

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

**DEFENDANT GANJE'S
REPLY TO PLAINTIFFS'
RESPONSE IN OPPOSITION
TO RULE 12(B)(6) MOTION
TO DISMISS**

Defendant, Sue Ganje, by and through her counsel of record, Sara Frankenstein of Gunderson, Palmer, Nelson & Ashmore, hereby files here Reply to Plaintiffs' Response in Opposition to Defendant Ganje's Rule 12(b)(6) Motion to Dismiss.

I. Section 5 of the Voting Rights Act

Plaintiffs allege that the Defendants failed to comply with § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, by not first preclearing their violations of South Dakota law before violating state law to remove Plaintiffs' names from the voter registration list.

Misapplications of law are not changes in policy or procedure that require § 5 preclearance. Plaintiffs make no attempt to distinguish the wealth of case law cited in Ganje's first brief that held this proposition. Plaintiffs focus their attention on distinguishing Montgomery v. Leflore County Republican Executive Committee, 776 F.Supp. 1142 (N.D.Miss.

1991). The Montgomery case involved violations of precleared Mississippi election laws that remained in full force. Importantly, the court found that “*it was not Congress’ intent for litigants to utilize § 5 of the Voting Rights Act for purposes of enforcing precleared state election laws.*” Id. at 1144 (citations omitted, emphasis added). Montgomery cited numerous cases, as did Ganje, supporting this holding.

Plaintiffs make no attempt to distinguish the Fifth Circuit case U.S. v. Saint Landry Parish School Board, 601 F.2d 859, which held that “we can find no case which even hints that actions of a state official which 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 § 5 ...” Id. at 864. The Fifth Circuit found no such case, and neither did the Plaintiffs.

Nor did Plaintiffs distinguish the numerous cases which have held that such election issues should be determined by state courts and not federal courts under the VRA.

For their proposition that an incorrect application of state law is still subject to § 5, Plaintiffs solely cite Riley v. Kennedy, 128 S.Ct. 1970 (2008). Plaintiffs cite a sentence from Riley, but fail to cite the remainder of the paragraph, which states that “[o]ur more recent decision in Young however, qualified that general rule: A 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.” Id. citing Young v. Fordice, 520 U.S at 279. Plaintiffs have cited no case holding that a misapplication of precleared law states a § 5 VRA claim. All case law is to the contrary.

II. Section 2 Of The Voting Rights Act

Plaintiffs argue that they need not prove discriminatory intent under the VRA. This argument misses the point. While Plaintiffs need not prove that Ganje intended to racially discriminate against them, the VRA does require Plaintiffs to allege and prove that a voting abridgement occurred “on account of race or color.” Plaintiffs may prove that their voting rights were abridged on account of race or color by proving purposeful discrimination or unintended discrimination in effect. Plaintiffs’ complaint, however, does not even allege that Plaintiffs’ disenfranchisement was on account of race or color.

Plaintiffs do not allege that Native Americans are discriminated against on account of their race in the South Dakota criminal justice system. Plaintiffs also do not allege that Native Americans are discriminated against in the *federal* criminal justice system. Both Plaintiffs are criminals convicted within the federal criminal justice system, and sentenced by this Court. Plaintiffs have not alleged Ganje removed the two Plaintiffs’ names from the voter registration rolls on account of race. Nor have Plaintiffs alleged that any other person violated Plaintiffs’ rights on account of race. Plaintiffs sole hope of proving a § 2 VRA claim is their assertion that the state criminal justice system (not the federal criminal justice system) contains a disproportionate number of Native Americans, and that Native Americans represent a disproportionate number of those sentenced to probation. Plaintiffs have also failed to allege that they, or Native Americans as a class, have less opportunity to elect representatives of their choice.

Plaintiffs provide no facts to support such claims in their Complaint. Plaintiffs state no statistics or other proof of such allegations. Rather, Plaintiffs only allege conclusions. Plaintiffs argue that they did assert that the two plaintiffs were improperly removed from the voter rolls.

Alleging that two plaintiffs' names were removed from the voter rolls is not a factual basis for a disproportionate number of Native Americans in the state criminal justice system. Alleging that two plaintiffs' names were removed from the voter rolls also is not a factual basis for a disproportionate number of Native Americans being sentenced to probation.

