UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

EILEEN JANIS and KIM COLHOFF, Plaintiffs, vs. CHRIS NELSON, in his official capacity as Secretary of State of South Dakota and as a member of the State Board of Education; MATT McCAULLEY, CINDY SCHULTZ, CHRISTOPHER W. MADSEN, RICHARD CASEY, KAREN M. LAYHER, and LINDA LEA M. VIKEN, in their individual and official capacities as members of the State Board of Elections; SUE GANJE, in her individual and official capacity as Auditor for Shannon County; and LA FAWN CONROY, in her individual and official capacity as a poll worker for Shannon County, Defendants.	)	CR. 09-5019-KES ORDER DENYING DEFENDANT GANJE'S MOTION TO DISMISS

Defendant Sue Ganje moves to reconsider Rule 12(b)(6) motion to dismiss, or in the alternative, dismiss Counts 6 and 7 in the amended complaint. Plaintiffs, Eileen Janis and Kim Colhoff, resist Ganje's motion.

BACKGROUND

The amended complaint alleges that on November 4, 2008, plaintiff Eileen Janis, a Native American and resident of Pine Ridge, South Dakota, which is in Shannon County, attempted to vote in the local, state, and federal elections at Billy Mills Hall in Shannon County on the Pine Ridge Indian Reservation. Janis was informed by a poll worker that her name was not on the list of registered voters in the county. After a call was placed to the Shannon County auditor's office, Janis was told that her name was removed from the voter registration rolls because of her January 2008 felony conviction. Janis told the poll workers that she should still be able to vote because she was sentenced only to probation. Janis asked the county election officials for a provisional ballot, but she was not given one.

The amended complaint also alleges that in June of 2008, plaintiff Kim Colhoff checked the voter registration roll book in Shannon County to confirm her eligibility to vote in the June 3, 2008, primary elections, but she did not find her name in the book. The amended complaint alleges that Colhoff's name was also removed from the voter registration roll book on the basis that she was convicted of a felony in January of 2008 even though she was sentenced to probation. The amended complaint also alleges that Colhoff did not cast a provisional ballot because she was never told by

county election officials that she could cast a provisional ballot in the June 3, 2008, primary elections or the November 4, 2008, general elections.

The amended complaint also alleges that the voting rights of other similarly situated individuals are being denied and that the practice of removing the names of other similarly situated individuals from the eligible voting lists results in a disparate and negative impact on Native Americans. Plaintiffs also allege in the amended complaint that defendants have not obtained preclearance under Section 5 of the Voting Rights Act prior to implementing their practice of denying voting rights to people with felony convictions who are on probation.

STANDARD OF REVIEW

Ganje moves to dismiss Counts 6 and 7, which allege violations of Sections 2 and 5 of the Voting Rights Act, in the amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).[1] Under Rule 12(b)(6),

[1] Ganje's motion is technically a motion for judgment on the pleadings under Rule 12(c) because it was filed after she had answered the amended complaint. See Westcott v. City of Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990). Regardless of whether Ganje's motion to dismiss falls under Rule 12(b)(6) or Rule 12(c), however, the standard of review is the same. See id. (noting that the "distinction [between Rule 12(c) and 12(b)(6)] is purely formal, because we review this 12(c) motion under the standard that governs 12(b)(6) motions") (citations omitted)). Recently the United States Supreme Court addressed the proper standard to be applied to a motion to dismiss under Rule 12(b)(6). See Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009). The court will therefore apply the standard of review and applicable case law associated with Rule 12(b)(6) even though Ganje's motion falls under Rule 12(c).

the facts alleged in the complaint must be considered true and all inferences must be viewed in favor of the nonmoving party. Strand v. Diversified Collection Serv., 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)). Recently, the United States Supreme Court emphasized that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " Id. at 1949. The Supreme Court further stated that "only a complaint that states a plausible claim for relief survives a motion to dismiss." Id. at 1950. "The plausibility standard . . . asks for more than a sheer possibility that defendant has acted unlawfully." Id. at 1949.

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.; see also Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009) ("A complaint states a plausible claim for relief if its 'factual content . . . allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' " (citing Iqbal, 129 S. Ct. at 1949)). The "fundamental tenet of Rule 12(b)(6) practice"

that "inferences are to be drawn in favor of the non-moving party" has not, however, been changed. Braden, 588 F.3d at 595 (citations omitted).

