

**HIGH COURT
MARSHALL ISLANDS**

LORIANN MATTHEW, Plaintiff, v. DANIEL ANDREW (former Chief Electoral Officer), BEN KILUWE (current Chief Electoral Officer) SECRETARY OF CULTURE & INTERNAL AFFAIRS, JOHN DOE Nos. 1-5 and JANE DOE Nos. 105, Defendants.	CIVIL ACTION NO. 2022-01639 HCT/CIV/MAJ AMENDED FINAL JUDGMENT
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Counsel:

David M. Strauss, counsel for Plaintiff Matthew

Lometo Philipppo, Assistant Attorney-General, counsel for Defendants

This is an action by plaintiff Loriann Matthew for the award of damages against the defendant election officials for preventing her from voting in the August 21, 2021 special election for Mayor of Aur Atoll (the "special election").

I. FACTUAL BACKGROUND

1. Plaintiff Loriann Matthew is an adult citizen and resident of the Republic. Dfts' FF&CL,¹ ¶ 1.

2. On July 15, 2020, plaintiff Loriann Matthew re-registered her electoral district from Maloelap Atoll to Aur Atoll. The plaintiff's new Affidavit on Application for Registration ("Application") was stamped "Received" with an Electoral Administration stamp, dated, and

¹Defendants' Proposed Findings of Fact and Conclusions of Law, filed July 11, 2023 ("Dfts' FF&CC").

initialed by an election official. Exhibit P-1. The plaintiff's friend Renne Jekkar ("Jekkar") accompanied the plaintiff, and he also registered to vote on Aur Atoll on the same date and at the same time. The plaintiff's Application and Jekkar's application were both given to Election Board Member Julie Beinkotkot ("EBM Beinkotkot") who signed them. Plt's FF&CL, ¶ 1; Dfts' FF&CL, ¶¶ 2-3.

3. On August 10, 2021, twelve days before the special elections for various local governments, including Aur, Mera Raito Jebenu ("Jebenu") obtained a copy of the voter list for Aur Atoll ("Aur voter list") from the Electoral Administration. Exhibit P-2. Plt's FF&CL, ¶ 2.

4. After reviewing the names on the Aur voter list, Jebenu contacted Chief Electoral Officer Daniel Andrew ("CEO Andrew") and several employees in the Electoral Administration by email at 11:04 a.m. on August 17, 2021, informing them that there were six persons who were registered voters for Aur, but that their names did not appear on the Aur voter list. Jebenu attached copies of the registration papers for the six persons (including the plaintiff) to the email. Exhibit P-3. Plt's FF&CL, ¶ 3; Dfts' FF&CL, ¶¶ 4-5.

5. CEO Andrew emailed Jebenu and others later that day at 1:57 p.m. and asked where the six persons had registered to vote. Jebenu replied by email at 4:30 p.m. to the CEO and others that while she did not know where one of the six voters had registered (Aron Kniper), the others had registered at the Electoral Administration, and their applications were initialed by Electoral Administration employees. Exhibit P-4. Plt's FF&CL, ¶ 4; Dfts' FF&CL, ¶ 6.

6. On Friday, August 20, 2021, the day before the special election, Pam Kaious ("Kaious") went to the Electoral Administration to make sure that the six registered persons' names were on the updated Aur voter list. However, the Electoral Administration would not allow Kaious to see the updated list, asserting that it was "still being updated." Also, the

Electoral Administration did not inform Kaious verbally if the six persons' names were being added to the list. Plt's FF&CL, ¶ 5; Dfts' FF&CL, ¶ 7.

7. On Saturday, August 21, 2021, the plaintiff and her friend Jekkar went to the Laura Elementary School polling place, in Majuro, to vote in the special election for Aur. The plaintiff entered the classroom to vote, stated her name, and showed her identification to the election officials. The election officials looked through the updated Aur voter list and told her that they could not find her name, so she could not vote. The plaintiff informed the election officials that she had changed her registration from Maloelap to Aur back in 2020 and that her name should be on the list. Again, the election officials told her that since her name was not on the updated Aur voter list, then they could not allow her to vote. Plt's FF&CL, ¶ 6; Dfts' FF&CL, ¶¶ 9-12.

