

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

EILEEN JANIS and KIM COLHOFF,)	Civ. No. 09-5019
)	
Plaintiffs,)	
)	
v.)	STATE DEFENDANTS'
)	RESPONSE TO
CHRIS NELSON, in his individual)	PLAINTIFFS' SECOND
and official capacity as Secretary of)	MOTION TO
State of South Dakota and as a)	AMEND/CORRECT
member of the State Board of)	COMPLAINT
Elections; 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 official and individual)	
Capacity as Auditor for Shannon)	
County; LA FAWN CONROY, in)	
her individual and official capacity)	
as a poll worker for Shannon)	
County,)	
)	
Defendants.)	

COME NOW Defendants Chris Nelson, Matt McCaulley, Cindy Schultz, Christopher W. Madsen, Richard Casey, Karen M. Layher, and Linda Lea Viken, (hereinafter referred to as "State Defendants"), and submit this Response to Plaintiffs' Second Motion to Amend/Correct Complaint (Doc. 124) and memorandum in support of that motion (Doc. 125).

PROCEDURAL HISTORY

On June 16, 2009, the Court issued the Scheduling Order governing this case. (Doc. 57). The deadline for joining parties and amending pleadings was set for August 24, 2009. (Doc. 57, p. 2).

On September 9, 2009, the State Defendants moved for a protective order regarding four interrogatories and two requests for production from Plaintiffs. (Doc. 69; Doc. 113, p. 20). On December 30, 2009, the Court issued its Order granting in part and denying in part the motion for protective order. (Doc. 113). The Court ordered the State Defendants to respond to certain interrogatories and requests for production, as limited by the Court's order, by January 29, 2010. (Doc. 113, p. 27).

As part of that order, the Court also extended the deadlines for disclosure of experts, discovery completion, and motions (excluding motions in limine). (Doc. 113, p. 28). The deadline for completion of discovery was extended to April 9, 2010, and the motions deadline was extended to May 3, 2010. (Doc. 113, p. 28). The deadline for joining parties and amending pleadings, however, was not extended.

On January 28, 2010, State Defendants mailed the discovery responses to Plaintiffs. (Doc. 123). In addition, although State Defendants had no obligation to gather information not in their possession, custody, or control, they also as a courtesy provided

conviction information informally obtained from the South Dakota Unified Judicial System. (Doc. 127, Ex. A).

On February 8, 2010, the Plaintiffs filed their motions to amend the First Amended Complaint and to certify a class action. (Docs. 124 & 126). The Plaintiffs move to add as class plaintiffs every felon in South Dakota sentenced to probation and considered by Defendants ineligible to vote on that basis. (Doc. 124, Attachment 1, p. 5). Plaintiffs seek to add as class defendants all county auditors in South Dakota. (Doc. 124, Attachment 1, p. 6).

State Defendants have addressed why the Plaintiffs cannot certify a class action in their separate response to that motion. Here, the State Defendants address why the Plaintiffs have not met the burden necessary to amend their First Amended Complaint at this point in time.

ARGUMENT AND AUTHORITIES

Plaintiffs have moved to amend the First Amended Complaint pursuant to Federal Rule of Civil Procedure 15. This rule provides that “[t]he court should freely give leave when justice so requires.” Fed. Rule Civ. Proc. 15(a)(2).

However, the scheduling order set the deadline for amending and joining parties as August 24, 2009. (Doc. 57, p. 2). Although other deadlines were extended, the amendment deadline was unchanged. (Doc. 113, p. 28).

The Eighth Circuit Court of Appeals has “unmistakenly conclud[ed] that Rule 16(b)’s good-cause standard governs when a party seeks leave to amend a pleading outside of the time period established by the scheduling order, not the more liberal standard of Rule 15(a).” Sherman v. Winco Firewords, Inc., 532 F.3d 709, 716 (8th Cir. 2008) (citing Popoalii v. Corr. Med. Servs., 512 F.3d 488, 497 (8th Cir. 2008)). Therefore, Plaintiffs must show good cause for failure to seek leave to amend earlier. Id. The first inquiry is the diligence of the moving party in meeting the scheduling order’s deadlines, and prejudice to the nonmovant may also be a relevant factor. Id. at 717 (citing Bradford v. DANA Corp., 249 F.3d 807, 809 (8th Cir. 2001)).

Plaintiffs claim that their delay in moving to amend the First Amended Complaint was due to the delay in Defendants’ discovery answers. However, at least part of the information relied upon by Plaintiffs in their motion for class certification was publicly available. (Doc. 127, p. 4). In addition, Plaintiffs fail to specify what information produced by State Defendants on January 28, 2009, allegedly converted their claim to a class action. (Doc. 125, p. 5). In summary, the Plaintiffs have failed to meet their burden of showing good cause for not seeking amendment within the Scheduling Order deadline.

Even if Plaintiffs were diligent in making their motion to amend, however, the timing of the motion results in prejudice to the Defendants. The deadline for completing discovery is a little over a month away (April

9). Yet at this late date, Plaintiffs have moved to add as a plaintiff class all felons in South Dakota allegedly disenfranchised, and moved to add as a defendant Class all sixty-six county auditors. Moreover, Plaintiffs have based this move on nothing more than conclusory allegations.¹ This creates the potential for numerous additional witnesses at a point in time where Defendants would be foreclosed from completing meaningful discovery in regard to these witnesses. Because of this prejudice to the Defendants, the Court should deny the Plaintiffs' motion to amend. See Niesse v. Shalala, 17 F.3d 264, 266 (8th Cir. 1994) (District Court's decision to deny request to amend complaint not an abuse of discretion when considerable additional discovery would be required to deal with the question of class certification, and the case was near submission to the court.)

For the reasons stated above, State Defendants respectfully request that the Court deny Plaintiffs' Second Motion to Amend/Correct Complaint.

¹ This is addressed more fully in State Defendants' Response to Plaintiffs Motion to Certify Class Action.

Dated this 1st day of March, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2010, a true and correct copy of State Defendants' Response to Plaintiffs' Second Motion to Amend/Correct Complaint was served electronically through the CM/ECF system upon the following persons:

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