

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

CARRIE HARKLESS, TAMECA MARDIS and
ASSOCIATION OF COMMUNITY
ORGANIZATIONS FOR REFORM NOW,

Plaintiffs,

v.

JENNIFER BRUNNER, in her official capacity as
Secretary of State, and HELEN E. JONES-
KELLEY, in her official capacity as Director of the
Department of Job and Family Services,

Defendants.

CIVIL ACTION NO. 1:06-cv-2284

JUDGE PATRICIA A. GAUGHAN

MAGISTRATE JUDGE NANCY A.
VECCHIARELLI

**REPLY MEMORANDUM OF LAW IN FURTHER
SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION**

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Plaintiffs Carrie Harkless, Tameca Mardis and the Association of Community Organizations for Reform Now (“ACORN”) (collectively, “Plaintiffs”) respectfully submit this reply memorandum in further support of their motion for reconsideration of this Court’s December 28, 2006 Memorandum Opinion and Order (the “Opinion”) dismissing the Complaint in this action and, in the alternative, for leave to file an Amended Complaint addressing Ohio’s failure to comply with the National Voter Registration Act of 1993 (the “NVRA”).

Plaintiffs’ opening memorandum demonstrated that the Court committed clear error by misapplying the legal standards on a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure and that certain facts concerning the Director of Ohio’s Department of Job and Family Services (the “Director”) were not available at the time of the motion to dismiss. In opposition to the motion, the Secretary of State (the “Secretary”) does not deny that she has various NVRA-related duties under Ohio law and that the Complaint alleged that the Secretary had failed to fulfill those duties. Rather, the Secretary’s three-page memorandum merely asserts that she intends to take action to bring Ohio into compliance with the NVRA. But those assertions are simply irrelevant to the issue of whether the Complaint stated a claim for relief, and should be disregarded by the Court in considering the motion for reconsideration. The Director submitted a similarly deficient response, which fails to explain why the new evidence of the Director’s NVRA authority, identified in Plaintiffs’ opening brief, is not adequate grounds for reconsideration. Moreover, the Secretary does not respond to Plaintiffs’ argument concerning ACORN’s standing to bring this action, and the Director does not – because she cannot – explain why the allegations concerning ACORN are insufficient to support standing. Finally, neither defendant offers a valid justification for why Plaintiffs’ alternative request for leave to amend to correct the purported deficiencies in the Complaint should be denied.

Argument

POINT I

THE COURT COMMITTED CLEAR ERROR IN GRANTING DEFENDANTS' MOTIONS TO DISMISS, AND NEWLY DISCOVERED EVIDENCE FURTHER CONFIRMS THAT THE COMPLAINT STATES A CLAIM FOR RELIEF

A. The Complaint States A Claim For Relief Against The Secretary

Plaintiffs' opening brief explained that both the NVRA and Ohio law impose specific duties and obligations *on the Secretary* – such as the obligation to provide training to employees at NVRA designated agencies as to their voter registration duties, to prepare and transmit written instructions on the implementation of voter registration at the agencies and to prepare and cause to be displayed in a prominent location a notice that identifies the person designated to assist with voter registration – and even the Secretary admits that she has some of those duties. See Ohio Rev. Code at § 3503.10(A), (F) & (I); Opinion at 13-14 (quoting Subsection 3503.10(A)) & at 17 n.1. The Opinion erred by accepting the Secretary's assertions that she had in fact complied with such duties, notwithstanding Plaintiffs' well-supported factual allegations that she has not. (Compl. ¶ 25.) Moreover, contrary to the Court's holding, nothing in Ohio law limits the Secretary's authority to “administer oaths, issue subpoenas, summon witnesses, compel the production of books, papers, records, and other evidence, and fix the time and place for hearing any matters relating to administration and enforcement of the election laws” (Ohio Rev. Code § 3505.05(N)(1)) to the investigation of employees of either the Secretary's office or county boards of elections. (Opening Br. at 4-5.)

The Secretary's half-hearted three-page opposition brief does not address any of Plaintiffs' arguments, nor does she even dispute that there have been rampant violations of the NVRA in Ohio. Rather, the Secretary makes the self-serving statements that she, unlike her

predecessor, “is a strong proponent of assuring voter access for all,” “believes that it is important to make voter registration easy and readily available to all citizens of the State of Ohio,” and “will work closely with the county and State Department of Jobs [sic] and Family Services to make sure that each individual’s rights under the National Voter Registration Act are protected whenever they enter a DJFS office.” (Secretary Opp. Br. at 1.) Such assertions by the non-moving party must be ignored by the Court in determining a motion to dismiss, and should likewise be ignored on the reconsideration motion.