8. The election officials did not give the plaintiff a new voter registration application form to fill out at the polling place and did not give her a ballot so that she could vote. Plt's FF&CL, ¶ 7; Dfts' FF&CL, ¶ 12.

9. The plaintiff's friend Jekkar's name was on the updated Aur voter list, and he was allowed to vote. Plt's FF&CL, ¶ 8.

10. On August 21, 2021, Lynn Garland ("Garland") was present as a poll watcher at the Laura Elementary School polling place for the special election for Aur. Garland saw the plaintiff step into the classroom to vote. When the plaintiff emerged from the classroom, she told Garland that the election officials had not allowed her to vote because the plaintiff's name was not on the Aur voter list. Garland, who works at Woja Elementary School, recognized the EBM who was allowing entry into the classroom to vote as the principal of Woja Elementary School. Garland asked an Election Board Member ("EBM") why the plaintiff was not allowed to

vote, and the EBM explained that plaintiff could not vote because her name was not on their list. Garland told the EBM that the plaintiff's name was supposed to be on the list because she had registered, but the EBM said that since her name was not on the list, they would not give her a ballot or allow her to vote. Plt's FF&CL, 9.

11. On March 15, 2022, more than seven months after the day of the special election, the plaintiff filed with the Attorney-General a claim under the Government Liability Act 1980, 3 MIRC Ch. 10 (the "GLA"), because election officials did not allow her to vote during the Aur special election. Dfts' FF&CL, ¶ 13.

12. The plaintiff sought \$15,000 in damages and relief with the Attorney-General; Dfts' FF&CL, ¶ 14.

13. The cover letter with the plaintiff's claim pointed out that the six-month time limitation for filing a claim with the Attorney-General under §1007 of the GLA, 3 MIRC 1007, had been found to be invalid by the Supreme Court. The plaintiff's counsel provided the Attorney-General's Office a copy of the Supreme Court case *Enos and Enos, v. RMI*, 1 MILR (Rev.) 63 (1987), but did not provide information on *Bujen and Wase v. RMI, et al.*, 3 MILR 8, 11 (2005). Dfts' FF&CL, ¶¶ 15-16.

14. More than five months after the plaintiff filed her March 15 claim with the Attorney-General, the Attorney-General had neither accepted or rejected the claim.

15. On August 19, 2022, the plaintiff filed her complaint in this matter.

16. On October 24, 2022, the defendants filed their answer in this matter. In their answer, the defendants asserted that the plaintiff's claim is barred by the six-month statute of

limitations set forth under Section 1009 of the Government Liability Act, 3 MIRC 1009.

However, on July 10, 2023, the defendants withdrew their statute of limitations defense.²

II. LEGAL STANDARDS

The constitutional and statutory provisions applicable to this case are set forth below.

A. Constitutional Right to Vote

Regarding the right to vote, Article II, Section 14(2), of the Constitution, entitled "Access to Judicial and Electoral Processes," provides as follows:

Every person has the right to participate in the electoral process, whether as a voter or as a candidate for office, subject only to the qualifications prescribed in this Constitution and to election regulations which make it possible for all eligible persons to take part.

B. Constitutional Right to Enforce Rights Secured by the Bill of Rights

If a person's constitutional right to vote is denied or abridged, that person may invoke the right in a civil proceeding for relief against any such violation under Article II, Section 18 of the Constitution, "Invoking Bill of Rights Provisions." Article II, Section 18 provides as follows:

(1) No right secured by the Bill of Rights may be denied or abridged, whether directly through the imposition of force or penalty, or indirectly through the withholding of privilege or benefit.

(2) Any provision of the Bill of Rights may be invoked either as a defense to a civil or criminal proceeding or as a basis for legal or equitable relief against any actual or threatened violation.

²Defendants' Motion to Withdraw Affirmative Defense filed July 10, 2023.

C. Statutory Provisions for Voting

Further to the constitutional right to vote, the Elections and Referenda Act 1980, 2 MIRC Ch. 1 (“Elections Act”), makes provision for voting for Nitijela seats and local government councils.

