

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Nick, et al.,

Plaintiff,

vs.

Bethel, Alaska, et al.,

Defendants.

Case No. 3:07-cv-00098-TMB

ORDER

Re: Plaintiff's Motion to Amend

I. MOTION PRESENTED

Plaintiffs have moved for leave to amend their complaint by adding one substantive claim, one individual plaintiff, four tribal councils as plaintiffs, and one defendant in her official capacity. They also seek to remove an individual plaintiff, Nellie Moses, from the complaint. Defendants Bethel, Alaska and Sandra Modigh, the Municipal Clerk of Bethel, (the "Bethel Defendants") oppose the amendments. Defendants Sean Parnell, Lieutenant Governor, Whitney Brewster, Director of the state Division of Elections, and Becka Baker, Elections Supervisor of the Nome Regional Elections Office, have filed a "Limited Non-Opposition" to the motion, raising concerns that discovery may need to be extended if the amendments are allowed. Because Defendants have failed to overcome the presumption in favor of amendments under Fed. R. Civ. P. 15(a) and relevant case law strongly favor the approval of amendments, the Court GRANTS the Plaintiffs' motion to amend.

II. BACKGROUND

Plaintiffs filed this action in federal district court on June 11, 2007, alleging violations of Sections 4(f)(4)¹ and 203² of the Voting Rights Act of 1965 ("VRA"), which sets forth guarantees of

¹ 42 U.S.C. § 1973b(f)(4).

² 42 U.S.C. § 1973aa-1a.

language materials and assistance for limited-English proficient individuals, and Section 208³ of the Act, which addresses voter assistance for individuals unable to read or write.⁴ On July 31, 2007, this Court denied Plaintiffs' motion to convene a three-judge court to hear their claim under Section 203 of the Act, concluding that private plaintiffs are not expressly authorized to convene a three-judge court under 42 U.S.C. § 1973aa-2 for actions alleging violations of 42 U.S.C. § 1973aa-1a.⁵

On December 31, 2007, Plaintiffs filed the motion to amend at issue here, along with their proposed 26-page First Amended Complaint.⁶ The amendments include: a new substantive claim that the Bethel and State Defendants violated Section 5 of the VRA,⁷ the addition of Arthur Nelson as an individual plaintiff, the addition of four tribal councils as Plaintiffs (the Kasigluk Traditional Council, the Kwigillingok I.R.A. Council, the Tuluksak Tribal Council, and the Tuntutuliak Traditional Council), and the addition of Michelle Speegle, the Elections Supervisor of the Fairbanks Regional Elections Office, as a Plaintiff.⁸

The new Section 5 claims allege that since January 1, 2000, the Bethel and State Defendants have not followed the standards, practices, or procedures for providing language assistance that were precleared by the Justice Department in 1981. This alleged failure, Plaintiffs assert, constitutes a "change affecting voting under Section 5," which requires preclearance by the Justice Department or the U.S. District Court for the District of Columbia. And because Defendants did not submit this change to the Justice Department or district court for approval, Plaintiffs assert, they are in violation of Section 5 of the VRA.⁹ More specifically, Plaintiffs' claim that in conducting elections in the Bethel Census Area, Defendants have not provided assistance and voting materials in the Yup'ik

³ 42 U.S.C. § 1973aa-6.

⁴ Dkt. 1.

⁵ Dkt. 45.

⁶ Dkt. 59.

⁷ 42 U.S.C. § 1973(c).

⁸ The Defendants have not objected to the addition of Speegle as a plaintiff.

⁹ Dkt. 59, Ex. 1, First Am. Compl. ¶¶ 49-53, 66.

language. Materials that should have been fully and accurately translated into Yup'ik, they allege, include: advertisements for voter registration, information on voter purges under the National Voter Registration Act, provisional ballots, poll worker recruitment, election dates, absentee voting information, polling place locations and assignments, and sample ballots required by state law. Plaintiffs further contend that Defendants have failed to provide effective oral language assistance in connection with voting materials, and have failed to recruit and train bilingual poll officials on a consistent basis. By statute, the Section 5 claims must be heard by a three-judge panel.¹⁰

