IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA NORFOLK DIVISION

Latasha Holloway, pro se, **Plaintiff,** **v.** **City of Virginia Beach,** **Defendant.**	**Civil Action No. 2:18-CV-69**

CITY OF VIRGINIA BEACH'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

COMES NOW Defendant City of Virginia Beach ("City"), by counsel, and for its Brief in Opposition to Plaintiff Latasha Holloway's ("Plaintiff") Motion for Leave to File an Amended Complaint ("Plaintiff's Motion"), states as follows:

Procedural History and Factual Background

In this action. Plaintiff, appearing *pro se*, claims that the at-large election system used to elect the members of the Virginia Beach City Council "unlawfully dilut[es] or minimiz[es] 'minority voting strength,'" and violates certain statutory and constitutional rights. (Compl. at 2, ECF No. 5). Plaintiff had also filed a serious of other motions, including two motions for appointment of counsel that were denied without prejudice. (Mot. to Appoint Counsel, ECF No. 2; Renewed Mot. to Appoint Counsel, ECF No. 24). The City filed a Motion to Dismiss on April 10, 2018. (Mot to Dismiss, ECF No. 13). Thereafter, on April 12, 2018, the Court stayed this action "pending the resolution of Plaintiff's appeal to the Fourth Circuit." (Order at 2, ECF No. 18).

The Fourth Circuit dismissed Plaintiffs appeal for lack of jurisdiction on April 24, 2018,

and issued its mandate on May 16, 2018. (Op., ECF No. 19; Mandate, ECF No. 21). With Plaintiff's appeal resolved, this Court entered an Order on May 21, 2018, that (i) lifted the previously imposed stay, and (ii) established a briefing schedule for the City's Motion to Dismiss. (Order, ECF No. 22).

On May 22, 2018, Plaintiff then filed a Motion for Extension in which she requested "additional time" to respond to the City's Motion to Dismiss. (Mot. for Extension at 2, ECF No. 23). Plaintiff sought "additional time" to enable her to "retain legal counsel." This Motion for Extension was granted on June 5, 2018. (Order, ECF No. 25). Notwithstanding, Plaintiff filed her response to the City's Motion to Dismiss on the same day her Motion for Extension was granted: June 5, 2018. (Response to Mot. to Dismiss, ECF No. 26). On June 7, 2018, Plaintiff filed an Affidavit that purports to lend support to her Response to the City's Motion to Dismiss. (Affidavit, ECF No. 27).

Plaintiff has now moved for leave to amend her Complaint to "join additional parties defendants, because complete relief cannot be accorded among those named defendants without joinder" and to "include additional causes of action, or requests for relief, or to name additional parties as defendants to the action, or to cure any deficiency in their causes of action." (Mot. for Leave, ECF No. 29, pg. 1-2). The City opposes the filing of the proposed Amended Complaint (Amend. Comp., ECF No. 29, pp 16-27) because it is futile and contrary to the ends of justice.

Standard of Review

Federal Rule of Civil Procedure 15(a) states that "a party may amend [its] pleading only by leave of the court...and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The Supreme Court has held that:

> [i]n the absence of any apparent or declared reason such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc. the leave sought should, as the rules require, be freely given.

Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962) (emphasis added); accord Medigen of Ky., Inc. v. Public Svc. Comm'n of W. Va., 985 F.2d 164, 168 (4th Cir. 1993).

In order to justify a denial of a motion for leave to amend, "it must appear to the Court that the amendment is futile, offered in bad faith, prejudicial or otherwise contrary to the interests of justice." Roper v. County of Chesterfield, 807 F. Supp. 1221, 1223 (E.D. Va. 1992). The disposition of a motion to amend is committed to the sound discretion of the Court. See Murray v. State Farm Fire & Cas. Co., 870 F.Supp. 123, 125-26 (S.D.W.Va.1994) (citing Foman, 371 U.S. at 182).

Analysis

The City contends that Plaintiff's Motion should be denied as futile for the following reasons: (1) because adding defendants in their official capacity does not serve any legitimate purpose; (2) the ends of justice do not require filing of the proposed Amended Complaint; and (3) the addition of a class action claim is unnecessary, unwarranted, burdensome, and expensive. For the reasons fully explained below, the Plaintiff's Motion must be denied as futile.

I. The proposed amendment adding defendants in their official capacity does not serve any legitimate purpose.

Plaintiff has sought to file an Amended Complaint to "join additional parties defendants, because complete relief cannot be accorded among those named defendants without joinder." (Mot. for Leave, ECF No. 29, pg. 1). Plaintiff originally filed suit against the City of Virginia

Beach but now wishes to name every member of the Virginia Beach City Council and every member of the Electoral Board for City of Virginia Beach. Plaintiff asserts that "[a]ll defendants are sued in their official capacities." (Amend. Comp., ECF No. 29, pg. 17, ¶ 6).

