

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 04-22572-CIV-KING/O'SULLIVAN

EMMA YAIZA DIAZ et al.,

Plaintiffs,

v.

SUE M. COBB, Secretary of State
of Florida, et al.,

Defendants.

**DEFENDANT LESTER SOLA'S
MOTION TO DISMISS THE THIRD AMENDED COMPLAINT**

Plaintiffs have now filed their fifth pleading since they commenced this case in 2004: the Third Amended Complaint (the "TAC"). In it, Plaintiffs assert three constitutional claims. In their First and Second Causes of Action, Plaintiffs seek nominal damages and injunctive relief related to Defendants' treatment of Plaintiffs' incomplete voter registration applications. In their Third Cause of Action, Plaintiffs take issue with the Secretary of State's uniform voter registration application and, specifically, the language that accompanies the mental incapacity check-box on that form. Because neither the Constitution nor cases interpreting it lend any support to Plaintiffs' claims, dismissal is required.

I. The First and Second Causes of Action Must Be Dismissed as to Supervisor Sola.

In Plaintiffs' First and Second Causes of Action, they concede: (1) that they failed to submit completed voter registration applications prior to the book closing deadline, TAC ¶ 131 (admitting that Plaintiffs "did not check one or more of the boxes relating to citizenship, felon status, or mental incapacity"); and (2) that Florida law prohibits the Supervisors of Elections from allowing persons to complete after the book closing deadline applications that, although submitted prior to that deadline, omitted information required by state law, TAC ¶ 137 ("State law prohibits Supervisors of Elections from accepting corrections to an application with regard to the checkboxes after the close of books that would render the application complete prior to the election and permit placing the voter on the rolls."). Nonetheless, in an attempt to blame others for their own errors and omissions in completing their voter registration applications and their failure to submit their applications on time, Plaintiffs point their fingers to Florida's election

officials. Specifically, Plaintiffs fault Supervisor Sola and his colleagues for failing to immediately inform Plaintiffs that their applications were incomplete, and for failing to allow them to complete their applications after the state-imposed deadline for closing the registration books had passed. See TAC ¶¶ 132, 140. According to Plaintiffs, these actions amount to violations of the Constitution. Each of these claims fails as a matter of law.

A. Supervisor Sola Did Not Violate the Constitution By Failing to Immediately Inform Plaintiffs That Their Applications Were Incomplete.

There is simply no provision of the Constitution that would require a Supervisor of Elections to track down applicants who, on the eve of book closing, submitted incomplete voter registration applications, and to procure from each such person whatever information was missing from his or her application. Not even the federal and state statutes on point require such actions by Supervisors of Elections. The National Voter Registration Act, for example, only requires local elections officials “to send notice to each applicant of the disposition of [a voter registration] application.” 42 U.S.C. § 1973gg-6(a)(2). Similarly, Florida law requires Supervisors of Elections to “notify each applicant of the disposition of the applicant’s voter registration application,” and to “request that the applicant supply the missing information using a voter registration application signed by the applicant.” Fla. Stat. § 97.073(1). No provision of any law, let alone the Constitution, requires Supervisors of Elections to notify applicants of their mistakes “immediately” or “prior to book closing.” Indeed, the federal statute does not require Supervisors of Elections to notify applicants about defects in their applications within a specified period of time, and Florida law, as Plaintiffs concede, “provides Supervisors of Elections with a minimum of twenty days from the date on which the application is received to notify an applicant who has supplied an incomplete application [of] such [a] deficiency.” TAC ¶ 74.

Even if the Constitution somehow required Supervisors of Elections to notify applicants of their defective applications within a certain number of days, the facts alleged by Plaintiffs could hardly constitute a violation. The only Plaintiff from Miami-Dade County, Emma Yaiza Diaz, alleges that she filled out part of a voter registration application on September 17, 2004. TAC ¶ 104. Although it is not clear from Ms. Diaz’s vague allegations, it appears as though she gave her application to a third party outside the Miami Convention Center with the intention that that party deliver the application to the Supervisor’s office. TAC ¶ 104. Ms. Diaz does not allege what date her application was actually delivered to the Supervisor’s office, but according to Supervisor Sola’s records, the application was received on September 23, 2004. Only ten days

later—and thus ten days sooner than is now required by Florida law, see TAC ¶ 74—the Supervisor of Elections sent Ms. Diaz, along with a pre-paid return envelope, a letter providing an opportunity for her to provide the missing information that would have completed her application. See D.E. 9 (Pls.’ Mot. for Prelim. Inj., Ex. 6A (Letter from the Supervisor of Elections to Ms. Diaz, dated October 3, 2004)).¹ Although Ms. Diaz received that letter on October 8, 2004, she never responded to the opportunity to correct her application. See TAC ¶ 105.