III. DISCUSSION

Fed. R. Civ. P. 15(a)(2) provides that leave to amend should be freely given “when justice so requires.” The Ninth Circuit has interpreted this rule as establishing a “strong policy permitting amendment”¹¹ that is “to be applied with extreme liberality.”¹² In *Foman v. Davis*, the United States Supreme Court identified factors that courts should consider in deciding whether to grant leave to amend.¹³ The factors include: bad faith or dilatory motive on the part of the movant, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint.¹⁴ Of these, the Ninth Circuit has directed district courts to give the greatest weight to considerations of prejudice to the opposing party, declaring that “[p]rejudice is the ‘touchstone of the inquiry.’”¹⁵ Absent a strong showing of one of the *Foman* factors, especially prejudice, a presumption exists under Rule 15(a) in favor of granting leave to amend.¹⁶

¹⁰ See 42 U.S.C. § 1973c; 28 U.S.C. § 2284.

¹¹ *Bowles v. Reade*, 198 F.3d 752, 757 (9th Cir. 1999).

¹² *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990).

¹³ 371 U.S. 178, 182 (1962).

¹⁴ *Id.*; *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990).

¹⁵ *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (quoting *Lone Star Ladies Inv. Club v. Schlotzsky's, Inc.*, 238 F.3d 363, 368 (5th Cir. 2001)).

¹⁶ *Id.*

A. The Section 5 Claims

The Bethel Defendants' primary argument against Plaintiffs' Section 5 claims is that the amendments would be futile because the "proposed amended complaint alleges no facts and their motion presents no evidence indicating how the Bethel defendants failed to comply with Section 5." The Bethel Defendants further assert that there is no substantive basis for the Section 5 claim against them because they have submitted all election changes to the Department of Justice and received preclearance.

In weighing amendments under Rule 15(a)(2), courts have generally equated futility with frivolousness or legal insufficiency.¹⁷ For example, in *Gabrielson v. Montgomery Ward & Co.*, a case cited by the Bethel Defendants, the plaintiff sought to add a claim for benefits under Montgomery Ward's Comprehensive Health Care Plan Trust.¹⁸ Yet under the express terms of the plan, the plaintiff did not qualify for benefits for two distinct reasons and any amended claim seeking benefits would have been defeated by summary judgment. Therefore, the Ninth Circuit affirmed the district court's denial of the plaintiff's motion to amend.¹⁹ Similarly, in *Johnson v. Buckley*, another case cited by the Bethel Defendants, the plaintiffs in an ERISA suit sought to amend their complaint to add claims of breach of fiduciary duty.²⁰ The district court denied the plaintiffs' motion because adequate relief was already available to the employees under a civil enforcement provision, and because the amendment merely restated claims already asserted as part of an earlier motion on the standard of review.²¹ The Ninth Circuit affirmed the district court's denial noting, as to the second reason, that "the employees could have appealed [the standard of review order] without including [the new claims] in the complaint."²²

¹⁷ 6 Wright and Miller, Federal Practice and Procedure § 1487 at 637-38 (2d ed. 1990).

¹⁸ 785 F.2d 762, 765-66

¹⁹ *Id.* at 766.

²⁰ *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004).

²¹ *Id.* at 1078.

²² *Id.*

Contrary to the Bethel Defendants' assertion, Plaintiffs' proposed Section 5 claims, at this stage of the litigation, do not appear to be futile, frivolous, or legally insufficient. Plaintiffs attached to their proposed amended complaint a copy of a 1981 letter from the then-director of the State of Alaska's Division of Elections to a state assistant attorney general describing the state's compliance with the minority language requirements of the VRA. Plaintiffs assert that the U.S. Attorney General then approved the state's language assistance program, but that Defendants have failed to follow all of the procedures and that this failure constitutes a change subject to Section 5's preclearance requirement.

The Bethel Defendants deny these claims, but have not shown them to be without any possible basis, as in *Gabrielson*. Nor have the Bethel Defendants shown that the Section 5 claims merely restate claims made in support of an earlier motion, as in *Johnson*. Instead, the Bethel Defendants simply refute the Section 5 claims, asserting that Bethel has "continuously submitted changes in its election procedures to the Department of Justice, and the Department has granted preclearance." Yet the Bethel Defendants do not specifically address the Plaintiffs' allegations related to language assistance for Alaskan Native residents. Regardless, their argument is better suited to a summary judgment motion on the merits. Under the Supreme Court's decision in *Foman*, an "amendment should not be barred as futile if the underlying facts 'may be a proper subject of relief.'" ²³ Here, the Court finds that Plaintiffs' Section 5 claims, if proven, present a proper subject for relief.