Official-capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent.'" See Kentucky v. Graham, 473 U.S. 159, 165, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985) (quoting Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 690 n. 44, 98 S. Ct. 2018 (1978)). Thus, "[b]ecause suits against a municipal officer sued in his official capacity and direct suits against municipalities are functionally equivalent, there no longer exists a need to bring official-capacity actions against local government officials, because local government units can be sued directly." Busby v. City of Orlando, 931 F.2d 764, 776 (11th Cir. 1991) (citing Kentucky v. Graham, 473 U.S. at 166, 105 S. Ct. at 3105; Brandon v. Holt, 469 U.S. at 471-72, 105 S. Ct. at 877-78).

Upon review of Plaintiff's proposed Amended Complaint, the claims against these additional City officials are entirely duplicative of Plaintiff's claims against the City. Permitting Plaintiff to pursue claims against both the City and these individuals in their official capacity would be redundant and needlessly complicates this case without a legal reason to do so. Therefore, Plaintiff's stated purpose for the Amended Complaint to add additional parties in their official capacity is futile and must be denied.

II. The ends of justice do not require filing of the proposed Amended Complaint.

The failure of Plaintiff's claim in the Complaint and in the proposed Amended Complaint is no mere technical failure in pleading, but is rather a result of the fact that no actionable violation of her rights has occurred. For this reason, justice does not demand filing of an Amended Complaint be permitted.

Section 1983 is an inappropriate vehicle through which to pursue claims under Section 2 of the Voting Rights Act of 1965. See Moseley v. Price, 300 F. Supp. 2d 389, 396 n. 11 (2004) ("[I]t is well-settled that § 1983 cannot serve as a means to enforce a statute that has its own comprehensive internal enforcement scheme, as the Voting Rights Act clearly has"). Continued reference to Section 1983 is futile when the stated basis of Plaintiff's claim arise under Section 2 of the Voting Rights Act of 1965.

Section 2 of the Voting Rights Act of 1965 provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race." 42 U.S.C. § 1973(a) (emphasis added). The 1982 amendment made clear that Section 2 condemns not only voting practices borne of a discriminatory intent, but also voting practices that operate, designedly or otherwise, to deny equal access to any phase of the electoral process for minority group members." United States v. Charleston County, S.C., 365 F.3d 341, 345 (4th Cir. 2004).

There are two methods by which a state or political subdivision might violate Section 2: vote denial and vote dilution. See Johnson v. Governor of State of Florida, 405 F.3d 1214, 1228 n.26 (11th Cir. 2005). "A vote dilution claim alleges that a particular practice operates to cancel out or minimize the voting strength of a minority group." Hall v. Virginia, 385 F.3d 421, 427 (4th Cir. 2004) (internal quotations omitted). For Plaintiff to make out a vote dilution claim, she must:

> (1) demonstrate that [the minority group] is sufficiently large and compact to constitute a majority in a single member district, (2) show that [the minority group] is politically cohesive, and (3) demonstrate that the white majority votes sufficiently as a bloc to enable it … usually to defeat the minority's preferred candidate.

Id. at 426 (quoting Thornburg v. Gingles, 478 U.S. 30, 50-51, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986) (internal quotations omitted)). These three requirements are the heart of any vote-dilution claim. See id. at 431-32. After establishing these three prerequisites, the plaintiff must then establish that, under the totality of the circumstances, the minority group has been denied the opportunity to participate in the political process and elect representatives of its choice. See Charleston County, 365 F.3d at 345.

Plaintiff has alleged in the original Complaint that the at-large voting system of the City has the effect of diluting African American voting strength. Plaintiff now attempts to add facts to her Amended Complaint that were clearly lacking in the Complaint. However, Plaintiff has pled no facts in the proposed Amended Complaint that address the crucial prerequisite vote dilution factors, nor has she identified factually how the City has deprived African-Americans of their ability to participate in the electoral system or elect candidates of their choice.

Plaintiff's addition of allegations about "the effects of present and past discrimination in such areas as education, employment, income, living conditions, and health" do not cure the deficiencies of the Complaint. (Amended Comp., ECF No. 27, pg. 20-21, ¶ 18(a)-(e)). Further, Plaintiff's addition of conclusory language that "the African America population is sufficiently numerous and sufficiently concentrated in particular areas of the city" is insufficient to state a claim that is plausible on its face. (Amended Comp., ECF No. 27, pg. 23, ¶ 22).