As Plaintiffs’ own facts demonstrate, the Supervisor of Elections informed Ms. Diaz by U.S. Mail that her application was incomplete a mere ten days after her application was received. It is simply impossible that the Constitution would require more. Moreover, Ms. Diaz’s own conduct since this incident demonstrates that there is no reason to believe that even if she had received notice of her defective application prior to the October 4, 2004 book closing date, she would have registered in time for the November 2004 election. Since she received the Supervisor’s notice on October 8, 2004, many book closing deadlines—and corresponding elections—have come and gone without Ms. Diaz completing her defective application. Indeed, it was not until last week that Ms. Diaz finally submitted a completed application. See D.E. 175 (Defendant Lester Sola’s Suggestion of Mootness). Given her own actions, it is simply disingenuous for Ms. Diaz to claim that she would have voted in the November 2004 election had she received earlier notice that her application was incomplete. The fact is that even after receiving such notice, Ms. Diaz waited almost two years before taking any action to correct her own mistake.

This claim should be dismissed.

B. Supervisor Sola Did Not Violate the Constitution By Following State Law and Refusing to Permit Applicants to Complete Their Applications After Book Closing.

Florida law requires that the voter registration books must be closed “on the 29th day before each election.” Fla. Stat. § 97.055. As a result, unless a person has submitted a completed, valid voter registration application on or before the 29th day before a particular election, that person will not be allowed to vote in that election. This practice is consistent with

¹ Not only did Supervisor Sola act more expeditiously than the law required, but also he provided Ms. Diaz with a pre-paid envelope to allow her to more easily remedy the omissions in her voter application. Rather than thank Supervisor Sola for going beyond what the law required him to do to help her fix her own mistake, Ms. Diaz sued him.

both Florida law, see Fla. Stat. § 97.052(6) (providing that an “applicant shall have an opportunity to complete the application form to vote in the next election up until the book closing for that next election”) (emphasis added), and federal law, see National Voter Registration Act, 42 U.S.C. § 1973gg-6(a)(1)(D) (requiring States to ensure that an eligible applicant is registered to vote in an election “if the valid voter registration form of the applicant is received” before book closing for that election) (emphasis added). Moreover, courts have consistently upheld the constitutionality of book closing deadlines like the one enacted by the Florida Legislature and obeyed by the Supervisors of Elections. See, e.g., Marston v. Lewis, 410 U.S. 679, 681 (1973) (upholding Arizona’s 50-day registration cutoff); Dunn v. Blumstein, 405 U.S. 330, 348-49 (1972) (striking down Tennessee’s three-month residency requirement, but discussing with approval Tennessee’s requirement of registration at least 30 days before an election).

Because they are unable to challenge the constitutionality of Florida’s statutory 29-day book closing deadline, Plaintiffs have resorted to the following claim: the Supervisors’ refusal to allow them to complete their incomplete applications after book closing, while at the same time permitting already-registered voters to amend their names and signatures and still vote in the next election, constitutes “discriminate[ion] between applicants.” TAC ¶ 79. Plaintiffs point to section 97.055 of the Florida Statutes, which states that after the book closing date, the only changes that may be made to a voter’s registration (for purposes of the upcoming election) are “updates” to an already-registered voter’s name, address, and signature. See TAC ¶ 76 (citing to Fla. Stat. § 97.055). Plaintiffs allege that the “Defendant County Supervisors had no reasonable basis for permitting a grace period for applicants to correct certain information, but not for corrections to the checkboxes.” TAC ¶ 69.

Plaintiffs’ equal protection claim fails. Simply put, Plaintiffs, who are applicants seeking to complete facially incomplete applications after book closing, are not similarly situated to already-registered voters seeking to “update” their names, addresses, and signatures, all of which are already part of the Supervisors’ registration records. Thus there is no merit to Plaintiffs’ allegation that “[s]uch applicants are similarly situated.” TAC ¶ 79. Moreover, it is not the Supervisors who have chosen to treat these two different classes of persons differently; it is the Florida Legislature. It was a legislative determination to allow registered voters to update their information after a book closing deadline, but not allow applicants to complete their applications

after that same deadline. Compare Fla. Stat. § 97.055 (providing that “updates to a voter’s name, address, and signature . . . shall be the only changes permitted for purposes of the upcoming election”) with Fla. Stat. § 97.052(6) (prohibiting an applicant from completing a voter registration form to vote in the next election after the book closing date for that election). As much as Plaintiffs seek to blur the line, the Supervisors simply cannot be held responsible for a legislative scheme, which they are required to follow, enacted by the State of Florida.