The Bethel Defendants also object to the Section 5 claims on the grounds of bad faith by Plaintiff's counsel. They assert that Plaintiffs' motion to amend is, in essence, an attempt to evade this Court's earlier ruling denying a three-judge panel for their claim under Section 203 of the VRA. They also contend that Plaintiffs could have brought the Section 5 preclearance claims when the suit was originally filed. Plaintiffs respond that they did not learn of a basis for the Section 5 claims until November 2007 when they deposed Whitney Brewster, Director of the state Division of Elections. Given this, the Court finds no evidence of bad faith in the timing of the Plaintiffs' motion to amend.

Nor does the Court view the motion to amend as an attempt to evade its earlier order. While the VRA mandates a three-judge panel for the Section 5 claims, the panel is not required to exercise

²³ 371 U.S. at 182.

jurisdiction over the other claims.²⁴ As the Supreme Court stated in *Perez v. Ledesma*, “[e]ven where a three-judge court is properly convened to consider one controversy between two parties, the parties are not necessarily entitled to a three-judge court and a direct appeal on other controversies that may exist between them.”²⁵ The Court thus expressly reserves the issue of whether the non-Section 5 claims should be heard by the three-judge panel as well.

Finally, the Bethel Defendants challenge the Section 5 claims on the grounds of undue delay and prejudice. The only reason they give for this is the likely need for “increased discovery of facts substantially unrelated to the minority language claims.” No further explanation is offered as to why additional discovery would be unrelated to the minority language program, when Plaintiff’s claims center on the provision of language assistance related to voting and voting materials.

The Bethel Defendants rely for support on *AmerisourceBergen Corp. v. Dialysis West, Inc.*, in which the Ninth Circuit affirmed the district court’s denial of the plaintiff’s motion to amend its reply to the defendant’s counterclaim.²⁶ The Ninth Circuit found that the denial was justified, in part, because 15 months had elapsed between the plaintiff’s discovery of a basis for a new affirmative defense and the filing of the motion to amend.²⁷ More damaging, the appellate court found that the plaintiff had all the information necessary to raise the affirmative defense at the time the original reply was filed.²⁸ Here, the Plaintiffs sought to amend their complaint just a month after learning, through discovery, of a potential basis for the Section 5 claims. There is no indication – and the Defendants have not asserted – that the Plaintiffs possessed the information needed to assert the Section 5 claims when they filed their original complaint.

²⁴ See *Armour v. Ohio*, 775 F.Supp. 1044, 1048 (N.D. Ohio 1991); *Tucker v. City of Montgomery Bd. of Comm’rs*, 410 F.Supp. 494, 500 (M.D. Ala. 1976). But see *Robertson v. Bartels*, 148 F.Supp.2d 443, 461-62 (discussing split of opinion as to discretionary jurisdiction of three-judge panel and concluding that Congress intended to limit the jurisdiction of three-judge courts to those claims mandated to be heard by statute or to those “inextricably intertwined” with the mandated claims).

²⁵ 401 U.S. 82, 87 (1971).

²⁶ 465 F.3d 946, 954 (9th Cir. 2006).

²⁷ *Id.* at 953.

²⁸ *Id.*

The Court recognizes that the addition of the Section 5 claims is likely to trigger additional depositions and discovery requests. But the Bethel Defendants have failed to show how or why this burden would rise to the level of undue prejudice and warrant denial of the amendments. And under Rule 15's liberal amendment policy, any prejudice to the non-moving party must be weighed against the burden to the moving party if the amendments are denied. Here, the prejudice to the Plaintiffs would be great; they would be forced to file a separate suit asserting the Section 5 claims and start the litigation process over again. Therefore, the Court concludes that the Section 5 claims should be allowed.

