the Amended Complaint paragraphs 37, 38, 39, 41, and 57 put forth allegations based on speculative injuries to unknown individuals who are non-parties to this lawsuit. Furthermore, these allegations refer to other speculative persons not residing in Shannon County.

Other paragraphs make allegations regarding the South Dakota criminal justice system. The plaintiffs were convicted criminals within the federal criminal justice system. Plaintiffs make no allegations regarding the federal criminal justice system – the system that affected Plaintiffs.

Significantly, the Amended Complaint does not allege discrimination within the South Dakota criminal justice system. As indicated above, the Amended Complaint makes no allegation of discrimination in the federal criminal justice system. The closest the Amended Complaint comes to this area is paragraph 38, which alleges that “Native Americans are disproportionately represented in South Dakota’s criminal justice system. Upon information and belief, Native Americans represent a disproportionate number of those who are sentenced to probation.” The Amended Complaint does not allege that Native American’s disproportionate representation is due to discrimination or unfairness based on race. Importantly, the Amended Complaint does not allege that the Plaintiffs were discriminated against or treated unfairly in the federal criminal justice system.

Finally, Plaintiffs seek a remedy which does not affect Plaintiffs, but rather other speculative persons who are non-parties to this lawsuit. The Amended Complaint, p. 15, (3)

requests “an injunction prohibiting defendants from denying voting rights to people with felony convictions who are on probation until they have complied with section 5 of the Voting Rights Act.” Plaintiffs did not seek an injunction affecting them, as both Plaintiff’s names are currently on the voter registration rolls.

Plaintiffs request relief directing Defendants to “adopt procedures to prevent future disfranchisement of individuals convicted of felonies who are on probation.” Amended Complaint, p. 15, (5). Again, Plaintiffs are requesting “relief” for other speculative persons who are non-parties to this lawsuit.

Next, Plaintiffs request the court to “[a]uthorize the appointment of federal observers pursuant to 42 U.S.C. § 1973a(a) to enforce the voting rights of people with felony convictions who retain the right to vote.” Amended Complaint, p. 16, (6). The Voting Rights Act only allows such injunctive remedies when the lawsuit is brought by an “aggrieved person.” 42 U.S.C. § 1973a(a). Again, Plaintiffs are seeking “relief” for speculative nonparties.

Plaintiffs also ask that the Court “[e]xercise and retain jurisdiction under 42 U.S.C. § 1973a(c) . . . to enforce the voting rights of people with felony convictions who retain the right to vote.” Amended Complaint, p. 16, (7). Similarly, Plaintiffs request for Defendants to “prepare and distribute across the state public service announcements and education materials regarding the voting rights of people with felony convictions.” Again, Plaintiffs are requesting relief for other speculative persons who are non-parties to this lawsuit, in areas of the state not affected by this lawsuit.

Moreover, Plaintiffs request relief in several ways which are moot. In Plaintiffs’ Prayer for Relief, Plaintiffs ask the Court for a declaratory judgment (p. 15, (2)) and an injunction prohibiting Defendants from denying their right to vote and to place Plaintiffs’ names back on

the registration lists (p. 15, (4)). Both such requests are moot, as Plaintiffs currently have the right to vote and their names are listed on the voter registration rolls. Defendant Sue Ganje has testified that she will not remove Plaintiffs names from the voter registration rolls absent a court order. See Affidavit of Sue Ganje, Docket No. 42.

Plaintiffs have conceded that their request for injunctions affecting Plaintiffs is moot. On March 25, 2009, Plaintiffs filed a Motion for a Temporary Restraining Order or Preliminary Injunction (Docket No. 24), requesting that Plaintiffs' names be immediately restored to the voter rolls. Defendant Ganje proved that both Plaintiffs had been restored to the voter registration rolls, and therefore, Plaintiffs' motion was moot. In Plaintiffs' Motion to Withdraw their request for Temporary Restraining Order or Preliminary Injunction (Docket No. 46, p. 3), Plaintiffs admit that "[b]ecause Defendant Ganje has sworn she will not prevent plaintiffs from voting in upcoming elections, Plaintiffs have obtained the remedy they sought in filing their motion." Plaintiffs' request for their names to be placed on the voter registration is moot, as conceded by Plaintiffs.

Plaintiffs, however, indicated they do not believe this bears an impact on the ultimate merits of their legal claims (Docket No. 46, p. 3). To support this statement, Plaintiffs state the Complaint's merits revolve around whether the names of other convicted felons in counties other than Shannon are also so removed, and whether the same situation "impacts a far greater number of eligible voters throughout the state." Id. at p. 4. In essence, Plaintiffs have asserted that even though the two Plaintiffs in this case no longer have a live controversy, Plaintiffs believe their claims should continue upon the supposition that other eligible voters were also denied their right to vote.