DISCUSSION

I. Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973

Section 2 of the Voting Rights Act states in relevant part:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title[.][2]

42 U.S.C. § 1973(a).

The amended complaint alleges that both plaintiffs are Native Americans, were registered voters in Shannon County, convicted of a felony, and sentenced to probation. The amended complaint further alleges that both plaintiffs' names were removed from the list of eligible voters because of their felony convictions even though they were sentenced only to probation.[3] Additionally, the amended complaint alleges that the voting rights of other

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[2] Section 1973b(f)(2) states that "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group."

[3] Under South Dakota's felon disenfranchisement law, a person only loses the right to vote for as long as that person is imprisoned. See SDCL 23A-27-35; Stumes v. Bloomberg, 551 N.W.2d 590, 594 (S.D. 1996) (Sabers, J., concurring specially) (noting that the plaintiff had "no right to vote for legislators while imprisoned" (emphasis added)).

people who have been convicted of felonies have been denied regardless of the sentence imposed. Finally, the amended complaint alleges that Native Americans represent a disproportionate number of those individuals who are sentenced to probation.[4]

The amended complaint specifically alleges two similar instances involving the unlawful removal of a Native American's name from the voter registration list. It is reasonable to infer from those facts that the voting rights of other similarly situated individuals, Native Americans who have been convicted of a felony and sentenced to probation, have been violated in a similar manner. Moreover, because Native Americans are alleged to represent a disproportionate number of individuals who are sentenced to probation, it is reasonable to infer that the unlawful removal of names of

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[4] Ganje argues that there are no other alleged facts, statistics, or other proof within the amended complaint to support the allegation that "upon information and belief, Native Americans represent a disproportionate number of those who are sentenced to probation." (Docket 81 at 7.) This allegation, however, is a statement of fact. Because this is a motion to dismiss under Rule 12(b)(6), there is no requirement that the alleged fact needs to be supported by other additional statements of fact or any other evidence. See Erickson v. Pardus, 551 U.S. 89, 94 (2007) ("[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). See also Schaaf v. Residential Funding Corp., 517 F.3d 544, 549 (8th Cir. 2008) ("At this stage of the litigation, we accept as true all of the factual allegations contained in the complaint, and review the complaint to determine whether its allegations show that the pleader is entitled to relief." (citation omitted)). Ganje has not identified any authority indicating that a heightened pleading standard applies in a Section 2 claim.

individuals who retain the right to vote has resulted in Native Americans, including plaintiffs, having less opportunity than others to participate in the political process and elect their preferred candidates. Cf. Thornburg v. Gingles, 478 U.S. 30, 47 (1986) (citations omitted) (stating that Section 2 requires "a certain electoral law, practice, or structure [that] interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives"). These alleged facts are sufficient to sustain a claim under Section 2 of the Voting Rights Act.

Ganje argues that plaintiffs have not alleged that their names were removed from the voter registration lists because of their race. In bringing a claim under Section 2 of the Voting Rights Act, however, "plaintiffs are not required to demonstrate that the challenged electoral law or structure was designed or maintained for a discriminatory purpose." Id. at 44 n.8 (citations omitted). Rather, plaintiffs must demonstrate that "a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." Id. at 47 (emphasis added). This is what is known as the "results test." See id. at 44 n.8. In accordance with this "results test" standard, the amended complaint alleges that the act of unlawfully removing Native Americans from the voting

registration list "has resulted in Native Americans, including Plaintiffs, having less opportunity than other members of the electorate to participate in the political process[.]" (Docket 81 at 13.) Because it is alleged that a disproportionate number of Native Americans receive a probation sentence, it is reasonable to infer that the practice of removing the names of individuals sentenced to probation from the voter lists has caused a disproportionate number of Native Americans to be removed from the voter lists when compared to non-Native Americans who have been sentenced to probation. Cf. Thornburg, 478 U.S. at 47. Accordingly, it is reasonable to infer that Native Americans would have less of an opportunity to participate in the political process and elect their preferred representatives because Native American names have been disproportionately removed from the voter registration lists.

Ganje also argues that the Voting Rights Act does not apply to felon disenfranchisement statutes. See, e.g., Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006); Johnson v. Governor of Florida, 405 F.3d 1214 (11th Cir. 2005); Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986); but see Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003). The cases relied on by Ganje, however, involved the plaintiffs attempting to use the Voting Rights Act as a means to strike down the states' felon disenfranchisement statutes. See Hayden, 449 F.3d at 309 (involving the plaintiffs alleging "that a New York

State statute that disenfranchises currently incarcerated felons and parolees . . . results in unlawful vote denial and vote dilution" (citation omitted)); Johnson, 405 F.3d at 1216 (involving a "challenge to Florida's felon disenfranchisement law"); Wesley, 791 F.2d at 1257 (involving a challenge of "the Tennessee statute disenfranchising convicted felons"). Here, plaintiffs are not attempting to strike down South Dakota's felon disenfranchisement law. Rather, plaintiffs are relying on South Dakota's felon disenfranchisement law to support their claims. In fact, the Section 2 claim stems from the act of deviating from South Dakota's disenfranchisement law in such a way that disparately and negatively results in a denial of Native American voting rights under the Voting Rights Act. Thus, Ganje's argument is not dispositive, and her motion to dismiss the Section 2 claim is denied.

II. Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c

Ganje argues that Count 7, which alleges a violation of Section 5 of the Voting Rights Act,[5] must be dismissed because the removal of plaintiffs'

[5] Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c(a), states that

> [w]henever a State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be

names from the eligible voter lists was an isolated incident of misconduct by the local election officials. Plaintiffs argue that Shannon County has instituted a practice of removing eligible voters from the voter registration list based on felony convictions, even though they remain eligible to vote, without obtaining preclearance pursuant to Section 5 of the Voting Rights Act.

The amended complaint alleges that, even though plaintiffs were still eligible to vote because they were only sentenced to probation, their names were still removed from the voting list, (Docket 81 at 4-8), and that other similarly situated individuals are being denied their voting rights in a similar manner. (Id. at 7.) The amended complaint also alleges that the Shannon County auditor's office confirmed that Janis's name was removed from the voter registration list because of her felony conviction even though she had been sentenced to probation.[6] (Id. at 5-6.) These factual allegations, which must be accepted as true, allow for the reasonable inference that the removal of the names from the voter registration list of individuals who have been convicted of a felony, regardless of the sentence imposed, was more than an

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> denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure[.]

[6] Ganje is the Auditor for Shannon County and is responsible for maintaining the voter registration records for the county. See SDCL 12-4-2.

isolated incident and that an unprecleared voting practice or procedure had been implemented in Shannon County in violation of Section 5.

Ganje argues that the alleged actions in the amended complaint cannot be considered a change in voting practices within the meaning of Section 5 because the actions of the local election officials were in conflict with the state's precleared laws.[7] See Riley v. Kennedy, 128 S. Ct. 1970, 1984 (2008) (holding that "the State's reversion to its prior practice did not rank as a 'change' requiring preclearance"). Ganje argues that the alleged practice of removing the names of individuals who have been convicted of a felony from the voter list regardless of the sentence imposed was nothing more than a "temporary" misapplication of state law. See id. at 1984 ("A

[7] Ganje also identifies numerous other cases where a court found that there was no change in the election practice or procedure because the acts violated state law. These cases, however, are materially distinguishable from the facts and circumstances surrounding this case. For example, in Montgomery v. Leflore County Republican Executive Committee, 776 F. Supp 1142 (N.D. Miss. 1991), the defendants were not "governmental subdivisions." Id. at 1145. In Eccles v. Gargiulo, 497 F. Supp. 419 (E.D.N.Y. 1980), the alleged change in voting practice stemmed from a court order. (Id. at 422) ("The consequent difficulty for plaintiffs is that in this Circuit, the State Supreme Court decree may not be considered a change in election procedures covered by the Act."). Webber v. White, 422 F. Supp. 416 (N.D. Tex. 1976), also involved a court ordered change. Id. at 426-27. In Gordon v. Executive Committee of Democratic Party of City of Charleston, 335 F. Supp. 166 (D.S.C. 1971) (per curiam), the three-judge panel addressed an unconstitutional voting procedure, that when "restricted to its constitutional limits," was the same as the previous voting procedure. Id. at 169 (emphasis added). Beatty v. Esposito, 439 F. Supp. 830 (E.D.N.Y. 1977), involved "one instance" where "one Chairman of a county political committee" acted "ostensibly in accordance with his statutory discretion." Id. at 832.

practice best characterized as nothing more than a 'temporary misapplication of state law,' we held, is not in 'force or effect,' even if actually implemented by state election officials." (citing Young v. Fordice, 520 U.S. 273, 282 (1997)).

In Riley, the Supreme Court addressed the issue of whether a state must "obtain fresh preclearance in order to reinstate the election practice prevailing before enactment of the law struck down by the State's Supreme Court[.]" Id. at 1976. In limiting its holding to the unique circumstances surrounding the case, the Supreme Court held that the Alabama Supreme Court's reinstatement of the prior precleared practice did not amount to a "change" of a voting practice or procedure for purposes of Section 5. Id. at 1986 (emphasizing that the "reasoning and the particular facts of this case should make the narrow scope of [the Supreme Court's] holding apparent").

