

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

CELIA VALDEZ, et al.

Plaintiffs,

v.

MARY HERRERA, in her official
capacity as New Mexico Secretary of
State, et al.

Defendants.

CIVIL ACTION NO. 1:09-cv-0668
JCH/DJS

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR A
CONTINUANCE REGARDING DEFENDANT HYDE'S SUMMARY
JUDGMENT MOTION**

Plaintiffs respectfully submit the following memorandum of points and authorities in support of their Motion for a Continuance Regarding Defendant Hyde's Summary Judgment Motion. Attached as Exhibit 1 is the Declaration of Robert A. Kengle, counsel for Plaintiffs, supporting the reasons why Defendant Hyde's motion is premature and should not be addressed until after fact discovery in this case has been completed. A proposed order is being forwarded to District Judge Herrera.

Specifically, Plaintiffs request that the current deadline for filing their response to the summary judgment motion, which is June 1, 2010, be continued

until two weeks after the close of fact discovery. Fact discovery had been set to close on June 1, 2010 but, on May 19, 2010, that deadline was stayed pending resolution of Plaintiffs' Motion to Establish a Revised Litigation Schedule. [Doc. 63.]

Defendants other than Defendant Herrera oppose the instant motion. Defendant Herrera has no position on the motion.¹

Due to the imminence of the current June 1 deadline for responding to the summary judgment motion, Plaintiffs respectfully request that the instant motion be considered and granted on an expedited basis. Should this Court conclude that the requested relief may not be granted until the motion has been fully briefed according to the schedule set by the Local Rules, Plaintiffs then request that the June 1 response date be tolled pending a ruling on this motion.

Procedural Background

As the Court is aware, on May 13, 2010, Defendant Hyde filed a motion for summary judgment. [Doc. 57.] Pursuant to the Local Rules, Plaintiffs' response is due June 1, 2010. Defendant Hyde is Secretary of the New Mexico Human Services Department (HSD) and is sued in her official capacity. The Complaint

¹ Plaintiffs first asked Defendant Hyde to agree to continue the date for Plaintiffs' response to the summary judgment motion until two weeks after the close of fact discovery, noting that Plaintiffs would be moving for an extension of the fact discovery deadline. Defendant Hyde refused. Plaintiffs then asked Defendant Hyde to at least agree to extend the response date until June 18, nine days after the upcoming settlement conference in this case. Defendant Hyde again refused.

alleges that HSD is violating Section 7 of the National Voter Registration Act (“NVRA”), 42 U.S.C. §§ 1973gg-5. Complaint, Pars. 60-61; 64-70; 75 [Doc. 1]. Section 7 requires HSD to “distribute” a voter registration application “with each application for . . . [public] assistance, and with each recertification, renewal, or change of address form relating to such . . . assistance,” unless the individual “in writing, declines to register to vote.” 42 U.S.C. § 1973gg-5(a)(6)(A). *See Association of Community Organizations for Reform Now v. Scott*, 2008 U.S. Dist. Lexis 53580 (W.D. Mo. July 15, 2008) (granting preliminary injunction against the director of Missouri’s public assistance agency for failure to comply with the NVRA).

Thereafter, on May 18, 2010, Plaintiffs filed a Motion to Establish a Revised Litigation Schedule. [Doc. 59.] This motion, *inter alia*, sought to extend the deadline for Plaintiffs to respond to Defendant Hyde’s summary judgment motion until two weeks following the close of fact discovery. On May 19, 2010, Magistrate Judge Svet issued an order denying this request without prejudice, directing Plaintiffs to “present their request in a separate motion, and submit a proposed order to the District Judge.” [Doc. 62 at 1.] Accordingly, Plaintiffs have filed the instant Motion for a Continuance, and have submitted a proposed order to District Judge Herrera.