B. Arthur Nelson

The Bethel Defendants object to the addition of Arthur Nelson as an individual plaintiff on the grounds of bad faith, undue delay, and prejudice. In particular, the Bethel Defendants assert that the Plaintiffs exhibited bad faith by failing to disclose Nelson's name or information about his claims in response to certain interrogatories and the supplemental disclosure requirements of Fed. R. Civ. P. 26(e)(1)(A). Specifically, they claim that the Plaintiffs were remiss in not producing information related to Nelson in response to the Bethel Defendants' Interrogatories 10 and 11,²⁹ which were first served on Plaintiff Billy McCann and his attorneys on September 5, 2007. McCann's response, submitted on October 9, 2007, objected that the inquiries were overly broad and burdensome, but went on to describe the difficulties McCann experienced in attempting to vote in non-tribal elections due to his limited English proficiency. McCann's response made no mention of Arthur Nelson. On December 5, 2007, the Bethel Defendants served McCann and his attorneys with a second set of interrogatories, of which No. 15 requested "any additional information you have obtained" in connection with McCann's responses to the first set of interrogatories. On January

²⁹ Interrogatory No. 10 states: "For the allegation in paragraph 29 of your Complaint, that Bethel Defendants fail to provide information and assistance to Alaska Native limited-English proficient voting age U.S. citizens, please state in detail all the fact on which you base the allegation, identify any persons who have knowledge of that allegation, and identify any documents which related to that allegation." Dkt. 64, Ex. B.

Interrogatory No. 11 states: "For the allegation in paragraph 32 of your Complaint, that Bethel Defendants fail to allow voters to receive necessary assistance, please state in detail all the facts on which you base the allegation, identify any persons who have knowledge of that allegation, and identify any documents which relate to that allegation." *Id.*

7, 2008, McCann responded by incorporating his earlier objections to the interrogatories as overly broad and then stating: “Plaintiff McCann does not have any responsive non-privileged information in his possession, custody, or control. If additional responsive information is obtained, Plaintiff McCann will identify and disclose it to the Bethel Defendants in a timely manner pursuant to Fed. R. of Civ. P. 26(e).”³⁰

Plaintiffs argue now that Interrogatories 10 and 11 were improper under Fed. R. Civ. P. 34 because they asked McCann to “tell us everything you know.” They suggest that the Bethel Defendants should, instead, serve discovery requests directly on Nelson. Alternatively, Plaintiffs argue that even if the December 5, 2007 discovery requests were proper, “it is palpably unreasonable to expect full discovery on a plaintiff within a week of amending the complaint and ten days after meeting him.”

The Court finds that under the circumstances of this case, Plaintiffs’ failure to disclose information about Nelson in their January 7, 2008 discovery response does not justify barring the addition of Arthur Nelson to the suit on the grounds of bad faith. There is no evidence Plaintiffs engaged in dilatory tactics; nor does the record suggest that the proposed amendment would be of doubtful value.³¹ Even assuming *arguendo* that Plaintiffs committed a discovery violation by failing to disclose Nelson’s claims in their January 2008 filing, the Court finds that any error was harmless because Plaintiffs had already filed their amended complaint on December 31, 2007. Therefore, the Bethel Defendants had notice of Nelson’s name and potential claims against them at least a week before Plaintiffs filed their discovery responses.

As with the Section 5 claims, the Court recognizes that the addition of Nelson is likely to lead to additional depositions and discovery requests, requiring time and resources. Yet Plaintiffs’ motion was timely filed and the deadline for the close of discovery is still more than a month away, providing time for the Defendants to depose Nelson. Therefore, the Court concludes that the amendment adding Nelson as an individual plaintiff should be permitted.

³⁰ Fed. R. Civ. P. 26(e)(1) requires a party who has responded to an interrogatory to supplement or correct its disclosure or response “if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing . . . ”

³¹ See *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, 799 (9th Cir. 2001).

C. The Four Tribal Councils

The Bethel Defendants also object to the addition of the four tribal councils as plaintiffs on the grounds of undue delay and prejudice. Their primary objection is that the amendments will “cause further delays to the case schedule as it progresses.” In light of the liberal approach to amendments commanded by Rule 15(a) and binding precedent, this is an insufficient reason to bar Plaintiffs’ amendments.

As to prejudice, the Bethel Defendants argue that they bear a particularly heavy burden because the four tribal councils seek to assert claims only against the State Defendants. But the burden to the Bethel Defendants would have been the same if Plaintiffs had named the four tribal councils in their original complaint. And when the potential hardships stemming from the amendments are weighed, the balance tips in favor of the Plaintiffs, who would bear a greater burden from denial of the tribal council amendments than the Defendants would if they are allowed. The Court therefore concludes the four tribal councils should be permitted to join the suit.

V. CONCLUSION

The Court **GRANTS** Plaintiffs’ Motion for Leave to File First Amended Complaint at Docket 58.

Dated at Anchorage, Alaska, this 19th day of May 2008.

/s/ Timothy Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE