

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-22572-Civ-King

EMMA YAIZA DIAZ <i>et al.</i> , Plaintiffs, v. SUE M. COBB, Secretary of State of Florida, <i>et al.</i> , Defendants.

**PLAINTIFFS' SUPPLEMENTAL BRIEF CONCERNING
EVIDENCE THAT MIGHT BE DISCOVERED**

On November 17, 2006, during the oral argument of Defendants' motions to dismiss, the Court requested that Plaintiffs submit a brief setting forth examples of evidence that Plaintiffs might obtain through discovery, were the Court to deny Defendants' motions to dismiss and permit the parties to take discovery. In response to that request, Plaintiffs respectfully submit this Supplemental Brief Concerning Evidence that Might Be Discovered.

ARGUMENT

I. WHETHER DISCOVERY MIGHT YIELD ADMISSIBLE EVIDENCE IS WHOLLY IRRELEVANT TO THE COURT'S CONSIDERATION OF DEFENDANTS' MOTIONS TO DISMISS

It is black letter law that a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) must be decided solely on the basis of allegations pleaded in the complaint. *See, e.g., Fin. Sec. Assur., Inc. v. Stephens, Inc.*, 450 F.3d 1257, 1264 (11th Cir. 2006) (“[O]rdinarily, [courts] do not consider anything beyond the face of the complaint and documents attached thereto when analyzing a motion to dismiss.”); *Milburn v. United States*, 734 F.2d 762, 765 (11th Cir. 1984). On a motion to dismiss, the

issue “is not whether [plaintiffs] may ultimately prevail . . . but whether the allegations are sufficient to allow them to conduct discovery in an attempt to prove their allegations.” *Jackam v. Hosp. Corp. of Am.*, 800 F.2d 1577, 1579-80 (11th Cir. 1986) (court misapplied 12(b)(6) standard by, in effect, deciding case on the merits). Thus, a speculative discussion of what discovery might yield in this case is an unwarranted exercise that may not properly be considered in resolving Defendants’ motions to dismiss. *A & D P’ship v. Equity Group, Inc.*, Civil Action No. 87-3139, 1988 U.S. Dist. LEXIS 15017, at *27 (E.D. La. Dec. 23, 1988) (“Facts which might come to light during discovery and development of evidence are irrelevant to consideration of a motion to dismiss pursuant to 12(b)(6) of the [F.R.C.P.], because the Court must limit its consideration to the facts alleged in the Complaint.”) (citation omitted).

II. IF DEFENDANTS’ MOTIONS TO DISMISS ARE DENIED, PLAINTIFFS WILL LIKELY DISCOVER ADDITIONAL EVIDENCE THAT DEFENDANTS UNCONSTITUTIONALLY BURDENED THEIR RIGHT TO VOTE AND SUCH BURDEN WAS UNNECESSARY TO DEFENDANTS’ INTERESTS

Notwithstanding the irrelevance of facts outside of the Third Amended Complaint to the disposition of Defendants’ motions to dismiss, if Defendants’ motions to dismiss are denied and the parties are permitted to take discovery, Plaintiffs will likely amass further evidence in support of their claims that: (1) Defendants’ refusal to process applications on which the mental incapacity box is not checked severely burdens Plaintiffs’ right to vote and fails to serve any legitimate, let alone necessary, state interest and (2) Defendants’ refusal to afford applicants who timely submitted an incomplete voter registration application with timely notice or an opportunity to cure such

deficiencies severely burdens Plaintiffs' right to vote and is not necessary to any legitimate state interest.

As to burden on the right to vote, discovery may produce the following evidence:

Mental Incapacity Box

The identity and number of eligible voter registration applicants whose application was rejected for failure to check the box on their voter registration application indicating that they had not been adjudicated mentally incapacitated with regard to voting; who did not correct such deficiency prior to the voter registration deadline; and/or who cast a provisional ballot in the following election and such ballot was not counted because the applicant was not registered to vote for failure to have checked the mental incapacity box;

The identity of persons in Florida, by county, who have been adjudicated mentally incapacitated with regard to voting;

Testimony from voter registration applicants that they did not understand the language accompanying the mental incapacity box;

Testimony from voter registration applicants who did not understand the language accompanying the mental incapacity box that they had difficulty obtaining assistance from election officials in interpreting the language;

Expert testimony that the phraseology of the mental capacity question is likely to confuse voter registration applicants and in particular, applicants with lower levels of literacy;

Testimony from Supervisors of Elections concerning their practices and procedures for ascertaining whether an applicant should be deemed ineligible to vote on the ground that she has been adjudicated mentally incapacitated with regard to voting;

A demographic analysis, by race and levels of literacy, of voter registration applicants whose application was rejected due to their failure to check the mental capacity box.

Notice and Opportunity To Cure

Identity and number of voter registration applicants who submitted an incomplete voter registration application that did not include a checkmark on the mental incapacity, felon status, and/or citizenship box and who received no notice or no meaningful notice of such deficiency in time to correct such deficiency and be added to the voter rolls prior to the upcoming elections;

As to whether Defendants' purported interested in the practices that Plaintiffs have challenged are legitimate and necessary to burden Plaintiffs' right to vote, discovery may produce the following evidence:

Testimony from election officials that, with respect to applicants who did not check the mental capacity box, they took no steps to verify that the applicant had not been adjudicated mentally incapacitated;

The names of people adjudicated mentally incompetent in defendant counties, and other Florida counties, cross referenced with the names of otherwise eligible voters in those counties who were denied the right to register and vote because of their failure to check the mental capacity box;

The names and testimony of election officials from states outside of Florida whose application forms employ a more easily intelligible question regarding mental capacity;

The names and testimony of election officials who will testify that voting by mentally incapacitated persons in Florida has been reported infrequently, if at all, and that the problem is negligible;

Evidence, or lack thereof, related to investigations or prosecutions of voter fraud arising from the mental incapacity box;

Testimony from election officials, who (prior to 2006) provided applicants with a grace period to correct their voter registration application, concerning the feasibility of processing such applicants' registration applications and adding them to the rolls;

Testimony from election officials concerning the process and procedures for processing voter registration applications in their respective county and the time and resources associated therewith;

Testimony from election officials concerning the process and procedures for determining whether a voter registration application is incomplete and providing applicants who submitted an incomplete application with notice of the disposition of his or her application;

Testimony from election officials concerning the effect of the statewide voter database on the process and procedures associated with processing voter registration applications and the time and resources associated therewith;

Testimony from election officials concerning the resources available to their respective elections office to process voter registration applications, during the past several election cycles, relative to the number of prospective voter registration applicants in their county;

Testimony from election officials who (prior to 2006) provided applicants with a grace period to correct their voter registration application as to the numbers of voters added to the rolls due to the grace period.

Dated: West Palm Beach
Florida, December 18, 2006

RESPECTFULLY SUBMITTED,

/s/ Mary Jill Hanson

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent electronically as an email attachment this 18th day of December, 2006 to counsel for the parties listed in Exhibit A, attached hereto.

By: /s/ Elizabeth S. Westfall
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