


UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF FLORIDA

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


2006 SEP 22 PM 3:05
U.S. DISTRICT COURT
MIA

EMMA YAIZA DIAZ, et al.

Plaintiffs,

v.

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

Defendants.

**DEFENDANTS, ARTHUR ANDERSON, WILLIAM COWLES, JERRY HOLLAND,
BRENDA SNIPES' REPLY IN SUPPORT OF MOTION TO DISMISS THE THIRD
AMENDED COMPLAINT**

COMES NOW, Defendants, Arthur Anderson, William Cowles, Jerry Holland, and Brenda Snipes' and file this Reply in Support of Motion to Dismiss Third Amended Complaint.

I. CONSTITUTIONAL CLAIMS – GRACE PERIOD; MENTAL INCAPACITY CHECKBOX

Defendants Cobb and Sola have set forth significant argument in Reply to the Plaintiffs' response relating to Plaintiffs' failure to state a cognizable constitutional claim, including as to their counts relating to the asserted "grace period," and the mental incapacity box, as well as the state's interest in the challenged regulations. Defendants Anderson, Cowles, Holland and Snipes will not repeat the arguments. Instead, to the extent applicable to Defendants Anderson, Cowles, Holland and Snipes, the Replies filed by Defendants Cobb and Sola are adopted and incorporated herein.

II. OFFICIAL CAPACITY CLAIM PURSUANT TO 42 U.S.C. § 1983

Plaintiffs respond to Defendants' motion to dismiss alleging that Defendant Supervisors failed to provide timely notice to voter registration applicants that their application was incomplete, and/or failed to create a grace period after book closing to correct omissions, quoting a portion of a

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United States Supreme Court case, *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), to support the argument that they adequately pled a cause of action. However, that case actually supports the Defendant Supervisors' argument that the Plaintiffs have failed to allege a cause of action.

In *Oklahoma City*, the Court reviewed the holding of its earlier decision in *Monell v. New York City Dept. of Social Services*, 436 So.2d. 658, 98 L.Ed. 2018, 56 L. Ed.2d. 611 (1978), and reaffirmed that deprivations caused pursuant to a municipal custom or policy can lead to municipal liability. *Oklahoma City*, 471 U.S. at 818. Even if the allegations in the Third Amended Complaint are true, that two individuals failed to receive timely notice from separate Supervisors of Elections, and that mistakes will invariably be made on applications submitted in the future and some of those people may not receive timely notice of the deficiencies, Plaintiffs have failed to even allege a policy of either Sola (as to Plaintiff Diaz) or Cowles (as to Plaintiff Lanman), or of any other Defendant Supervisors (as to un-named others who may not have, or may not in future, received timely notice) that would create liability as to the Defendant Supervisors. The language quoted by Plaintiffs in their Response, when placed in context, supports dismissal of this claim:

In the first place, the word "policy" generally implies a course of action consciously chosen from among various alternatives; it is therefore difficult in one sense even to accept the submission that someone pursues a "policy" of "inadequate training," unless evidence be adduced which proves that the inadequacies resulted from conscious choice-that is, proof that the policymakers deliberately chose a training program which would prove inadequate.

Oklahoma City, 471 US at 823. (emphasis added).

The fallacy in Plaintiffs arguments is that they fail to allege a policy of the Defendant Supervisors which led or leads to untimely notice, much less a conscious choice of the Defendant Supervisors that they deliberately chose, thereby establishing a practice or custom that led to the allegedly untimely notifications. The *Monell* decision, *supra*, which has been reaffirmed in subsequent decisions requires that the policy in question also must be "the moving force of the

constitutional violation", *Polk County v. Dodson*, 454 U.S. 312, 326, 102 S. Ct. 445, 454, 70 L. Ed. 2d 509, 1981.

A review of the Plaintiffs' Complaint demonstrates that the allegations fail to show that the Supervisors of Election, made a conscience choice and failed to notify or consciously failed to provide a grace period requested by the Plaintiffs herein. As stated by the Plaintiffs in paragraph 137 of the Complaint "state law prohibits Supervisors of Election from accepting corrections to an application with regard to the checkboxes after the close of the books." Section 97.055, Florida Statutes, clearly establishes that the registration books are closed on the 29th day before the election. The Plaintiffs herein would seek to have the Supervisors of Elections establish a policy providing for a grace period in violation of state law.

The Florida Legislature has established the book-closing deadline, and further provided that incomplete applications are considered as such and that the Supervisor of Elections is to notify the applicant of the insufficiency. See § 97.073, F.S. It cannot be properly asserted, based upon Florida Statutes, which are required to be followed by the Supervisors, that the Defendant Supervisors have established a policy or custom, which is the moving force behind an alleged violation of the Plaintiffs civil rights. As stated in *Tuttle, supra*, the allegations asserted by the Plaintiffs do not demonstrate that the alleged violations of the Plaintiffs' civil rights resulted from a policy or custom established by the Supervisors from a choice of various alternatives. In fact, the only alternative that appears to be put forth by the Plaintiffs, is for the Supervisors of Elections to establish a policy or custom and act contrary to the general law which controls the registration procedures.