Plaintiffs' Motion to Establish a Revised Litigation Schedule also requested that the litigation schedule be amended to allow for additional time for fact and expert discovery, and to adjust the post-discovery deadlines and dates accordingly. On May 19, this Court vacated the dates for the pretrial conference and bench trial. [Doc. 62.] Shortly thereafter, also on May 19, Magistrate Judge Svet issued an order staying the current case management deadlines pending a ruling on the remaining elements of Plaintiffs' request for a revised litigation schedule. The Magistrate Judge further specified that he will issue this ruling at the conclusion of briefing conducted pursuant to the regular timeline set by the Local Rules. [Doc. 62.]

Motion for Continuance

1. Overview

The basis for the instant motion, as well as for Plaintiffs' request for a revised litigation schedule, is this: Plaintiffs have been diligent in seeking to complete discovery by the discovery deadline of June 1, 2010. However, Defendants have engaged in a pattern of actions and inaction which has deprived Plaintiffs of a full and fair opportunity to complete discovery by June 1. As a result, discovery remains materially incomplete in several critical areas and cannot be completed within the existing schedule. The uncompleted discovery specifically relates to Plaintiffs' case in chief regarding HSD's failure to comply

with the NVRA, and thus relates specifically to Plaintiffs' opposition to Defendant Hyde's summary judgment motion. Accordingly, Plaintiffs have shown that, at this juncture in the litigation, they are unable to present a full factual record demonstrating that there are genuine issues of material fact, and thus that summary judgment should be denied. *See* Fed. R. Civ. Pro. 56(f).²

Moreover, as a result of Defendants' inexcusable delays in producing discoverable information, Plaintiffs not only have been provided information relevant to the summary judgment motion immediately prior to the filing of the motion, but also *after* the motion was filed. This includes documents produced by HSD immediately before and after it filed the summary judgment motion, and the forthcoming Rule 30(b)(6) deposition of the Secretary of State's office, which will take place on May 26, 2010, six days before the response to the summary judgment motion currently is due. Such last minute productions clearly prejudice Plaintiffs' opportunity to present a full response to the motion by June 1.

²The purpose of Rule 56(f) is to ensure that summary judgment motions are resolved in a just and orderly manner by ensuring that parties faced with a summary judgment motion have a fair and reasonable opportunity to develop the factual record prior to responding to the motion. As stated in Moore's Federal Practice, "a district court is under a duty to ensure that an opposing party has been given a reasonable opportunity to compile an evidentiary record before ruling on a motion for summary judgment." 11 James Wm. Moore et al., Moore's Federal Practice § 56.10[8][a] (3d ed. 2010). It follows, therefore, that "[u]nless dilatory or lacking in merit, [a Rule 56(f)] motion should be liberally treated." *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1522 (10th Cir. 1992) (internal quotation marks omitted).

2. Discussion

Because Plaintiffs have not been allowed a reasonable opportunity to compile, prior to June 1, an evidentiary record as to HSD's violation of the NVRA, Plaintiffs' motion should be granted. Plaintiffs respectfully refer this Court to the attached Declaration of Robert Kengle, and also to the memorandum [Doc. 60] which Plaintiffs filed on May 18, 2010 in support of their Motion to Establish a Revised Litigation Schedule, for a full discussion of the manner in which Defendants have prejudiced Plaintiffs' discovery efforts, and Plaintiffs' resulting need for additional discovery.

- a. The parties' respective positions regarding the meaning of NVRA compliance.

Plaintiffs' case in chief against the HSD, at its core, concerns the failure of HSD public assistance employees, *in their actual day to day practices*, to carry out the requirements of the NVRA. This necessarily must be determined by examining their practices over a span of time, since what is at issue is HSD's pattern of conduct, not whether any one particular point in time, in isolation, evidences compliance or non-compliance. Determining actual practices, in turn, requires comprehensive discovery, since that information is within HSD's control.

Defendant Hyde, however, seeks to obtain summary judgment based on what, *on paper*, are HSD's policies and procedures, and furthermore, seeks to focus what those paper policies and procedures say *today*. In particular,

Defendant's proposed findings of fact relating to "HSD's Voter Registration Procedures at ISD Offices" [Doc. 58 at 3] all relate to what HSD staff purportedly have been *told* to do, with no evidence at all as to whether or not staff actually have done, and are now doing, these things. [Doc 58 at 3-8.]