Putting aside those self-serving statements, the Secretary’s legal argument is limited to the observation that motions for reconsideration are rarely granted and the unsubstantiated argument that Plaintiffs’ motion does not establish a clear error but simply reargues their position on the motion to dismiss. But, as demonstrated in the opening memorandum and above, the Court’s factual determination on a motion to dismiss that the Secretary had complied with the NVRA, notwithstanding the factual allegations in the Complaint to the contrary, misapplied the appropriate review standard and constituted a clear error.

B. The Complaint States A Claim For Relief Against The Director

The opening memorandum explained that shortly before the Opinion was issued, the Director produced her initial disclosures, which admitted that she had attempted to enforce the NVRA at county DJFS agencies, belying her argument that she was prohibited by Ohio law from doing so. The Director now attempts to explain away her correspondence with the county DJFS offices reminding them of their NVRA obligations as “not any kind of official enforcement” and simply evidence of the “Director’s willingness to go above and beyond the call of duty.”

(Director Opp. Br. at 3.)

The Director’s argument misses the point: In moving to dismiss, the Director argued – and the Court agreed – that she was *prohibited* by Ohio law from taking any action to administer or enforce the NVRA unless she was required by Ohio law to take such action. It is not a question of a “willingness to go above and beyond the call of duty.” The Director’s prior argument – accepted by the Court in the Opinion – was that she was either *required* or *prohibited* from taking action; there was no middle ground for “permissive” or “willing” action on the part of the Director. Unless the Director is admitting that she violated Ohio law by taking a prohibited action, the new evidence confirms that she in fact is required (or at least is not prohibited by Ohio law) from taking action to promote compliance with the NVRA. In any event, any uncertainty compels the denial of the Director’s motion to dismiss in favor of allowing further discovery on this issue.¹

C. ACORN Has Standing To Bring This Action

Finally, the opening memorandum explained that the Court erred in holding that ACORN did not have standing as a plaintiff in this action.² For example, Plaintiffs noted that the Complaint alleged that many of ACORN’s voter registration efforts “would have been unnecessary had defendants complied with the law” (Compl. ¶ 4) and that the Court was required under the Federal Rules’ notice pleading regime to draw the reasonable inference that ACORN would not have spent money conducting activities it deemed unnecessary if defendants had

¹ The Director also argues that the evidence is not “new” since she served her initial disclosures in mid-December 2006 (they were served by mail on Friday, December 15) and the Opinion was not issued until December 28. The Director does not dispute that these facts were not available to Plaintiffs in opposing the motion to dismiss, and we respectfully submit that the few business days between receipt of the initial disclosures and the Court’s issuance of the Opinion, especially in light of the holidays, was insufficient time to bring the disclosures to the Court’s attention prior to the motion being decided.

² Defendants do not dispute that both Ms. Harkless and Ms. Mardis have standing.

enforced the NVRA. See Minger v. Green, 239 F.3d 793, 799 (6th Cir. 2001) (“[T]he Rules require that we not rely solely on labels in a complaint, but that we probe deeper and examine the substance of the complaint.”).

The Secretary does not respond to this argument. The Director’s response, that these allegations “fail to add up to an allegation that ACORN would not otherwise have committed the same time and resources to activities near County DJFS offices,” (Director’s Mem. at 5), is ridiculous. To accept that argument, the Court would be required to draw the inference that ACORN would have continued to devote the same time and resources to activities it has already pled are unnecessary. The far more reasonable inference to draw from the Complaint (even in the absence of the Rules requiring inferences to be drawn in favor of the non-moving party) is that ACORN would have spent fewer resources on unnecessary activities.

The Director’s brief similarly fails to refute Plaintiffs’ argument that the Court erred in holding that ACORN did not have standing on behalf of its members. As explained in Plaintiffs’ opening memorandum, the Opinion improperly concluded that ACORN failed to allege that any of its members in fact suffered an injury (rather than accepting the Complaint’s allegations that unregistered ACORN members were harmed by not being given the opportunity to register or change their voter registration address during visits to DJFS offices) and mistakenly incorporated a new, fourth element to the traditional test for associational standing, namely that the Complaint allege more than an “setback to its abstract social interests” (which is an element of direct standing for an organization to sue on its own behalf). In response, the Director claims that ACORN “members were almost certainly offered the chance” to register to vote, which the Director claims “virtually compels the conclusion that they must have deliberately declined to register.” (Director Opp. Br. at 6.) Instead of relying on the Director’s unsupported factual

assertion, however, the Court is required on a motion to dismiss to draw all reasonable inferences in favor of Plaintiffs. Doing so compels the conclusion that ACORN has standing to bring this action on its own behalf and on behalf of its members.

POINT II
IN THE ALTERNATIVE,
LEAVE TO AMEND SHOULD BE GRANTED

Leave to amend should be granted “when justice so requires.” Fed. R. Civ. P. 15(a); see General Electric Co. v. Advance Stores Co. Inc., 285 F. Supp.2d 1046, 1048 (N.D. Ohio 2003). Plaintiffs’ opening memorandum demonstrated that the proposed Amended Complaint would cure all of the highly technical and easily remedied purported defects that led to dismissal of the Complaint. (Opening Br. at 10-11.)