Plaintiffs cite various Eleventh Circuit cases for the proposition its recent 42 U.S.C. § 1983 have found Supervisors of Elections to be appropriate Defendants under a § 1983 action. Plaintiffs have failed to establish that there is an official policy claim predicated upon a policy or

custom adopted by Defendants that is a moving force for the alleged violations herein. As such, those cases have no application to the motion of the Defendants herein.

III. ELEVENTH AMENDMENT IMMUNITY

As for Plaintiffs' response against Defendant Anderson, Cowles, Holland and Snipes' Eleventh Amendment immunity claim, "[w]hether a defendant is an 'arm of the State' must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise." *Manders v. Lee*, 338 F.3d. 1304, 1308 (11th Cir. 2003). Contrary to Plaintiffs' argument, the Defendant Supervisors' liability is not asserted to have arisen as a result of their participation in County canvassing boards, so *Lawson v. Shelby County*, 211 F.3d. 331 (6th Cir. 2000) is inapplicable. Moreover, it is irrelevant that a non-party once conceded that Eleventh Amendment immunity would not apply, particularly since that concession, occurring in *Al-Hakim v. State*, 892 F.Supp. 1964 (M.D. Fla. 1995), pre-dates *Manders*.

The Plaintiffs assert that the Defendant Supervisors are allegedly liable for their conduct in administering voter registration applications in advance of statewide elections (TAC, ¶¶ 21, 55, 56, 61, 105, 106, 107-119, 121, 148; and, Prayer for Relief paragraphs 1, 6 and 8). As a result, this Court should review whether the Defendant Supervisors were acting as arms of the state for their actions leading to the statewide elections in 2004 and 2006. When doing so, this Court should look to the *Manders* factors, as applied to the allegations in the Complaint.

The Plaintiffs do not so much dispute the Defendants' arguments under the *Manders* factors as much as they advance different aspects of Defendant Supervisor responsibilities to attempt to argue that the Defendant Supervisors are solely County officers. However, issues

relating to emergency elections, and canvassing boards, are not issues pled in the Third Amended Complaint.¹

A review of the *Manders* decision, *supra*, demonstrates that the Georgia Sheriff in question was elected in the county by the county electors as are these Defendant Supervisors. Section 1, Article VI of the Florida Constitution provides that registration and elections are to be regulated by law. Article VIII, Section 1(d), (f) and (g), Florida Constitution, generally provide that duties of the Supervisor or Elections are established by general law and no law of a county can be inconsistent with general law. Based upon those provisions, the duties of the Supervisor are defined and established by state law and, as such, a Supervisor of Election is responsible for carrying out state law functions established by the Florida Legislature and are not entitled to create county policies contrary to those state established mandates. Because they are carrying out state law functions, immunity applies.

Further, a review of the provisions of § 97.012, F.S., makes clear that the Secretary of State is the Chief Elections Officer who and has a duty to maintain uniformity in the interpretation and implementation of the election laws. In the event that there is a failure to comply with the Florida Elections Code, the Secretary has the authority to file civil actions to obtain compliance by a Supervisor of Election with the state law and the uniformity requirements. See § 97.012(14), F.S.

¹ Plaintiffs do not accurately describe the meaning of Section 101.733(1), Florida Statutes. It does not say that a County Supervisor “represent[s] county;” rather, it states that a Supervisor in a County affected by an emergency can request the Governor to declare a state of emergency relating to an election. This provides a County Supervisor of Elections in an affected County the right to request the Governor to suspend or delay an election, and could easily apply to a statewide state of emergency as well. For example, if a hurricane struck the Florida peninsula on October 24, with utilities unavailable for two weeks, County Supervisors in affected Counties could request the Governor to delay a general election scheduled for, say, November 7, be postponed. Such a scenario could occur if a storm like Hurricane Wilma, which landed on the South Florida peninsula on October 24, 2005, and suspended local government functions for two weeks, were to occur on a year of a general election.

In light of the United States Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525, 148 L.ed.2d.388 (2000), the conduct of statewide elections must be done with an eye towards equal protection, making the role of the Supervisors of Election in a statewide election, in light of the *Manders* factors, much different role than a County or local election official. The actions taken by the Defendant Supervisors of Election in the conduct of a statewide election make them "arms of the state" and provide Eleventh Amendment immunity in the instant case.

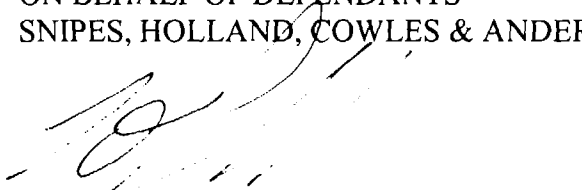
The Defendant Supervisors undertook a thorough analysis of the *Manders* factors in their Motion to Dismiss the Third Amended Complaint, and continues to rely upon such.

WHEREFORE, Defendants, Defendants, Arthur Anderson, William Cowles, Jerry Holland, and Brenda Snipes request this Court to enter an Order dismissing the Third Amended Complaint.

Dated this 22nd day of September, 2006.

Respectfully submitted,

ON BEHALF OF DEFENDANTS
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Email and U.S. Mail on this 22nd day of September, 2006, to the following:

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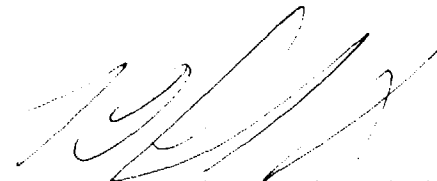
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