The court is guided, however, by the Supreme Court's "cautionary observations" that its holding in Riley should "not suggest the outcome would be the same if a potentially unlawful practice had simply been abandoned by state officials after initial use in an election" and that the "same result would not necessarily follow if a practice were invalidated only after enforcement without challenge in several previous elections." Id. (citing Perkins v. Matthews, 400 U.S. 379, 395 (1971) and Young, 520 U.S. at 283)). Here, the facts alleged in the amended complaint reveal that elections were

held prior to the abandonment of the alleged practice. See Young, 520 U.S. at 283 (noting the significance of the fact that "the State held no elections prior to its abandonment of the Provisional Plan, nor were any elections imminent" in finding that the practice did not constitute a change within the meaning of Section 5). Accordingly, the court finds that the present case does not involve an alleged practice that, if proven to be true, is fairly characterized as a "temporary" misapplication of South Dakota's felon disenfranchisement law.

Ganje's reliance on United States v. Saint Landry Parish School Board, 601 F.2d 859 (5th Cir. 1979) is similarly misplaced.[8] Saint Landry involved an isolated incident of alleged wrongdoing where three poll workers bribed African American voters, accompanied the voters into the voting booths, and prevented them from voting for their desired candidate. Id. at 861. In addressing whether the poll workers' actions constituted a "change" in the voting practice or procedure, the Fifth Circuit Court of Appeals stated that "we can find no case which even hints that actions of a state official which

[8] Ganje has identified several other cases that involve variations of the underlying issue addressed in Saint Landry. See, e.g., Powell v. Power, 436 F.2d 84, 85 (2d Cir. 1970) (involving election officials "permitting a number of individuals to cast ballots who under state law were not qualified to vote"); Gremillion v. Rinaudo, 325 F. Supp. 375, 378 (E.D. La. 1971) (involving "incidents that, even if true, are clearly ministerial errors and omissions on the part of the local official charged with conduct of the election"). The court's reasoning with regard to Saint Landry also extends to the other cases cited by Ganje.

are in conflict with the state's required procedures should be considered a change in voting procedures enacted or administered by the state within the meaning of [Section] 5[.]" Id. at 864.

The Fifth Circuit Court of Appeals in Saint Landry acknowledged, however, that Section 5 covers situations "when an enactment was not actually passed, but when a procedure was nonetheless widely administered with at least the implicit approval of the state governing authority." Id. at 864. Moreover, the Supreme Court has acknowledged that Section 5 "reaches informal as well as formal changes." Foreman v. Dallas County, Tex., 521 U.S. 979, 980 (1997) (per curiam) (internal quotation and citation omitted). "If it were otherwise, States could evade the requirements of [Section] 5 merely by implementing changes in an informal manner." NAACP v. Hampton County Election Comm'n, 470 U.S. 166, 178 (1985); see also Riley v. Kennedy, 128 S. Ct. 1970, 1991 (2008) (Stevens, J., dissenting) (noting that "informal abandonment or adoption by election officials" can be considered a change in voting practice).[9]

[9] Ganje also argues that "garden-variety election challenges such as ballot count or election administration have been redirected from federal court to the state tribunals." See Montgomery, 776 F. Supp. at 1146 (citations omitted). The court rejects the implication that the allegation in the amended complaint is a "garden-variety" election issue. Numerous Native Americans allegedly have had their names unlawfully removed from the voter registration lists because an unprecleared voting practice was implemented. Furthermore, Ganje has not demonstrated why this allegation is better suited for state court.

As stated above, the amended complaint alleges that the Shannon County auditor's office confirmed that Janis's name was removed from the voter registration list because of her felony conviction even though she had only been sentenced to probation. (Docket 81 at 5-6.) The amended complaint also alleges that Colhoff, who was also convicted of a felony and sentenced only to probation, was no longer on the Shannon County voter registration list. (Id. at 6-7.) The amended complaint then alleges that other similarly situated individuals were also being removed from the voter registration list. (Id. at 7.) Those alleged facts are sufficient to allow for the reasonable inference that Shannon County had in fact implemented an unprecleared practice of removing a voter's name from the voter registration list after a felony conviction, regardless of the sentence imposed. Thus, Ganje's motion to dismiss the Section 5 claim is denied.

Accordingly, it is hereby

ORDERED that Ganje's Motion to Reconsider Rule 12(b)(6) Motion to Dismiss, or in the Alternative, Motion to Dismiss Claims 6 and 7 under Rule 12(b)(6) (Docket 108) is denied.

Dated January 26, 2010.

BY THE COURT:

/s/ *Karen E. Schreier*
KAREN E. SCHREIER
CHIEF JUDGE