The Secretary argues in opposition to the motion to amend that unless the Court grants the motion for reconsideration, amendment would be futile. In so arguing, the Secretary ignores the allegations of the proposed Amended Complaint that the Secretary has not complied even with its admitted NVRA obligations. (Am. Compl. ¶¶ 24-25.)

The Director argues that the motion to amend is untimely because it was filed after judgment had been entered. But that is simply not the law. In Laber v. Harvey (cited in Director Opp. Br. at 7), the Fourth Circuit explained that “a district court may not deny [a motion to amend] simply because it has entered judgment against the plaintiff – be it a judgment of dismissal, a summary judgment, or a judgment after a trial on the merits.” 438 F.3d 404, 427 (4th Cir. 2006) (reversing district court’s denial of plaintiff’s motion for reconsideration and motion to amend complaint) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)). “Instead, a post-judgment motion to amend is evaluated under the same legal standard as a similar motion

filed before judgment was entered – for prejudice, bad faith or futility.” Laber, 438 F.3d at 427.³ Indeed, the determination that amendment should be permitted alone is sufficient to vacate a previously entered judgment. See id. at 428 (“A conclusion that the district court abused its discretion in denying a motion to amend, however, is sufficient grounds on which to reverse the district court’s denial of a Rule 59(e) motion.”); see also Foman, 371 U.S. at 182 (reversing denial of motion for reconsideration where district court abused its discretion in denying motion to amend); Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 597 n.1 (5th Cir. 1981) (“Where judgment has been entered on the pleadings, a holding that the trial court should have permitted amendment necessarily implies that [the] judgment...was inappropriate and that therefore the motion to vacate should have been granted.”).

Nor is there merit to the Director’s argument – also made in opposition to the motion for reconsideration – that Plaintiffs should have acted sooner in seeking leave to amend in the few days (during the holiday season) between their receipt of the Director’s initial disclosures and the issuance of the Opinion. And while the Director asserts that amendment would be futile, she does not address any of the changes to the proposed Amended Complaint that correct the

³ The cases relied on by the Director for the proposition that the “usual liberality in granting leave to amend disappears once judgment has been entered” involve such different facts and are so readily distinguishable that they not only fail to support the Director’s position but in fact highlight the appropriateness of granting leave to amend in this action. For example, in Benzon v. Morgan Stanley Distribs., 420 F.3d 598 (6th Cir. 2005), the 6th Circuit affirmed the denial of leave to amend where the plaintiff had already been granted two opportunities to amend her complaint prior to the entry of judgment. See id. at 613. Similarly, in United States ex rel. American Textile Mfrs. Inst. v. Limited, 179 F.R.D. 541 (S.D. Ohio 1998), the Court concluded that the motion for leave to amend was filed in “arguable bad faith” where plaintiffs waited nearly two months after entry of judgment to seek leave to amend, in the interim had filed motions for recusal of the trial judge, to vacate the dismissal and to alter or amend the judgment, there had been hundreds of pages of briefing on the motions to dismiss and earlier post-judgment motions, and the motion for leave to amend would have been futile because plaintiffs did not identify any new, valid claims. See id. at 551. Here, by contrast, Plaintiffs have not previously had an opportunity to amend their Complaint, Plaintiffs promptly sought leave to amend after receiving the Director’s initial disclosures and the proposed Amended Complaint cures the purported defects in the original pleading and states a claim for relief against both defendants.

purported technical defects both in ACORN's standing and in the sufficiency of the allegations against the Director.

Neither defendant has claimed that she would be prejudiced by Plaintiffs' proposed Amended Complaint, and neither defendant has suggested that Plaintiffs have acted in bad faith. Nor is the proposed Amended Complaint futile. The proposed Amended Complaint makes clear that Plaintiffs are alleging:

- that the Secretary of State has not complied with its acknowledged NVRA obligations (Am. Compl. ¶¶ 24-25);
- that the Director has, through her actions, acknowledged additional NVRA duties (Am. Compl. ¶ 26);
- that ACORN would not have expended funds on voter registration duties outside DJFS offices had the NVRA been adequately enforced (Am. Compl. ¶ 41); and
- that ACORN has members who have been injured by defendants' NVRA violations (Am. Compl. ¶ 40).

Because these clarifying allegations remedy the pleading defects on which the Court based its Opinion, amending the Complaint would not be futile. Hence, if the Court does not grant Plaintiffs' motion for reconsideration, it should give them leave to file the proposed Amended Complaint.

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Certificate of Service

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 11th day of July, 2007.

/s/ Robert W. Topp