It is well settled that disproportionate racial impact alone does not establish a VRA violation. Wesley v. Collins, 791 F.2d 1255, 1260-61 (6th Cir. 1986). The VRA was passed pursuant to Congressional enforcement powers under the Fifteenth Amendment, and was intended to provide voting rights to all eligible "without distinction of race, color, or previous condition of servitude." Beatty v. Dinkins, 478 F.Supp. 749, 751 (S.D.N.Y. 1979). The Supreme Court stated in Thornburg v. Gingles that "[t]he essence of a § 2 claim is 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." 478 U.S. 30, 47 (1986)(emphasis added). "That is, the Supreme Court recognized that there must be some causal connection between the challenged electoral practice and the alleged discrimination that results in a denial or abridgement of the right to vote." Ortiz v. City of Philadelphia, 28 F.3d 306, 310 (3d Cr. 1994). Again, Plaintiffs argument that they need not assert intentional discrimination misses the mark. Plaintiffs must prove their injury was on account of race or color, even though they need not prove that Ganje abridged their rights by purposeful racial discrimination.

Plaintiffs do not discuss their failure to allege that Plaintiffs "have less opportunity than other members of the electorate to . . . elect representative of their choice." Ortiz at 314; citing Chisom v. Roemer, 501 U.S. 380, 397 (1991). "Section 2 plaintiffs must demonstrate that they had less opportunity both (1) to participate in the political process, and (2) to elect

representatives of their choice.” Ortiz at 314. Plaintiffs must allege and prove that the misapplication of state felon disenfranchisement laws “impairs their ability to influence the outcome of an election.” Ortiz at 315; citing Chisom, 501 U.S. at 397. Without such an allegation, Plaintiffs have failed to sufficiently plead a § 2 VRA violation.

Plaintiffs also do not discuss their failure to allege racial discrimination in the federal criminal justice system. Plaintiffs were convicted within the federal justice system, not the state system.

The Second, Sixth, and Eleventh circuits agree that the VRA does not allow felon disenfranchisement suits. Muntaqim v. Coombe, 366 F.3d 102 (2nd Cir. 2004) (dismissed en banc on standing grounds in Muntaqim v. Coombe, 449 F.3d 371 (2006)); Wesley v. Collins, 791 F.2d 1255, 1262 (6th Cir. 1986); Johnson v. Governor of Florida, 405 F.3d 1214 (11th Cir. 2005). Only the Ninth Circuit has allowed § 2 VRA claims with regard to felon disenfranchisement. Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003). Farrakhan held that a bare statistical showing of disproportionate impact on a racial minority does not satisfy § 2, because causation cannot be inferred from impact alone. Id.

Certainly, plaintiffs must prove that the challenged voter qualification denies or abridges their right to vote on account of race, but the 1982 Amendments and subsequent case law make clear that factors outside the election system can contribute to a particular voting practice’s disparate impact ***when those factors involve race discrimination.***

Id. at 1019 (emphasis added). Again, Plaintiffs need not prove that Ganje abridged their right to vote due to Ganje’s purposeful racial discrimination, yet Plaintiffs must allege and prove that their voting abridgment was on account of their race or color (whether purposefully or as an unintended result).

Dismissal is appropriate under Fed.R.Civ.P. 12(b)(6), because Plaintiffs failed to set forth facts sufficient to state claims upon which relief can be granted.

Specifically, Plaintiffs have failed to allege:

1. A similar § 5 VRA claim recognized by any court in the land;
2. A § 2 VRA felon disenfranchisement claim recognized by the Eighth Circuit;
3. That Plaintiffs were denied their right to vote on account of race as required by § 2;
4. That Plaintiffs were racially discriminated against in the federal criminal justice system;
5. That Plaintiffs were affected by the state criminal justice system, and that the state criminal justice system has a disproportionate number of Native American felons due to racial discrimination within the justice system;
6. That Plaintiffs have less opportunity to elect representatives of their choice; and
7. Any fact whatsoever to serve as the basis for their conclusory allegation that § 2 was violated.

All of the above allegations are required to sufficiently plead a § 2 and § 5 VRA claim. The Court should dismiss their VRA claims for failure to state a claim upon which relief can be granted.

Dated: October 30, 2009.

GUNDERSON, PALMER, NELSON
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CERTIFICATE OF SERVICE

I hereby certify on October 30, 2009, a true and correct copy of **DEFENDANT GANJE'S REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO RULE 12(B)(6) MOTION TO DISMISS** was served electronically through the CM/ECF system upon the following individuals:

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