If as in the present case, a person who claims that he or she is entitled to vote, but whose name is not on the voter’s list, Section 129 of the Elections Act, “Application to correct errors and omissions,” makes provision for correcting errors and omissions. Section 129 reads as follows:

- (1) A person who claims that he is entitled to be entered in the Register or in the voters list and that:
 - (a) he has not been so entered; or
 - (b) he has been so entered incorrectly,may apply to the Chief Electoral Officer to have the Register or list amended.
- (2) The Chief Electoral Officer shall make or cause to be made full and careful inquiry into the matter of the application, and shall advise the applicant as soon as practicable that he:
 - (a) accepts the claim and amends the Register or list accordingly; or
 - (b) rejects the claim.
- (3) If the claim is rejected the applicant may elect to be automatically re-registered in the previous place of registration when the rejection occurs because of land right or residency, or may appeal to the High Court which may:
 - (a) confirm the rejection; or
 - (b) order the Chief Electoral Officer to amend the Register or list in such manner as the court directs.

Additionally, if a person appears at a polling place seeking to vote, but his or her name is not on the voters’ list, that person may vote under the challenged vote procedure set forth in Sections 173(2) and 173(3) of the Elections Act. Sections 173(2) and 173(3) read as follows:

- (2) If the name of the person does not appear in the voters list, or if a person could not present any of the required forms of

identification, and was unable to obtain full verification pursuant to section 1(c) above, an election official shall:

- (a) announce the fact in a loud, clear voice; and
 - (b) require him, before being allowed to vote, to complete before a member of the Board of Elections in the polling place an application in the form set forth in Schedule 1 appearing at the end of this Chapter, or in substantially the same form.
- (3) When a person votes by virtue of Subsection (2) of this Section:
- (a) he shall place his ballot paper in an unmarked envelope to be provided by an election official, seal the envelope and hand it to an election official;
 - (b) the election official shall deal with the ballot paper as if the right of the person to vote had been challenged; and
 - (c) the vote shall be deemed to be, and shall be treated for all purposes of this Chapter as, a challenged vote.

D. Tort and Contract Actions Against the Government

With respect to tort or contract actions against the Republic, the procedures for, and limitations on, such actions are set forth in the Government Liability Act 1980, 3 MIRC Ch. 10 (“GLA”). Section 1009 of the GLA sets the time limitation for filing tort or contract claims against the Republic. Section 1009, “Limitation of filing,” provides:

All tort and contract claims must be filed with the Attorney-General within six (6) months from the date when the claim arose.

Once a claim has been filed with the Attorney-General, Section 1021, “Statute of Limitations,” sets the time limitation for filing a tort or contract action on the claims. Section 1021 provides as follows:

Every tort or contract action is barred unless commenced within one year from the date the claim was filed with the Attorney-General under Section 1007 of this Chapter, or within six (6) months from the date of notification of rejection of the claim under Section 1015 of this Chapter, whichever is sooner.

III. DISCUSSION

In 2020, plaintiff Matthew, an adult citizen of the Republic, re-register to vote in the Aur Atoll district. Hence, she had the right to vote in the August 21, 2021 Aur special election pursuant to Article II, Section 14(2), of the Constitution, and the applicable provisions of the Elections Act. However, Election Administration officials did not permit her to vote.

On August 10, 2021, 12 days before the special election, Ms. Jebenu obtained from the Electoral Administration a copy of the Aur Atoll voter list. Exhibit P-1. On August 17, 2021, Ms. Jebenu contacted CEO Andrew via email and informed him that the names of six persons who had registered to vote in the Aur electoral district, including the plaintiff's, were not on the list. However, there is no evidence that CEO Andrew advised Jebenu, or the six persons not on the Aur voter list, that under Section 129 of the Elections Act they could apply to him as CEO to correct the Aur voter list and add their names. Additionally, on August 20, 2021, the Electoral Administration did not allow Pam Kious to inspect the Aur voter list and did not confirm to her whether the six missing names had been added.