Only two Plaintiffs have brought this lawsuit. These claims are not brought pursuant to the rules governing class action lawsuits. Such lawsuits may not be brought on behalf of other voters not named as plaintiffs under standing principles. Moreover, Plaintiffs have not sued counties other than Shannon in order to properly support claims allegedly impacting other eligible voters throughout the state. Therefore, Plaintiffs mischaracterize their lawsuit. The Complaint and Amended Complaint are brought by two plaintiffs whose claims are moot against one county, and state defendants involvement in that county's implementation of state voting statutes.

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, "Although 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)).

A. Plaintiffs’ Request For An Injunction Is Moot

In Harksen v. Peska, the South Dakota Supreme Court established the law in regard to injunctive relief, stating:

There are four basic factors to guide our courts in exercising discretion concerning injunctive relief: (1) Did the party to be enjoined cause the damage? (2) Would irreparable harm result without the injunction because of lack of an adequate and complete remedy at law? (3) Is the party to be enjoined acting in bad faith or is its injury-causing behavior an “innocent mistake”? (4) In balancing the equities, is the “hardship to be suffered by the [enjoined party] . . . disproportionate to the . . . benefit to be gained by the injured party”?

Plaintiffs cannot prove that they will suffer irreparable harm, since it is undisputed that both Plaintiffs are on the voter registration list and will not be removed absent a court order. See Affidavit of Sue Ganje, Docket No. 42 (“Ganje Affidavit”). Therefore, both Plaintiffs can vote in the next and subsequent elections, and cannot possibly suffer “irreparable harm” without an injunction ordered.

Nor can Plaintiffs prove that they have no adequate remedy at law, because they presently have the remedy they sought in the Complaint. In fact, Plaintiff Janis filed suit even

though she already had her voting rights restored on November 4, 2008, prior to the Complaint being filed.

Under the fourth factor, the Court must determine if the hardship to be suffered by Defendants is disproportionate to the benefit to be gained by Plaintiffs. Plaintiffs can gain no relief, as they currently can vote and will remain on the voter registration rolls unless otherwise directed by the Court. The injunction sought is one that may affect other speculative persons who are non-parties to this lawsuit, under the supposition that they exist. It is axiomatic that an injunction that does not affect Plaintiffs but rather potentially non-parties is injunctive relief which is disproportionate to the benefit to be gained by Plaintiffs.

B. Lack of jurisdiction under mootness standard

Not only have Plaintiffs failed to prove each of the four factors listed above to obtain an injunction, the Court has no jurisdiction to hear Plaintiffs' claims. "Federal Courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." Schanou v. Lancaster County Sch. Dist., 62 F.3d 1040, 1042 (8th Cir. 1995) (quoting Bender v. Williamsport Area Sch. Dist., 475 U.S. 354, 540 (1986)). Article III requires a "case or controversy" to exist at every stage in the litigation before the Court can reach the merits of a case. See Schanou, 62 F.3d at 1042. A "case or controversy" requires "a definite and concrete controversy involving legal interests at every state in the litigation." McFarlin v. Newport Special Sch. Dist., 980 F.2d 1208, 1210 (8th Cir. 1992). "Occasionally, due to the passage of time or a change in circumstances, the issues presented in a case will no longer be 'live' or the parties will no longer have a legally confinable interest in the outcome of the litigation." Arkansas AFL-CIO v. Federal Communications Comm'n, 11 F.2d 1430, 1435 (8th Cir. 1993). "[O]nce the action that

the plaintiff sought to have enjoined has occurred, the case is mooted because ‘no order of this court could affect the parties’ rights with respect to the injunction we are called upon to review.’” Seafarers Int’l Union of N.Am. v. National Marine Servs., Inc., 820 F.2d 148, 151-52 (5th Cir. 1987) citing Honig v. Students of the Cal. Sch. For the Blind, 471 U.S. 148, 149 (1985).

As Wright and Miller have noted:

Since an injunction is regarded as an extraordinary remedy, it is not granted routinely; [footnote omitted] indeed, the court usually will refuse to exercise its equity jurisdiction unless the right to relief is clear... [H]istorically, and even today, the main prerequisite to obtaining injunctive relief is a finding that plaintiff is being threatened by some injury for which he has no adequate legal remedy.

Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d § 2942 (1995). Moreover, under circumstances where the conduct which may require injunctive relief has abated, it has long been recognized that injunctive relief will be denied.

Because injunctive relief looks to the future, and is designed to deter rather than punish, relief will be denied if the conduct has been discontinued on the ground that the dispute has become moot and does not require the court’s intervention.