Finally, the burden placed on Plaintiffs to submit completed applications on time before being allowed to vote has been found acceptable by every federal court to consider it. See, e.g., Rosario v. Rockefeller, 410 U.S. 752, 757-8 (1973) (upholding statute that limited participation in primary election to voters who registered as members of the party within 30 days of the previous general election; admonishing the plaintiffs that “if their plight can be characterized as disenfranchisement at all, it was not caused by [the challenged law], but by their own failure to take timely steps to effect their enrollment”); id. at 765 (“Certainly, the State is justified in imposing a reasonable registration cutoff prior to any primary or general election, beyond which a citizen’s failure to register may be presumed a negligent or willful act forfeiting his right to vote in a particular election.”) (Powell, J., dissenting); Lucas County Democratic Party v. Blackwell, 341 F. Supp. 2d 861, 864 (N.D. Ohio 2004) (“I cannot order County Boards to register people to vote who may have overlooked or intentionally disregarded their obligation to provide information that they did in fact have when completing the voter registration form.”); see also Burdick v. Takishi, 504 U.S. 428, 438 (1992) (“Reasonable regulation of elections . . . does require [voters] to act in a timely fashion if they wish to express their views in the voting booth.”).

Book closing deadlines such as the one observed by Supervisor Sola have been found “necessary to promote . . . the orderly, accurate, and efficient administration of state and local elections, free from fraud.” Burns v. Forston, 410 U.S. 686, 686-87 (1973) (internal quotations omitted); Marston, 410 U.S. at 681 (upholding 50-day registration deadline as “necessary to promote the State’s important interest in accurate voter lists”). Florida’s Supervisors of Elections, including Supervisor Sola, are thus amply justified in refusing to allow Plaintiffs to submit their voter registration applications after the state-imposed book closing deadline.

II. Plaintiffs' Third Cause of Action Must Be Dismissed as to Supervisor Sola.

In their Third Cause of Action, Plaintiffs allege that Supervisor Sola denied their right to vote “because [he] issued registration applications that request mental incapacity information using inordinately complicated language.” TAC ¶ 149. This claim, too, lacks merit. As a threshold matter, to the extent Plaintiffs are seeking injunctive relief, their claim is moot. Plaintiff Emma Yaiza Diaz’s claim is moot given her recent submission of a completed voter registration application, on which she checked the mental incapacity check-box. See D.E. 175 (Defendant Lester Sola’s Suggestion of Mootness).² As for the claims of Plaintiffs’ union members, this Court has already held that they are not entitled to injunctive relief because they “know that their applications were deemed incomplete and have an easy opportunity to correct them.” Diaz v. Hood, Case No. 04-22572-CIV-KING, 2006 WL 1716827, at *3 (S.D. Fla. June 20, 2006); see also Lucas County Democratic Party, 341 F. Supp. 2d at 864 (“I cannot order County Boards to register people to vote who may have overlooked or intentionally disregarded their obligation to provide information that they did in fact have when completing the voter registration form.”).

Moreover, under Florida law, it is not the Supervisors of Elections who are responsible for issuing voter registration applications, but rather the Secretary of State. Section 97.052 of the Florida Statutes provides that the Department of State “shall prescribe by rule a uniform statewide voter registration application for use in this state.” Fla. Stat. § 97.052(1). Because as a matter of law Supervisor Sola has not “issued registration applications” (per statute, the Secretary of State issues such applications), he cannot be held liable, as Plaintiffs allege, for issuing “registration applications that request mental incapacity information using inordinately complicated language.” This claim must therefore be dismissed as it pertains to Supervisor Sola.

Even if the Third Cause of Action were properly pled against Supervisor Sola, Plaintiffs’ allegation that the mental incapacity check-box language is confusing does not rise to the level of an unconstitutional vote denial. This Court has already recognized that adequate assistance is available to any voter who does not understand the language of the application. Diaz, 2006 WL 1716827, at *8. To the extent Plaintiffs believe that better language exists to ensure that people adjudicated mentally incompetent do not vote, they have a remedy with the Secretary of State,

² Ms. Diaz’s recent actions demonstrate just how insignificant a “burden” it was for her to indicate that she is not mentally incompetent.

through an administrative rulemaking proceeding, to seek to amend Florida's uniform voter registration application.