Moreover, while Plaintiffs also include a few proposed findings relating to NVRA training and compliance monitoring, these findings again relate to what HSD, on paper, purportedly is doing, not what HSD's actual practices are. For example, according to HSD, when a potential NVRA problem is identified at a particular office, the agency deputy director "contact[s] the regional manager who oversees the particular office [evidencing the problem] to discuss the issue." [Doc. 58 at 11.] However, Defendant Hyde does not, in her proposed findings, include any information at all as to what has transpired during any of these discussions, or whether the regional managers then have done anything at all to address office compliance problems as a result of any such discussions. Indeed, when Plaintiffs sought to depose several regional managers to find out in fact what compliance actions they may have undertaken, HSD sought, unsuccessfully, to obtain a protective order preventing Plaintiffs from conducting these depositions.³

³ Defendant's proposed finding of fact relating to discussions between the deputy director and regional managers relies on four pages from the deposition of Deputy Director Roth. [Doc. 58 at 11, par. 44.] However, Defendant failed to include one of the four pages (page 69) in the Roth deposition excerpts attached to the summary judgment motion. [Doc 58-2.]

- b. Information on HSD practices to be determined through additional discovery.

As noted, the attached Kengle Declaration and Plaintiffs' prior memorandum [Doc. 60] include a complete discussion of the additional discovery that Plaintiffs need to obtain regarding HSD's compliance with the NVRA.

In sum, however, necessary discovery includes the following:

- Discovery directed to the Defendant Secretary of State regarding that office's direct and indirect interactions with HSD, including (but not limited to) the nature and extent to which the Secretary of State's office has restricted the ability of HSD offices to obtain voter registration applications.
- Follow-up written discovery to HSD based on the information obtained from the delayed depositions Plaintiffs conducted in late April and early May of this year of HSD regional managers and county managers. This would include, but not be limited to, discovery relating to restrictions on the number of registration forms HSD offices may obtain and HSD's response to such restrictions.
- Follow-up discovery based on HSD's inexcusably tardy production of HSD documents, including monthly registration reports, management evaluation reports, and emails sent and received by HSD managers.⁴ For example,

⁴HSD has produced, albeit tardily, only a handful of management emails, although it is clear that HSD managers regularly use email to discuss agency issues,

Plaintiffs are proposing to recall HSD's Rule 30(b)(6) deponent to address, *inter alia*, emails he sent prior to his February 24, 2010 deposition which were not produced by HSD until after his deposition was conducted. *See, e.g.*, Exhibit 2 (Roth email, Sep. 11, 2009, requiring all regional managers to email him as whether local HSD offices are complying with specified voter registration procedures; no responsive emails have been produced by HSD).

c. Late discovery production.

As noted, Plaintiffs' ability to respond by June 1 also has been prejudiced by discovery production that has occurred immediately prior to the filing of the summary judgment motion, and discovery production occurring after the filing of the motion, despite Plaintiffs' diligent efforts to obtain timely discovery.

including NVRA compliance. In this regard, Plaintiffs learned from Defendant Hyde's counsel only a few days ago that, despite the fact that Plaintiffs' request for production asked for all emails within HSD relating to voter registration, HSD saw fit to only ask central office managers and regional managers for such emails. (Request number four, in Plaintiffs' Requests for Production of Documents served on October 1, 2009, asked for all email communications within HSD "concerning the voter registration requirements of the NVRA.") Thus, for example, county managers and office NVRA site coordinators were not asked for their NVRA-related emails, even though they clearly play a key role in addressing NVRA compliance at their respective offices, and thus such communications fit squarely within Plaintiffs' discovery request.

Conclusion

For the foregoing reasons, Plaintiffs request that the Court grant Plaintiffs' Motion for a Continuance Regarding Defendant Hyde's Summary Judgment Motion.

Respectfully submitted this 20th day of May, 2010.

s/Mark A. Posner

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