In McFarlin v. Newport Special School District, 980 F.2d 1208 (8th Cir. 1992), the court refused to grant injunctive relief to parents on behalf of their daughter under circumstances where the daughter had been excluded from the high school basketball team. Id. at 1210-1211. The court concluded that the issue was moot because the student had graduated from high school, and the court could not place her back on the basketball team. Id. at 1210.

In Grandson v. University of Minnesota, 272 F.3d 568 (8th Cir. 2001), the Eighth Circuit affirmed a district court’s denial of injunctive relief under circumstances where female students brought claims alleging unequal treatment of female student athletes. The court found that one student’s claims were moot because, among other things, she sought to compel the university to create a women’s varsity ice hockey team, but the school already had done so. Id. at 574.

In summary, Plaintiffs request an injunction to place their names back on the voter registration rolls. Both Plaintiffs are currently on the voter registration rolls. Moreover, Defendant Ganje has testified that she will not be removing either Plaintiff's name without a court order instructing her to do so. See Ganje Affidavit. As the Eighth Circuit has found, this conduct renders moot Plaintiffs' request for declaratory judgment and all injunctive relief.

C. Standing

Standing "is perhaps the most important of the jurisdictional doctrines." U.S. v. Hays, 515 U.S. 737, 742 (1995). The United States Supreme Court has clearly indicated "the irreducible constitutional minimum of standing" which contains three elements. Id. First, the Plaintiff must have suffered an "injury in fact" which is defined as an invasion of a legally protected interest that is a) concrete and particularized; and b) actual or imminent, not conjectural or hypothetical. Id. at 743. Second, there must be a causal connection between the injury and the conduct complained of. Id. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Id. The U.S. Supreme Court has characterized these principles by repeatedly refusing "to recognize a generalized grievance against allegedly illegal government conduct as sufficient for standing to invoke the federal judicial power." Id. The burden is upon the party seeking the exercise of jurisdiction in his favor, who must clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute. Id.

"The rule against generalized grievances applies with as much force in the equal protection context as in any other." Id. In Allen v. Wright, 468 U.S. at 755, the U.S. Supreme Court made clear that even if a governmental actor is discriminating on the basis of race, the resulting injury "accords a basis for standing only to those persons who are personally denied

equal treatment by the challenged discriminatory conduct.” Hays at 743-44; *citing* Allen at 755. “Only those citizens able to allege injury as a direct result of having *personally* been denied equal treatment may bring such a challenge, and citizens who do so carry the burden of proving their standing, as well as their case on the merits.” Hays at 746, *citing* Allen at 755.

The Supreme Court has used juror selection as an example, citing Powers v. Ohio, 499 U.S. 400 (1991).

Powers held that “[a]n individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race.” But of course, where an individual juror is excluded from the jury because of race, that juror has *personally* suffered the race-based harm recognized in Powers, and it is the fact of *personal* injury that appellees have failed to establish here.

Hays at 746-47 (internal citations omitted).

“Federal courts, bound by Article III, are ‘not empowered to seek out and strike down any governmental act that they deem to be repugnant to the Constitution.’” Dillard v. Chilton Co. Commission, 495 F.3d 1324, 1331 (11th Cir. 2007); *citing* Hein v. Freedom From Religion Found., Inc., 127 S.Ct. 2553, 2562 (2007). “[A] plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy.” Id. at 2563-64 (*quoting* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). As in Lance v. Coffman, “[t]he only injury . . . allege[d] is that the law . . . has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.” 127 S.Ct. 1194, 1198 (2007) (*per curiam*).

For Plaintiffs to demonstrate standing under their Voting Rights Act claims, they must demonstrate that they:

- (1) ha[ve] personally suffered or will suffer some distinct injury-in-fact as a result of defendant's conduct;
- (2) the injury can be traced with some degree of causal certainty to defendant's conduct;
- (3) the injury is likely to be redressed by the requested relief;**
- (4) the plaintiff[s] must assert his own legal rights and interest, not those of a third party;**
- (5) the injury must consist of more than a generalized grievance that is shared by many; and**
- (6) the plaintiff's complaint must fall within the zone of interests to be regulated or protected by the rule of law in question.

Newman v. Voinovich, 789 F.Supp. 1410, 1415 (S.D. Ohio 1992) (emphasis added), *citing* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471-77 (1982). “Moreover, when . . . the plaintiff is seeking injunctive relief he must establish that he personally faces a realistic, immediate, and non-speculative threat of being prospectively subjected to or harmed by the particular conduct at issue.” Newman at 1415.

Plaintiffs Janis and Colhoff do not have standing to assert claims of other potential plaintiffs not named in this lawsuit. Nor should Plaintiffs Janis and Colhoff's Complaint be used as a method to discover other potential plaintiffs and other potential defendants. Ashcroft v. Iqbal, 129 S.Ct. 1937, 1953 (2009).

The fact that Plaintiffs have requested declaratory relief in addition to an injunction cannot save their Complaint from dismissal. Harris v. City of Houston, 151 F.3d 186, 191 n. 5 (5th Cir. 1998). “Requests for declaratory relief may sustain a suit only when the claims challenge some ongoing underlying policy rather than merely attacking an isolated action.” Id. (internal quotations omitted); see also Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 125-26 (1974) (holding that for declaratory relief to save a suit from mootness “[i]t is sufficient that the litigant show the existence of an immediate and definite government action or policy that has adversely effected and continues to effect a present interest.”).

Plaintiffs Janis and Colhoff cannot salvage their claims by making them on behalf of other potential plaintiffs not named in this lawsuit. Nor may Plaintiffs salvage their claims by alleging speculative, similar wrongdoing against other potential defendants not named in this lawsuit. Nor can Plaintiffs save their case by seeking relief that affects others not a party to this lawsuit. Plaintiffs lack standing to make such claims and requests for relief.

CONCLUSION

Based upon the aforementioned arguments and authorities, Defendant Sue Ganje respectfully requests the Court enter an Order dismissing the Plaintiffs' claims for injunctive and declaratory relief. Dismissal is appropriate under Fed. R. Civ. P. 12(b)(6) and 12(c), because the Plaintiffs' claims are moot, and they lack standing to bring such claims on behalf of other non-parties. Plaintiffs failed to set forth facts sufficient to raise claims upon which relief can be granted.

Dated: July 16, 2009.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: *s/Sara Frankenstein*

Sara Frankenstein
Attorneys for defendant,
Sue Ganje
440 Mt. Rushmore Road, 3rd floor
P.O. Box 8045
Rapid City, SD 57709
Telephone: (605) 342-1078
Telefax: (605) 719-3471
E-mail: sfrankenstein@gpnalaw.com

CERTIFICATE OF SERVICE

I hereby certify on July 16, 2009, a true and correct copy of **MEMORANDUM IN SUPPORT OF DEFENDANT SUE GANJE'S MOTION TO DISMISS ON MOOTNESS GROUNDS** was served electronically through the CM/ECF system upon the following individuals:

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

Patrick K. Duffy
Patrick K. Duffy, LLC
P.O. Box 8027
Rapid City, SD 57709-8027
E-mail: pduffy@rushmore.com
*Attorneys for plaintiffs,
Eileen Janis and Kim Colhoff*

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

Sherri Wald
Attorney General's Office
500 East Capitol
Pierre, SD 57501-5070
E-mail:
*Attorneys for defendants,
Chris Nelson, Matt McCaulley, Cindy Schultz,
Christopher Maden, Richard Casey, Karen Layher,
and Linda Lea Viken*

By: :/s/Sara Frankenstein
Sara Frankenstein

Shannon County

Voter Display

Voter's Id: J0465 060500000

Voter's Name: JANIS, EILEEN R

Address: PO BOX 525
PINE RIDGE SD
57770

Sex:

Date Registered: 11/04/08 Party: DEMOCRAT

Twp/City: 98 NOT IN FIRE DIS Ward: PIN

School: 01 SHANNON 65-1 Precinct: 3

Phone Number:

Date of Birth: 1/12/61

Old SS#/DrL#: 000000000

DriversLic: 00474069

DriversLicState: SD

Last 4 of SS#:

Water Dist:

Special District: 00

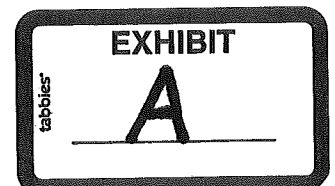
Commissioner District: 04

Election History:

Date Last Voted:

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Shannon County

Voter Display

Voter's Id: C1810 060500000

Voter's Name: COLHOFF, KIM A

Address: GENERAL DELIVERY
PINE RIDGE SD
57770

Sex:

Date Registered: 4/08/09 Party: DEMOCRAT

Twp/City: 98 NOT IN FIRE DIS Ward: PIN

School: 01 SHANNON 65-1 Precinct: 1

Phone Number:

Date of Birth: 10/30/56

Old SS#/DrL#: 000000000

DriversLic:

DriversLicState: SN

Last 4 of SS#:

Water Dist:

Special District: 00

Commissioner District: 03

Election History:

Date Last Voted:

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