On August 21, 2021, plaintiff Matthew went to the Laura Elementary School polling place, produced her identification to Elections Officials, but was refused the opportunity to vote because her name was not on the Aur voter list. Under Sections 173(2) and 173(3) of the Elections Act, the election officials were required to do the following: (i) announce in a loud voice that plaintiff's name was not on the list; (ii) require the plaintiff, before being allowed to vote, to complete a new Affidavit on Application for Registration before a member of the Board of Elections and (iii) give the plaintiff a ballot to complete, to place in an unmarked envelope, seal the envelope, and hand to an election official to be treated as a challenged vote under the Elections Act.

Under the Elections Act, election officials had statutory duties under Sections 129, 173(2) and 173(3) regarding the plaintiff's registration to vote and attempt to vote in the Aur Special Election. Elections Officials breach their duties regarding the plaintiff's right to register to vote and to vote. As a result of the election officials' breach, plaintiff Matthew was damaged — i.e., she was not permitted to vote in the Aur Special Election.

The defendants have offered no evidence to refute plaintiff Matthew's claim. In fact, the defendants have confirmed almost all of the facts upon which plaintiff Matthew relies. However, the defendants initially asserted that the plaintiff's claim was barred by the six-month statute of limitation set forth in Section 1009 of the GLA for filing claims with the Attorney-General. In response to the defense, plaintiff Matthew asserted Section 1009 was unconstitutional citing *Enos and Enos v. RMI*, 1 MILR (Rev) 63 (1989), in which the RMI Supreme Court held that the six-month time limitation in Section 1009 was unconstitutional. The Supreme Court found that under the circumstances of *Enos* GLA Section 1009 unduly restricted a constitutional right guaranteed by Article I, Section 4(c) of the Constitution, which provides specifically that the Government of the Marshall Islands shall not be immune from suit. In *Enos* the plaintiffs lived on Jaluit Atoll with limited access to Majuro, which at the time had only a few attorneys to assist with filing a claim. Under these circumstances, the Supreme Court held that the six-month statute of limitations was too short. However, as the Supreme Court noted in *Bujen and Wase v. RMI*, 3 MILR 8 (2005), "[n]o such problem is before the court in this case." Plaintiff Matthew lives on Majuro, not on a relatively remote neighboring atoll, and attorneys are more available in Majuro than in the past. However, the Court need not rule on this issue as the defendants have waived the statute of limitations defense. Nevertheless, the Court notes that in *Bujen* the Supreme Court indicated that the Section 1009 six-month statute of limitations may not be

unconstitutional, under circumstances where six months affords the claimant sufficient time to file a claim of the Attorney-General.

With respect to whether damages are a proper remedy for the defendants' negligent breach of plaintiff Matthews' constitutional and statutory rights to vote, the plaintiff cites *Biven v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). However, contrary to what the plaintiff argues, this Court does not see how Article II, Sections 14(2) and 18 are "similar to 42 U.S.C. § 1983" for purposes of applying the *Biven* rule. Moreover, a Westlaw search of *Biven* reveals that the case has received "Negative Treatment" in 483 cases. Absent a more fully developed argument by the plaintiff, this Court does not adopt the *Biven* holding.

As to the amount of damages the Court should award, the plaintiff requested damages not exceeding \$15,000, and the defendants argue that the plaintiff should not be awarded more than the amount presented in her claims to the Attorney-General, i.e., \$15,000. That is, the defendants have conceded that monetary damages upto \$15,000 are an appropriate remedy.

As to how the Court should calculate the amount of damages to be awarded, neither party has given the Court any guidance. However, to vindicate the plaintiff's rights to register and to vote and to deter the defendants from future breaches of the right to register to vote and to vote, **IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:**

Plaintiff Loriann Matthew shall have judgment against the defendants in the amount of \$3,000, with interest at the judgment rate of ~~9~~⁶% per year until paid. AS 9/1/23

So ordered and entered.

Carl B.
Ingram,
Chief Justice

Digitally signed by
Carl B. Ingram, Chief
Justice
Date: 2023.08.31
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Carl B. Ingram
Chief Justice, High Court
Date: August 31, 2023