CONCLUSION

The Third Amended Complaint should be dismissed with prejudice.

Respectfully submitted,

MURRAY A. GREENBERG
MIAMI-DADE COUNTY ATTORNEY

By: *s/. Jeffrey P. Ehrlich*
Jeffrey P. Ehrlich
Oren Rosenthal
Assistant County Attorneys
Florida Bar Nos. 51561 & 86320
Miami-Dade County Attorney's Office
111 N.W. 1st Street, Suite 2810
Miami, Florida 33128
Telephone: (305) 375-5744
Facsimile: (305) 375-5611
Email: ehrlich@miamidade.gov

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by mail on August 14, 2006 on all counsel or parties of record on the attached Service List.

s/. Jeffrey P. Ehrlich
Assistant County Attorney

SERVICE LIST

Mary Jill Hanson
Hanson, Perry & Jensen, P.A.
400 Executive Center Drive, Suite 207
West Palm Beach, Florida 33401
Phone: 561-686-6550
Fax: 561-686-2802
email: mjhanson@hpjlaw.com

Judith A. Browne
Sheila Y. Thomas & Elizabeth Westfall
Advancement Project
1730 M. Street, NW, Suite 910
Washington, DC 20036
Phone: 202-728-9557
Fax: 202-728-9558
email: ewestfall@advancementproject.org

Judith A. Scott
John J. Sullivan
SEIU, 1313 L. Street, NW
Washington, DC 20005
Phone: 202-898-3453
Fax: 202-898-3323
email: sullivan@seiu.org

Michael Halberstam, Esq.
Paul, Weiss, Rifkind, Wharton, Garrison, LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Phone: 212-373-3000
Fax: 202-492-0111
email: mhalberstam@paulweiss.com

Mike Cirullo
Orange County Attorney's Office
3099 East Commercial Boulevard, Suite 200
Fort Lauderdale, Florida 33308
Phone: 954-771-4500
Fax: 954-771-4923
email: mcirullo@cityatty.com

Elliot Mincberg
People for the American Way Foundation
2000 M Street, Suite 400
Washington, FC 20036
Phone: 202-467-2392
Fax: 202-293-2672
email: emincberg@pfaw.org

Jonathan P. Hiatt
AFL-CIO
815 Sixteenth Street, NW
Washington, DC 20006
Phone: 202-637-5053
Fax: 202-637-5323
email: jhiatt@aflcio.org

Manny Anon, Jr.
Florida Public Employees Council 79
3064 Highland Oaks Terrance
Tallahassee, Florida 32301
Phone: 222-0842
Fax: 224-6926
email: m_anon@afscmeffl.org

Tracey I. Arpen, Jr.
Deputy General Counsel
Duval County
City Hall, St. James Building
117 West Duval Street, Suite 480
Jacksonville, Florida 32202
Phone: 904-630-1700
Fax: 904-630-2388
email: tarpen@coj.net

Jeffrey P. Ehrlich
Miami-Dade County Attorney's Office
111 N.W. First Street, Suite 2810
Miami, Florida 33128
Phone: 305-375-5151
Fax: 305-375-5634
email: ehrlich@miamidade.gov

Burnadette Norris-Weeks
100 S.E. 6th Street
Ft. Lauderdale, Florida 33301-3422
Phone: 954-768-9770
Fax: 954-768-9790
email: bnorris199@aol.com

Ernst Mueller
Office of City Attorney
117 W. Duval Street, Ste. 480
Jacksonville, FL 32202-3700
Phone: 904-630-1700
Fax: 904-630-1731
email: emueller@coj.net

Ronald A. Labasky
Young Van Assenderp, P.A.
225 S. Adams Street, Suite 200
P.O. Box 1833
Tallahassee, FL 32302
Phone: 850-222-7206
Fax: 850-561-6834
email: rlabasky@yvlaw.net

Peter Antonacci
Allen C. Winsor
GrayRobinson, P.A.
301 South Bronough Street, Suite 600
P.O. Box 11189
Tallahassee, FL 32302-3189
Phone: 850-222-7717
Fax: 850-222-3494
email: pva@gray-robinson.com