An amendment is futile if it would "fail[] to satisfy the requirements of the federal rules" or if it "is clearly insufficient or frivolous on its face." U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc., 525 F.3d 370, 376 (4th Cir. 2008) (quoting United States ex rel. Fowler v. Caremark RX, LLC, 496 F.3d 730, 740 (7th Cir. 2007)); Johnson v. Oroweat Foods Co., 785 F.2d 503, 510 (4th Cir. 1986)). Plaintiff has again failed to create a pleading that would withstand the

scrutiny of Fed. R. Civ. P. 12(b)(6) because Plaintiff's vote-dilution claim remains purely conclusory and fails to establish the necessary prerequisite factors. See Hall, 385 F.3d at 431-32 (dismissing vote dilution claim when plaintiffs failed to establish prerequisite factors).

In sum, none of Plaintiff's vote-dilution claims are viable. Justice may require leave to amend be "freely given" in most instances; however, it is not required where the claims are futile because they have no factual support or facial plausibility. Therefore, Plaintiff's Motion should be denied because the ends of justice do not require the filing of an Amended Complaint that cannot satisfy federal pleading requirements and is clearly insufficient on its face.

III. The addition of a class action claim is unnecessary, unwarranted, burdensome, and expensive.

Assuming *arguendo* that Plaintiff had sufficiently pled a cause of action for a vote-dilution claim, a denial of Plaintiff's Motion to add a class action claim on "behalf of all African American citizens and African American registered voters of the City of Virginia Beach" is required. (Amend. Comp., ECF No. 29, pg. 17, ¶ 4). Plaintiff has totally failed to properly assert a class action, both procedurally and substantively. Plaintiff relies upon Fed. R. Civ. P. 23(a) and (b)(2) as the authority for bringing a class action with nothing more than rote recitals of the language of Rule 23 to justify the addition of a class action component to the Amended Complaint. See id. at ¶ 4(1)-(5). Fed. R. Civ. P. 23(a) sets forth the four threshold requirements that must be satisfied before the Court can proceed to the next step of determining whether an action is certified as a class action. By merely reciting those threshold requirements verbatim, Plaintiff has utterly failed to carry her burden in this regard.

Plaintiff has also failed to make a request for class certification in the form of a motion, or by alleging enough facts in the proposed Amended Complaint such that the Court can determine whether class certification is appropriate. It is axiomatic that "[t]he party seeking

class certification bears the burden of establishing that the action meets the requirements of Rule 23." Morris v. Wachovia Securities, Inc., 223 F.R.D. 284, 291 (E.D. Va. 2004) (citing In re A.H. Robins Company, Incorporated, 880 F.2d 709, 728 (4th Cir. 1989), cert. denied sub nom., Anderson v. Aetna Casualty and Surety Company, 493 U.S. 959, 110 S. Ct. 377 (1989) (internal quotation marks omitted)). Therefore, the proposed Amended Complaint that purports to add a class action claim is futile because it is substantively and procedurally flawed.

Furthermore, from a practical perspective, transforming this matter from a single plaintiff's vote-dilution claim to a class action lawsuit on behalf of "all African Americans in the City of Virginia Beach" is unnecessary, expensive and unduly burdensome to the City in view of the allegations made in the Amended Complaint. Assuming *arguendo* that Plaintiff was successful in obtaining her demanded declaratory and injunctive relief, this Court's Order granting injunctive or declaratory relief for Plaintiff would become legal authority and appropriately applied to any other potential plaintiff, as well as the public-at-large. As such, amending the Complaint to add a class allegation is unnecessary and futile.

Finally, if Plaintiff were entitled to transform this matter in to a class action lawsuit, the City would certainly bear untold litigation costs in defense of a currently unknown class of the potential claimants. The City should not to have to bear the burden and expense that would result from transforming this matter in to a class action lawsuit without a factual basis from the Plaintiff that justifies bringing a class action and would require the City to guess which of the alleged 85,935 voting-aged African Americans in Virginia Beach wish to participate alongside Plaintiff. (Amend. Comp., ECF No. 29, pg. 17, ¶ 9(b)).[1]

[1] The stated objective of the Federal Rules of Civil Procedure is "to secure the just, speedy, and inexpensive determination of every action." See Fed. R. Civ. P. 1.

Conclusion

For all the reasons set forth herein, Defendant City of Virginia Beach respectfully asks this Court to deny Plaintiff's Motion for Leave to File an Amended Complaint and for all other such relief as the case may require.

Respectfully Submitted,

CITY OF VIRGINIA BEACH

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CERTIFICATE OF SERVICE

I hereby certify that on the 21th day of June, 2018, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Latasha Holloway is a non-filing user of the CM/ECF system. No other parties require notice.

/s/
Gerald L. Harris

And I hereby further certify that on this same date I have mailed the foregoing document along with a copy of the NEF to the following non-filing user:

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